STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST: February 28, 2019
[redacted]
AGENCY: MAP
FH #: 7919008Q

In the Matter of the Appeal of [redacted]	:	**DECISION AFTER FAIR HEARING**
from a determination by the New York City Department of Social Services	:	

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 March 21, 2019, in New York City, before an Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

[redacted]

For the Managed Long-Term Care Plan (Centers Plan for Healthy Living)

Deborah Ferguson, Fair Hearing Representative

ISSUE

Was Centers Plan for Healthy Living's determination, dated January 16, 2019, to discontinue the Appellant's Personal Emergency Response System ("PERS") authorization, correct?

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 86, has been enrolled in and has received care and services, including Personal Care Services, through a Managed Long Term Care Plan operated by Centers Plan for Healthy Living ("Centers Plan").

2. The Appellant is in receipt of authorization for a Personal Emergency Response System ("PERS") and twenty-four (24) hour live-in Personal Care Aide (PCA).

3. By Notice dated January 16, 2019, Centers Plan informed the Appellant of its Initial Adverse determination to discontinue the Appellant's PERS authorization, effective January 28, 2019.

4. On July 31, 2018, Centers Plan completed a Uniform Assessment System – New York Comprehensive Community Assessment Report for the Appellant.

5. On January 2, 2019, Centers Plan completed a Uniform Assessment System – New York Comprehensive Community Assessment Report for the Appellant.

6. The Appellant requested an internal appeal of Centers Plan's January 16, 2019 Initial Adverse determination to discontinue the Appellant's PERS authorization, effective January 28, 2019.

7. On February 21, 2019, Centers Plan informed the Appellant of its Final Adverse determination to uphold the initial adverse determination to discontinue the Appellant's PERS authorization, effective January 28, 2019.

8. On February 28, 2019, the Appellant requested this fair hearing to review Centers Plan's determination.

APPLICABLE LAW

Section 364.2(b) of the Social Services Law provides in part, that the Department of Health shall be responsible for establishing and maintaining standards for all non-institutional health care and services rendered pursuant to this title.

Regulations at 18 NYCRR 505.5(c) provides:

(1) As part of its assessment for an authorization of personal care services or home health services, a social services district may also assess whether PERS would be appropriate for a person.

(2) An initial authorization for PERS must be based on a physician's order and a comprehensive assessment of the person.

(i) The comprehensive assessment must be performed by social services district staff, or by staff of the district's designee, on forms that the department approves to be used.

(ii) The comprehensive assessment must evaluate the following factors: the person's physical disability status, the degree to which the person is at risk of an emergency due to a

medical or functional impairment or disability, and the degree of the person's social isolation.

(iii) A social services district may authorize PERS only when the comprehensive assessment indicates that PERS would be appropriate for the person because:

(a) the person has a medical condition, disability, or impairment that warrants use of PERS;

(b) PERS would reduce or eliminate the number of hours of personal care services or home health services that the person would need;

(c) the person's safety in the home must be monitored;

(d) the person has insufficient informal caretakers, such as family members and friends, directly and continuously available to monitor his or her health and safety;

(e) the person is alert and self-directing, which means that he or she is capable of making choices about activities of daily living, understanding the impact of the choices, and assuming responsibility for the results of the choices;

(f) the person can communicate in basic English or, if the person is unable to communicate in basic English, the person's emergency responder or responders can communicate in basic English;

(g) the person would be able to use the PERS equipment effectively; and

(h) the person has a functioning telephone that is compatible with the PERS equipment or will have such a telephone when the PERS equipment is installed.

(3) If a social services district authorizes PERS, the PERS authorization and plan of care may be incorporated in the authorization and plan of care for personal care services or home health services.

(4) The duration of an initial PERS authorization must be based upon the person's needs, as reflected in the comprehensive assessment. No initial authorization may exceed six months.

(5) When a PERS recipient's physical circumstances, mental status, or medical condition significantly change during the authorization period, social services district staff, or staff of the district's designee, must perform a new comprehensive assessment and make any necessary changes in the authorization.

(6) A social services district must not authorize PERS if the person is eligible for the long-term home health care program (LTHHCP), can obtain PERS through the LTHHCP, and wishes to obtain PERS through the LTHHCP.

