

STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST: March 14, 2019

AGENCY: MAP

FH #: 7927302Q

In the Matter of the Appeal of	:
<div style="background-color: black; width: 150px; height: 1.2em; margin: 2px 0;"></div>	: 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 April 8, 2019, in New York City, before an Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

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

Deborah Ferguson, Fair Hearing Representative

ISSUE

Was the Plan's determination to deny the Appellant's request for an increase in the Appellant's personal care aid hours 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, , lives with her daughter, . The Appellant receives a total of 40 hours of Personal Care Services (PCS) hours from Centers Plan for Healthy Living (the Plan), which amounts to 8 hours per day, 5 days per week, Monday through Friday. The Appellant's PCS hours run from 9:00 AM to 5:00 PM.

2. On February 14, 2019, a Uniform Assessment System (UAS) New York Comprehensive Community Assessment Report of the Appellant's personal care needs was conducted.

3. On February 21, 2019, the Appellant requested an increase in her PCS hours from 8 hours per day, 5 days a week, which total 40 hours per week, to 10 hours a day, 6 days a week, 8:00 AM to 6:00 PM, Monday through Saturday, which total 60 hours per week.

4. By means of an Initial Adverse Determination notice dated March 1, 2019, the Plan notified the Appellant of its determination to deny the Appellant's request for PCS service hours in the amount of 10 hours a day, 6 days a week.

5. By means of a Final Adverse Determination notice dated March 5, 2019, the Plan notified the Appellant of its determination to deny the Appellant's request for PCS service hours in the amount of 10 hours per day, 6 days a week.

6. On March 14, 2019, the Appellant's Representative requested this fair hearing to contest the Plan's determination.

APPLICABLE LAW

Personal Care Services

Section 505.14(a)(1) of the regulations defines "Personal Care Services" to mean assistance with nutritional and environmental support functions and personal care functions. Such services must be essential to the maintenance of the patient's health and safety in his or her own home...."

- (2) **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.

- (4) **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.

(5) Personal care services shall include the following two levels of care, and be provided in accordance with the following standards:

(i) Level I shall be limited to the performance of nutritional and environmental support functions.

(b) The authorization for Level I services shall not exceed eight hours per week.

(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.

Section 505.14(b) of the Regulations provides that when a social services district receives a request for personal care services, it must determine whether the individual is eligible for Medical Assistance. The initial authorization for services shall be based on:

- a physician's order from the patient's physician based on the patient's current medical status as determined by a medical examination within 30 days of the request for Personal Care Services;
- a social assessment which must include a discussion with the patient to determine perception of his/her circumstances and preferences, an evaluation of the potential contribution of informal caregivers, such as family and friends, to the patient's care, and consideration of the number and kind of informal caregivers available to the patient, ability and motivation of informal caregivers to assist in care, extent of informal caregivers' potential involvement, availability of informal caregivers for future assistance, and acceptability to the patient of the informal caregivers' involvement in his/her care. The social assessment is completed by the Agency. When live-in 24-hour personal care services is indicated, the social assessment shall evaluate whether the patient's home has adequate sleeping accommodations for a personal care aide.
- a nursing assessment. The nursing assessment is completed by a nurse from a certified home health agency or by a nurse employed by the local social services department or by a nurse employed by a voluntary or proprietary agency under contract with the local social services department. The nursing assessment must be completed within 5 working days of the request and must include the following:

- (1) a review and interpretation of the physician's order;
 - (2) the primary diagnosis code;
 - (3) an evaluation of the functions and tasks required by the patient;
 - (4) the degree of assistance required for each function and task;
 - (5) an evaluation whether adaptive or specialized equipment or supplies including, but not limited to, bedside commodes, urinals, walkers and wheelchairs, can meet the patient's need for assistance with personal care functions, and whether such equipment or supplies can be provided safely and cost-effectively.
 - (6) the development of a plan of care in collaboration with the patient or his/her representative; and
 - (7) recommendations for authorization of services.
- an assessment of the patient's appropriateness for hospice services and an assessment of the appropriateness and cost effectiveness of using adaptive or specialized medical equipment or supplies covered by the Medicaid Program including, but not limited to, bedside commodes, urinals, walkers, wheelchairs and insulin pens; and

Where there is a disagreement between the physician's order and the social, nursing and other required assessments, or there is a question about the level and amount of services to be provided, or if the case involves the provision of continuous Personal Care Services or live-in 24-hour personal care services as defined in paragraph (a)(2) and (a)(4), respectively, of this section, an independent medical review of the case must be completed by the local professional director, by a physician designated by the local professional director, or by a physician under contract with the Agency to review personal care services cases, who shall make the final determination about the level and amount of care to be provided.

Section 505.14(a)(3)(iii) of the regulations provides that Personal care services, including continuous personal care services and live-in 24-hour personal care services as defined in paragraphs (2) and (4), respectively, of this subdivision, shall not be authorized to the extent that the patient's need for assistance can be met by the following:

- (1) voluntary assistance available from informal caregivers including, but not limited to, the patient's family, friends, or other responsible adult;
- (2) formal services provided or funded by an entity, agency or program other than the medical assistance program; or

Reauthorization for personal care services requires similar assessments as for the initial authorization; however, a nursing assessment is not required for Level I services if the physician's order indicates that the patient's medical condition is unchanged. Reauthorization of Level II services must include an evaluation of the services provided during the previous authorization period and must include a review of the nursing supervisory reports to assure that the patient's needs have been adequately met during the initial authorization period.

