

STATE OF NEW YORK  
DEPARTMENT OF HEALTH

REQUEST: November 7, 2019

AGENCY: MAP  
FH #: 8059485M

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In the Matter of the Appeal of	:
	: <b>DECISION</b>
	<b>AFTER</b>
	: <b>FAIR</b>
	<b>HEARING</b>
from a determination by the New York City	:
Department of Social Services	:

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**JURISDICTION**

Pursuant to Section 22 of the New York State Social Services Law (hereinafter Social Services Law) and Part 358 of Title 18 NYCRR, (hereinafter Regulations), a fair hearing was held on December 17, 2019, in New York City, before an Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant



For the Managed Long-Term Care plan

Deborah Ferguson, Fair Hearing Representative

**ISSUE**

Was the determination by the Managed Long-Term Care plan, Centers Plan for Healthy Living, to deny the Appellant's request for an authorization to increase the amount Personal Care Services hours from sixty-three (63) hours per week (9 hours per day x 7 days), and later twenty-four (24) hours daily care via "live-in" services, to twenty-four (24) hour daily constant care via "split-shift" services correct with regard to the adequacy of Personal Care?

**FINDINGS OF FACT**

An opportunity to be heard having been afforded to all interested parties and evidence having been taken and due deliberation having been had, it is hereby found that:

1. The Appellant, age eighty-six (86), has been in receipt of a Medical Assistance authorization, Medicaid benefits, and has been enrolled in a Medicaid Managed Long Term Care plan with Centers Plan for Healthy Living.

2. The Appellant resides alone.
3. The Appellant had been in receipt of an authorization of Personal Care Services in the amount of sixty-three (63) hours per week 9 hours per day x 7 days).
4. The Appellant requested that the Plan authorize an increase in her Personal Care Services to twenty-four (24) hour daily constant care via “split-shift” services.
5. On July 22, 2019, and July 24, 2019, a registered nurse assessor completed a Uniform Assessment System- New York Assessment Report (completed on the 24<sup>th</sup>), a Community Assessment Comments Report, a Person Centered Service Plan, a Personal Health Summary Report, and a Client Task Sheet which is based upon an in-person evaluation of the Appellant by a registered nurse assessor on July 22, 2019.
6. By written notice of Initial Adverse Determination which is dated July 29, 2019, the Plan determined to deny the Appellant’s request for an authorization to increase the Appellant’s Personal Care Services to twenty-four (24) hour daily constant care via “split-shift” services but to provide an authorization of Personal Care Services in the amount of twenty-four (24) daily care via “live-in” services.
7. The Appellant requested an internal appeal.
8. On September 12, 2019, a registered nurse assessor completed a Uniform Assessment System- New York Assessment Report which is based upon an in-person evaluation of the Appellant by a registered nurse assessor on September 11, 2019.
9. The nurse’s assessment found that the Appellant requires the following level of assistance with the following tasks of daily living: total dependence with meal preparation, ordinary housework, managing finances, managing medications, phone use, stairs, shopping , bathing, personal hygiene, dressing upper and lower body, walking, locomotion, toilet transfer and toilet use, bed mobility and eating; maximal assistance with transportation.
10. The Appellant has a medical diagnosis which includes the following medical conditions: Alzheimer’s disease, cerebral infarction, constipation, dependence on wheelchair, essential (primary) hypertension, full incontinence of feces, history of falling, insomnia, long term (current) use of aspirin, major depressive disorder, fatigue, pain, pure hypercholesterolemia, abnormalities of gait and mobility, dementia without behavioral disturbance, osteoarthritis, urinary incontinence, vitamin D deficiency, and unspecified vitamin deficiency.
11. By written notice of Final Adverse Determination Denial Notice which is dated October 14, 2019, the Plan advised that the Plan was upholding the Plan’s determination to deny the Appellant’s request for an authorization to increase the Appellant’s authorization of Personal Care Services from “live-in” to “split-shift” services.

12. On November 7, 2019, a fair hearing request was made in this matter.

### **APPLICABLE LAW**

Section 358-5.9 of the Regulations provides that, at a fair hearing concerning the denial of an application for or the adequacy of Medical Assistance benefits or Services, the Appellant must establish that the Agency's denial of assistance or benefits was not correct or that the Appellant is eligible for a greater amount of assistance or benefits.