(7) A reauthorization of PERS must follow the procedures set forth in paragraphs (2) through (6) of this subdivision, except that the recipient's physician, the social services district's local professional director, or a physician at the area Office of Health Systems Management must review the comprehensive assessment and be responsible for the final determination to reauthorize PERS. No single reauthorization may exceed six months.

(8) A social services district must notify the person in writing of its decision to authorize, deny, reauthorize, or discontinue PERS on forms required by the department. The notice must meet the notice requirements set forth in Part 358 of this Title. The person will be entitled to a fair hearing in accordance with the requirements of Part 358 of this Title. A PERS recipient for whom the social services district proposes to discontinue PERS will be entitled to aid continuing in accordance with the requirements of Part 358 of this Title.

GIS 04 MA/029: informs:

PERS authorizations must be based on an individualized assessment. The social services district must evaluate all requests for PERS solely on the basis of the individual's medical or functional need for PERS, as determined on an individualized, case-by-case basis. Authorizations and reauthorizations for PERS must be based on the physician's order and the comprehensive assessment required by Department regulations at 18 NYCRR § 505.33(c).

No threshold amount or level of personal care services is required. Social services districts must not require that PERS applicants receive any threshold or minimum number of hours of personal care services to be eligible for a PERS. However, PERS is not a "standalone" service. This means that the social services district must not authorize PERS for any applicant unless the applicant also requires, and is authorized to receive, assistance with one or more personal care services tasks.

PERS does not substitute for assistance with personal care services tasks. Social services districts must not authorize PERS as a substitute for, or in lieu of, assistance with recognized personal care services tasks, such as transferring, toileting or walking.

Section II of the Personal Emergency Response Service Manual reads in part:

General Requirement for the Provision of Care

The process and procedures for the authorization of personal emergency response services are completed in accordance with and in coordination with the authorization procedures for home care services. Authorization for PERS services are based on a physician's order and a comprehensive assessment which must include an evaluation of the client's physical disability status, the degree that they would be at risk of an emergency due to medical or functional impairments or disability and the degree of their social isolation.

Prior Authorization for Personal Emergency Response Services

Prior Authorization from the local department of social services is required for the provision of PERS. The authorization must be received by the provider of service prior to the initiation of service delivery. The local department of social services will enter the authorization into the prior approval system and will notify the provider. A PERS Authorization may not exceed six months.

18 NYCRR 358-3.7(a) mandates that an appellant has the right to examine the contents of the case record at the fair hearing. At the fair hearing, the agency is required to provide complete copies of its documentary evidence to the hearing officer. In addition, such documents must be provided to the appellant and appellant's authorized representative where such documents were not provided otherwise to the appellant or appellant's authorized representative in accordance with 18 NYCRR 358-3.7. 18 NYCRR 358-4.3(a). In addition, a representative of the agency must appear at the hearing along with the case record and a written summary of the case and be prepared to present evidence in support of its determination. 18 NYCRR 358-4.3(b).

As outlined in GIS 01 MA/044, the New York State Department of Health advises local Districts that when a determination is made to reduce, discontinue or deny personal care services, the notice must identify the specific reason that justifies the action, and explain why the stated reason justifies the reduction, discontinuance, or denial of such services.

MLTC Policy 16.05, provides further guidance to MLTC plans about appropriate reasons and notice language to be used when proposing to reduce or discontinue Personal Care Services (PCS) or Consumer Directed Personal Assistance Services (CDPAS). The MLTC Policy specifically addresses a reduction or discontinuance for the following reasons: a change in the enrollee's medical or mental condition or social circumstances; or a mistake that occurred in the previous authorization or reauthorization.

The MLTC Policy notes that a plan cannot reduce or discontinue an enrollee's PCS or CSPAS without a legitimate reason, e.g. one of the reasons listed in 18 NYCRR 505.14(b)(5)(v)(c)(2)(i) [PCS] and 18 NYCRR 505.28(h)(5)(ii)(a)-(f) [CDPAS) The plan must advise the enrollee of the specific reason for the proposed action. A plan cannot reduce or discontinue services without considering that facts of the individual enrollee's circumstances and cannot reduce or discontinue services as part of an "across the board" action that does not consider each individual enrollee's particular circumstances and need for assistance. The plan's notice has to accurately advise the enrollee, in plain comprehensible language, ***what*** the plan is proposing to change concerning the enrollee's PCS or CDPAS and ***why*** the plan is making the change.