In Rodriguez v. City of New York, 197 F. 3rd 611 (Federal Court of Appeals, 2nd Circuit 1999), cert. denied 531 U.S. 864, the Plaintiffs were Personal Care Services recipients who alleged that they would be in receipt of inadequate service not meeting legal requirements, without the provision of safety monitoring as an independent task in their Personal Care Services authorizations. The district court had ruled in favor of the Plaintiffs, but the Court of Appeals held that the Plan is not required to provide safety monitoring as an independent Personal Care Services task in evaluating the needs of applicants for and recipients of Personal Care Services. Local Agencies were advised of this decision in GIS message 99/MA/036.

GIS 03 MA/03 was released 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. In relevant portion, this GIS Message states:

Social services districts should authorize assistance with recognized, medically necessary personal care services tasks. As previously advised, 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.

Burden of Proof

Section 358-5.9(a) of Title 18 NYCRR sets forth the burden of proof for fair hearings as follows:

- (a) At a fair hearing concerning the denial of an application for or the adequacy of public assistance, medical assistance, HEAP, SNAP benefits or services; or an exemption from work activity requirements 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 or is exempt from work requirements pursuant to Part 385 of this Title.

DISCUSSION

The record establishes that the Appellant, [REDACTED], lives with her daughter, [REDACTED]. The Appellant receives a total of 40 hours of PCS hours from the Plan, which amounts to 8

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hours per day, 5 days per week, Monday through Friday. The Appellant's PCS hours run from 9:00 AM to 5:00 PM.

On February 14, 2019, a Uniform Assessment System (UAS) New York Comprehensive Community Assessment Report of the Appellant's personal care needs was conducted. On February 21, 2019, the Appellant requested an increase in her PCS hours from 8 hours per day, 5 days a week, which total 40 hours per week, to 10 hours a day, 6 days a week, 8:00 AM to 6:00 PM, Monday through Saturday, which total 60 hours per week.

By means of an Initial Adverse Determination notice dated March 1, 2019, the Plan notified the Appellant of its determination to deny the Appellant's request for PCS service hours in the amount of 10 hours a day, 6 days a week.

By means of a Final Adverse Determination notice dated March 5, 2019, the Plan notified the Appellant of its determination to deny the Appellant's request for PCS service hours in the amount of 10 hours per day, 6 days a week. The Final Adverse Determination states that "Your abilities to perform physical functioning stayed the same for dressing upper and lower body, personal hygiene (cleaning yourself), bed mobility (moving in bed), bathing, eating, meal preparation, and medication management, and ordinary housework. Your abilities to perform physical functioning improved for walking, transfer toilet (getting on and off the toilet) and toilet use. In summary, most of your abilities to perform physical functioning remained the same and some improved; therefore, your hours stay the same at 8 hours per day, 5 days per week, for a total of 40 hours per week."



The Appellant appeared at the hearing on April 8, 2019, along with the Appellant's daughter, [REDACTED] and the Appellant's home attendant. They submitted a letter dated March 25, 2019 from [REDACTED], which stated that the Appellant suffers from dementia and Alzheimer's disease, that her memory has progressively deteriorated, and that the Appellant "needs a close supervision during the day." They also submitted a letter dated April 1, 2019 from [REDACTED] which states that the Appellant suffers from macular degeneration and is legally blind.

At the hearing the Appellant's daughter stated that the Appellant takes care of her toileting

needs by herself, and that she can get into and out of bed by herself. The Appellant's daughter also stated that her sister [REDACTED] lives with the Appellant. [REDACTED] works during the week, and is out of the house from 8:00 AM to 6:00 PM, Monday through Friday. The Appellant's home attendant is with the Appellant from 9:00 AM to 5:00 PM, Monday through Friday. The family pays for someone to be with the Appellant on weekdays from 8:00 AM to 9:00 AM, and from 5:00 PM to 6:00 PM. In addition, the family will occasionally have someone over to be with the Appellant on Saturdays, if [REDACTED] is working on a Saturday. The Appellant's daughter stated that she does not know when [REDACTED] will work on a Saturday, but that she has only had to work two Saturdays since the beginning of 2019, at which time they paid for someone to watch the Appellant.

The Appellant's daughter stated at the hearing that the Appellant has dementia and should not be left alone, and that her family is afraid for her safety when she is alone. Therefore, they are requesting additional hours from 8:00 AM to 9:00 AM and 5:00 PM to 6:00 PM on Mondays through Fridays, and 10 hours on Saturdays, for safety concerns. As noted above, the letter from Dr. [REDACTED] states that the Appellant needs close supervision during the day. Therefore, they are requesting the additional hours to have someone to watch over the Appellant.

At a hearing concerning the denial of a request for an increase in hours of personal care services, the Appellant must establish that the Plan erred in its determination. The Appellant's representative's testimony and evidence has been considered, but it was not found persuasive. Providing additional personal care services for safety supervision is not something the Plan need authorize.

Pursuant to the regulations, when appealing the adequacy of services under the Medical Assistance coverage, the burden of proof falls on the Appellant to show that the Appellant is eligible for a greater amount of assistance. On this record, that burden has not been met.

Given the totality of the evidence presented, it is found that the Plan's determination to deny the Appellant's request for additional hours in the amount of 10 hours a day, 6 days a week was correct. Accordingly, the Plan is affirmed.

DECISION

The Plan's determination to deny the Appellant's request for an increase in the Appellant's personal care aid hours is correct.

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DATED: Albany, New York
04/12/2019

NEW YORK STATE
DEPARTMENT OF HEALTH

By

C. C. Oluwesa.

Commissioner's Designee