The Department's Managed Care Personal Care Services (PCS) Guidelines dated May 2013 advise that requests for PCS must be reviewed for benefit coverage and medical necessity of the service in accordance with Public Health Law (PHL) Article 49, 18 NYCRR 505.14 (a), the Medicaid Managed Care (MMC) Model Contract and these guidelines. As such, denial or reduction in services must clearly set forth a clinical rationale that shows review of the enrollee's specific clinical data and medical condition; the basis on which request was not medically necessary or does not meet specific benefit coverage criteria; and be sufficient to enable judgment for possible appeal. If the determination results in a termination or reduction, the reason for denial must clearly state what circumstances or condition has changed to warrant reduction or termination of previously approved services.

The NYS Department of Health, Office of Health Insurance Programs, Guidelines for the Provision of Personal Care Services in Medicaid Managed Care (published May 31, 2013), Section III (Authorization and Notice Requirements for Personal Care Services) subsection d (Level and Hours of Service), requires that the authorization determination notice, whether adverse or not, must include the number of hours per day, the number of hours per week, and the personal care services function (Level I/Level II):

- i. that were previously authorized, if any;
- ii. that were requested by the Enrollee or his/her designee, if so specified in the request;
- iii. that are authorized for the new authorization period; and
- iv. the original authorization period and the new authorization period, as applicable.

Part 438 of 42 Code of Federal Regulations (CFR) pertains to provision of Medicaid medical care, services and supplies through Managed Care Organizations (MCOs), Prepaid Inpatient Health Plans (PIHPs), Prepaid Ambulatory Health Plans (PAHPs) and Primary Care Case Managers (PCCMs), and the requirements for contracts for services so provided.

Section 438.210 of 42 CFR Subpart D provides, in pertinent part:

- (a) Coverage - Each contract with an MCO, PIHP, or PAHP must do the following:
  - (1) Identify, define, and specify the amount, duration, and scope of each service that the MCO, PIHP, or PAHP is required to offer.

- (2) Require that the services identified in paragraph (a)(1) of this section be furnished in an amount, duration, and scope that is no less than the amount, duration, and scope for the same services furnished to beneficiaries under fee-for-service Medicaid, as set forth in Sec. 440.230.

18 NYCRR 505.14(a)(5) provides that:

Personal care services include, but are not necessarily limited to, the following:

- (ii) Level II shall include the performance of nutritional and environmental support functions and personal care functions.
  - (a) Personal care functions include assistance with the following:
    - (1) bathing of the patient in the bed, the tub or in the shower;
    - (2) dressing;
    - (3) grooming, including care of hair, shaving and ordinary care of nails, teeth and mouth;
    - (4) toileting; this may include assisting the patient on and off the bedpan, commode or toilet;
    - (5) walking, beyond that provided by durable medical equipment, within the home and outside the home;
    - (6) transferring from bed to chair or wheelchair;
    - (7) turning and positioning;
    - (8) preparing meals in accordance with modified diets, including low sugar, low fat, low salt and low residue diets;
    - (9) feeding;
    - (10) administration of medication by the patient, including prompting the patient as to time, identifying the medication for the patient, bringing the medication and any necessary supplies or equipment to the patient, opening the container for the patient, positioning the patient for medication and administration, disposing of used supplies and materials and storing the medication properly;
    - (11) providing routine skin care;

- (12) using medical supplies and equipment such as walkers and wheelchairs; and
- (13) changing of simple dressings.

When the district, in accordance with 505.14(a)(4), determined the patient is appropriate for the Personal Care Services Program, a care plan must be developed that meets the patient's scheduled and unscheduled day and nighttime personal care needs. In determining the appropriate amount of hours to authorize, the district must review the physician's order and the nursing and social assessments to assure that the authorization and scheduling of hours in combination with any informal support contributions, efficiencies and specialized medical equipment, is sufficient to meet the patient's personal care needs.

The assessment process should also evaluate the availability of informal supports who may be willing and available to provide assistance with needed tasks and whether the patient's day or nighttime needs can totally or partially be met through the use of efficiencies and specialized medical equipment including, but not limited to, commode, urinal, walker, wheelchair, etc.