The MLTC Policy discusses in detail what a notice of reduction or discontinuance must contain for a change in the enrollee's medical or mental condition or social circumstances or for a mistake. Examples of specific notice language for these two circumstances are provided.

<u>Change in the enrollee's medical or mental condition or social circumstances</u>

- A plan must not simply recite a boilerplate reason such as: "The enrollee's medical or mental condition or social circumstances have changed and the plan determines that the services provided under the last authorization or reauthorization are no longer appropriate or can be provided in fewer hours.
- A plan's notice must state the following:

    1. state the enrollee's particular condition or circumstance - whether medical condition, mental condition, or social circumstance – that has changed since the last assessment or authorization;
    2. identify the specific change that has occurred in that particular medical or mental condition or social circumstance since the last assessment or authorization; and
    3. state why the services should be reduced or discontinued as a result of that change in the enrollee's medical or mental condition or social circumstances.

Regulation 358-5.9(a) provides:

> Except where otherwise established by law or regulation, in fair hearings concerning the discontinuance, reduction or suspension of public assistance, medical assistance, SNAP benefits or services, the social services agency must establish that its actions were correct.

DISCUSSION

The record established that the Appellant, age 86, has been enrolled in and has received care and services, including Personal Care Services, through a Managed Long Term Care Plan operated by Centers Plan for Healthy Living ("Centers Plan"). The Appellant is in receipt of authorization for a Personal Emergency Response System ("PERS") and twenty-four (24) hour live-in Personal Care Aide (PCA).

At the hearing Centers Plan submitted into evidence as Plan's Exhibit #1, Notice dated January 16, 2019, (Amended) wherein Centers Plan informed the Appellant of its Initial Adverse determination to discontinue the Appellant's PERS authorization, effective January 28, 2019, on the grounds that:

> "*service is not medically necessary.*
>
> • *Your Mobile, Landline, and Cellular Monthly Rental will be stopped because: Centers Plan for Healthy Living (CPHL) has made a decision to discontinue your Personal Emergency Response System (PERS) services based on your approval for a twenty-four (24) hour live-in Personal Care Aide (PCA). The PERS service is provided to ensure you can call for help in the event that you are alone and need assistance. Because you now have a Personal Care Aide (PCA) with you at all times and you are never alone, the PERS is no longer medically necessary."*

However, the record also established, as per Plan's Exhibit #7, that Centers Plan initially issued the January 16, 2019, Initial Adverse determination to discontinue the Appellant's PERS authorization, effective January 28, 2019, on the grounds that:

> "*member requested to stop*
> - *Your Mobile, Landline, and Cellular Monthly Rental will be stopped because: Centers Plan for Healthy Living (CPHL) has made a decision to discontinue your Personal Emergency Response System (PERS) services based on your approval for a twenty-four (24) hour live-in Personal Care Aide (PCA). The PERS service is provided to ensure you can call for help in the event that you are alone and need assistance. Because you now have a Personal Care Aide (PCA) with you at all times and you are never alone, the PERS is no longer medically necessary."*

At the hearing, the Appellant's son stated that the member never requested that provision of PERS services be discontinued. Appellant's son testified that the Appellant has severe and ongoing medical needs that provide a medical necessity to continue to have the PERS services in place even with the provision of a personal aide worker. Appellant's son explained that for example, the aide does not sleep the same room as Appellant and should it be necessary, in an emergency, the Appellant must have an access to PERS in the absence of the PCA. To corroborate his testimony on Appellant's ongoing medical history, the Appellant's son submitted into evidence, several medical letters that established that Appellant has a medical history of brain seizures, loss of one eye, permanent deafness in one ear, brain surgery, history of falls, osteoporosis, two heart attacks, severe arthritis in knees, dizzy spells, etc. These and other medical conditions, provide the medical necessity to continue the PERS service in place.