Social services districts should authorize assistance with recognized, medically necessary personal care services tasks. Social services districts are NOT required to allot time for safety monitoring as a separate task as part of the total personal care services hours authorized (see GIS 99 MA/013, GIS 99 MA/036). However, districts are reminded that a clear and legitimate distinction exists between "safety monitoring" as a non-required independent stand-alone function while no Level II personal care services task is being provided, and the appropriate monitoring of the patient while providing assistance with the performance of a Level II personal care services task, such as transferring, toileting, or walking, to assure the task is being safely completed.

Completing accurate and comprehensive assessments is essential to safe and adequate care plan development and appropriate service authorization. Adhering to Department assessments requirements will help assure patient quality of care and district compliance with the administration of the Personal Care Services Program.

General Information System message GIS 97 MA 033 notified local districts as follows:

The purpose of this GIS is to provide further instructions regarding the Mayer v. Wing court case, which applies to social services districts' reductions or discontinuations of personal care services. [Mayer v. Wing, 922 F. Supp. 902 (SDNY, 1996)]. The Mayer case is now final, and the Department is issuing these additional instructions to comply with the court's final order in this case.

Districts were first advised of the Mayer case in May 1996. (Please refer to GIS 96 MA/019, issued May 28, 1996.) As described in that GIS message, the Mayer case prohibits social services districts from using task-based assessment plans ("TBA plans") to reduce the hours of any personal care services recipient whom the district has determined needs 24-hour

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care, including continuous 24-hour services ("split-shift"), 24-hour live-in services ("live-in") or the equivalent provided by informal or formal supports. This GIS message identifies the policies and procedures districts must follow in order to comply with this particular provision of the Mayer case.

This particular provision of the Mayer case applies only when the district has first determined that the MA recipient is medically eligible for split-shift or live-in services. To determine whether the recipient is medically eligible for split-shift services or live-in services, the district must continue to follow existing Department regulations and policies. As is currently required, the district must assure that the nursing and social assessments fully document and support the determination that the recipient is, or is not, medically eligible for split-shift or live-in services.

When the district has determined that the MA recipient is medically eligible for split-shift or live-in services, it must next determine the availability of informal supports such as family members or friends and formal supports such as Protective Services for Adults, a certified home health agency or another agency or entity. This requirement is no different from current practice. And, as under current practice, the district must assure that the nursing and social assessments fully document and support its determination that the recipient does, or does not, have informal or formal supports that are willing and able to provide hours of care.

Remember that the contribution of family members or friends is voluntary and cannot be coerced or required in any manner whatsoever. A district may choose to implement so-called "statements of understanding" to reflect a family member's or friend's voluntary agreement to provide hours of care to a recipient whom the district has determined is medically eligible for split-shift or live-in services. (See 95 LCM-76, section III, issued July 18, 1995, for a description of statements of understanding.)

In addition to clarifying requirements for client notices under Mayer, the Department's regulations also reflect a Court ruling in Mayer regarding the use of task based assessments [18 NYCRR 505.14(b)(5)(v)(d)]. Specifically, social services districts are prohibited from using task-based assessments when authorizing or reauthorizing personal care services for any recipient whom the district has determined needs 24-hour care, including continuous 24-hour services (split-shift), 24-hour live-in services or the equivalent provided by a combination of formal and informal supports or caregivers. In addition, the district's determination whether the recipient needs such 24-hour personal care must be made without regard to the availability of formal or informal supports or caregivers to assist in the provision of such care. GIS 01 MA/044, issued on December 24, 2001.

Once the district has determined that the recipient is medically eligible for split-shift or live-in services and determined whether the recipient has informal or formal supports that are willing and able to provide hours of care, the district can assure that it is complying with the Mayer case by following the appropriate guidelines set forth below:

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1. Recipient is medically eligible for split-shift services but has no informal or formal supports:

The district should authorize 24-hour split-shift services for this recipient if the recipient otherwise meets the fiscal assessment requirements. The district must not use a TBA plan to reduce this recipient's personal care services.