The hearing record has been reviewed. In fair hearings concerning the discontinuance, reduction or suspension of public assistance, medical assistance, SNAP benefits or services, Centers Plan must establish that its actions were correct. Regarding Centers Plan's determination, MLTC Policy 16.05, provides guidance to MLTC plans about appropriate reasons and notice language to be used when proposing to reduce or discontinue Personal Care Services (PCS) or Consumer Directed Personal Assistance Services (CDPAS). The MLTC Policy notes that a plan cannot reduce or discontinue an enrollee's PCS or CSPAS without a legitimate reason, e.g. one of the reasons listed in 18 NYCRR 505.14(b)(5)(v)(c)(2)(i) [PCS] and 18 NYCRR 505.28(h)(5)(ii)(a)-(f) [CDPAS). The plan must advise the enrollee of the specific reason for the proposed action. A plan cannot reduce or discontinue services without considering that facts of the individual enrollee's circumstances and cannot reduce or discontinue services as part of an "across the board" action that does not consider each individual enrollee's particular circumstances and need for assistance. The plan's notice has to accurately advise the enrollee, in plain comprehensible language, ***what*** the plan is proposing to change concerning the enrollee's PCS or CDPAS and ***why*** the plan is making the change. Furthermore, the MLTC Policy discusses in detail what a notice of reduction or discontinuance must contain for a change in the enrollee's medical or mental condition or social circumstances.

The record establishes that, in the present case, Centers Plan initially issued a January 16, 2019, Initial Adverse determination to discontinue the Appellant's PERS authorization, effective January 28, 2019, on the grounds that, "*member requested to stop."* Subsequently, Centers Plan issued to Appellant an "Amended" Initial Adverse determination to discontinue the Appellant's PERS authorization, effective January 28, 2019, on the grounds that: "*service is not medically necessary."* The notice further explained that, "*Because you now have a Personal Care Aide (PCA) with you at all times and you are never alone, the PERS is no longer medically necessary."*

Centers Plan's determination of January 16, 2019 does not identify the particular condition or circumstance - whether medical condition, mental condition, or social circumstance – that has changed since the last assessment or authorization that would possibly justify Centers Plan's determination that the provision of PERS is no longer medically necessary and as required, such failure violates MLTC Policy 16.05.

Furthermore, PERS eligibility is determined by reviewing a comprehensive assessment that evaluates the Appellant's physical disability status, the degree of risk of an emergency due to medical or functional impairments or disability, the degree of social isolation, and other factors enumerated in 18 NYCRR 505.5(c)(2). While this initially included an assessment if PERS would "reduce or eliminate the number of hours of personal care services or home health services that the person would need," the Department subsequently settled litigation relating to this by issuing GIS 04 MA/029. GIS 04 MA/029: informs:

> PERS authorizations must be based on an individualized assessment. The social services district must evaluate all requests for PERS solely on the basis of the individual's medical or functional need for PERS, as determined on an individualized, case-by-case basis. Authorizations and reauthorizations for PERS must be based on the physician's order and the comprehensive assessment required by Department regulations at 18 NYCRR § 505.33(c).
>
> No threshold amount or level of personal care services is required. Social services districts must not require that PERS applicants receive any threshold or minimum number of hours of personal care services to be eligible for a PERS. However, PERS is not a "standalone" service. This means that the social services district must not authorize PERS for any applicant unless the applicant also requires, and is authorized to receive, assistance with one or more personal care services tasks.
>
> PERS does not substitute for assistance with personal care services tasks. Social services districts must not authorize PERS as a substitute for, or in lieu of, assistance with recognized personal care services tasks, such as transferring, toileting or walking.

The evidence presented at the fair hearing has been duly considered. Based upon the evidence adduced at the fair hearing, the record establishes that Centers Plan did not meet its burden of proof as required by Regulation 358-5.9(a). Thus, the Managed Long-Term Care

Plan's determination dated January 16, 2019, to discontinue the Appellant's Personal Emergency Response System cannot be sustained**.**

DECISION AND ORDER

Centers Plan's determination, dated January 16, 2019, to discontinue the Appellant's Personal Emergency Response System ("PERS") authorization was not correct and is reversed.

1. Centers Plan is directed to Cancel its determination dated January 16, 2019 and to restore the Appellant's Personal Emergency Response System (PERS) authorization.

2. Centers Plan is directed to continue to provide the Appellant an authorization for a Personal Emergency Response System (PERS).

Should Centers Plan need additional information from the Appellant to comply with the above directives, it is directed to notify the Appellant and her representative promptly in writing as to what documentation is needed. If such information is requested, the Appellant or her representative must provide it to Centers Plan promptly to facilitate such compliance.

As required by 18 NYCRR 358-6.4, Centers Plan must comply immediately with the directives set forth above.

DATED: Albany, New York
04/18/2019

NEW YORK STATE
DEPARTMENT OF HEALTH

By

Commissioner's Designee