2. Recipient is medically eligible for split-shift services and has informal or formal supports:

The district should authorize services in an amount that is less than 24-hour split-shift services if the recipient otherwise meets the fiscal assessment requirements. The amount that is authorized, when combined with the amount that informal or formal supports are willing and able to provide, would equal 24 hours. The district must not use a TBA plan to reduce this recipient's services because the recipient is receiving the "equivalent" of split-shift services: part of the services are funded by the MA program and part of the services are provided by the informal or formal supports.

3. Recipient is medically eligible for live-in services but has no informal or formal supports:

The district should authorize 24-hour live-in services for this recipient if the recipient otherwise meets the fiscal assessment requirements. The district must not use a TBA plan to reduce this recipient's personal care services.

4. Recipient is medically eligible for live-in services and has formal or informal supports:

The district should authorize services in an amount that is less than 24-hour live-in services if the recipient otherwise meets the fiscal assessment requirements. The amount that is authorized, when combined with the amount that the informal or formal supports are willing and able to provide, would equal 24 hours. The district must not use a TBA plan to reduce this recipient's services because the recipient is receiving the "equivalent" of live-in services: part of the services are funded by the MA program and part of the services are provided by the informal or formal supports.

#### Important Additional Information on TBA Plans:

Until notified otherwise by the Department, the following also apply to the use of TBA plans:

1. A district cannot use a TBA plan unless the TBA plan was already in use on March 14, 1996, or the district had the Department's approval as of that date to implement a TBA plan. This complies with the temporary restraining order in Dowd v. Bane, which the Department notified districts of in a previous GIS message, 96 MA/013, issued April 4, 1996.

2. Districts are not required to include safety monitoring as an independent task on their task-based assessment (TBA) forms. The Department recently obtained a stay of the August 21, 1997, federal court order that had required safety monitoring to be included as an independent TBA task. [See GIS 97 MA/26, issued November 6, 1997, informing districts of the stay of the order in Rodriguez v. DeBuono (SDNY, 1997).]

Pursuant to GIS 03 MA/003, issued on January 24, 2003, task-based assessments must be developed which meet the scheduled and unscheduled day and nighttime needs of recipients of personal care services. This GIS was promulgated to clarify and elaborate on the assessment of Personal Care Services pursuant to the Court's ruling in Rodriguez v. Novello and in accordance with existing Department regulations and policies.

Social services districts, including those using locally developed task-based assessment instruments, must complete a comprehensive assessment of the patient's health care needs in order to determine the patient's appropriateness for services and the amount, frequency and duration of a service authorization. Department regulations (18 NYCRR 505.14) require both a social and nursing assessment in the Personal Care Services patient assessment process.

The assessment process should evaluate and document when and to what degree the patient requires assistance with personal care services tasks and whether needed assistance with tasks can be scheduled or may occur at unpredictable times during the day or night.

In accordance with GIS 12 MA/026, published October 3, 2012, pursuant to the directives of the U.S. District Court for the Southern District of New York, in connection with the case of Strouchler v. Shah, the GIS directs that, when determining whether a person requires 24-hour split-shift care or live-in care, the local professional director must consider whether the physician's order and other required assessments document the following:

- The existence of a medical condition that directly causes the person to need frequent assistance with personal care services tasks during the night;
- The specific task or tasks with which the person requires frequent assistance during the night;
- The frequency at which the person requires assistance with these tasks during the night;
- Whether the person requires similar assistance with these tasks during the daylight hours and, if not, why not;
- The informal supports or formal services that are willing, able and available to provide assistance with the person's nighttime tasks;
- The person's ability to use adaptive or specialized equipment or supplies to meet his or her documented medical need for assistance with nighttime tasks; and whether the person's physician has documented that, due to the person's medical condition, he or she could not safely use the equipment or supplies; and
- Whether a live-in aide would likely be able to obtain an uninterrupted five hours of sleep were live-in services to be authorized.



18 NYCRR 505.14(a)(4) provides a new definition of “Live-in 24-Hour Personal Care Services” as follows: Live-in 24-hour personal care services means the provision of care by one personal care aide for a patient who, because of the patient’s medical condition, needs assistance during a calendar day with toileting, walking, transferring, turning and positioning, or feeding and whose need for assistance is sufficiently infrequent that a live-in 24-hour personal care aide would be likely to obtain, on a regular basis, five hours daily of uninterrupted sleep during the aide’s eight hour period of sleep.

18 NYCRR 505.14(a)(2) provides a new definition of “Continuous Personal Care Services” (“Split-Shift Care”) as follows: Continuous personal care services means the provision of uninterrupted care, by more than one personal care aide, for more than 16 hours in a calendar day for a patient who, because of the patient’s medical condition, needs assistance during such calendar day with toileting, walking, transferring, turning and positioning, or feeding and needs assistance with such frequency that a live-in 24-hour personal care aide would be unlikely to obtain, on a regular basis, five hours daily of uninterrupted sleep during the aide’s eight hour period of sleep.

GIS 15 MA/24, published on December 31, 2015, advises of the revisions to the Personal Care Services (PCS) and Consumer Directed Personal Assistance (CDPA) regulations at 18 NYCRR section 505.14 and 18 NYCRR section 505.28, and notes the following changes:

The definitions of “some assistance” and “total assistance” are repealed in their entirety. This means, in part, that a “total assistance” need with certain activities of daily living is no longer an eligibility requirement for continuous personal care services or continuous consumer directed personal assistance.

“Turning and positioning” is added as a specific Level II personal care function and as a CDPA function.

## **DISCUSSION**

The record in this matter establishes that the Appellant is seeking an authorization for an increase of Personal Care Services from her now current eighty-four (84) hours per (12 hours per day x 7 days) to twenty-four (24) hour daily constant care via “split-shift” services. The record also establishes that the Plan has provided the Appellant with an authorization of “live-in” services, which is an increase from the preceding authorization of task-based services in the amount of sixty-three (63) hours per week and has denied the Appellant’s request for an authorization of “split-shift” services.

At the hearing the Appellant’s brother-in-law testified that the Appellant, who is fully incontinent of bladder and bowel, removes her diaper frequently during the night, presumably when she soils same, and that the home attendant is not able to receive adequate sleep due to the fact that a great deal of time is spent with each of every overnight assistance due to the need to change the Appellant’s diapers, clean and rediaper the Appellant, clean the home attendant her/himself, change sheets, and clean any other space which has been soiled by the Appellant.

The evidence which has been presented by the parties in this matter has been carefully reviewed and the contentions of the respective parties duly considered. The testimony of the Appellant's brother-in-law was unrefuted by the Plan and is consistent, plausible, persuasive and therefore credible. The record, therefore, fails to establish that the Appellant's home attendant/care aide, is able to receive a minimum of five (5) hours of uninterrupted sleep per night. Plan's determination not to provide an authorization for the requested twenty-four (24) daily constant care via "split-shift" services, therefore, cannot be sustained.

### **DECISION AND ORDER**

The determination by Centers Plan for Healthy Living to deny the Appellant's request for an authorization to increase the amount Personal Care Services hours to twenty-four (24) hour daily constant care via "split-shift" services cannot be sustained and is reversed.

Centers Plan for Healthy Living is directed to:

1. Immediately provide the Appellant with an authorization of Personal Care Services in the amount of twenty-four (24) hour daily constant care via "split-shift" services.
2. Continue the authorization of Personal Care Services in the amount of twenty-four (24) hour daily constant care via "split-shift" services unchanged.

Should Centers Plan for Healthy Living need additional information from the Appellant in order to comply with the above directives, it is directed to notify the Appellant and the Appellant's Representative promptly in writing as to what documentation is needed. If such information is required, the Appellant or the Appellant's Representative must provide it to the Managed Long-Term Care plan promptly to facilitate such compliance.

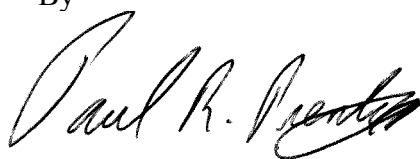
As required by Section 358-6.4 of the Regulations, Centers Plan for Healthy Living must comply immediately with the directives set forth above.

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DATED: Albany, New York  
12/23/2019

NEW YORK STATE DEPARTMENT  
OF HEALTH

By

A handwritten signature in black ink, appearing to read "Paul R. Prentiss", with a stylized flourish at the end.

Commissioner's Designee