

STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST: June 12, 2017

AGENCY: MAP

FH #: 7551238J

In the Matter of the Appeal of	:
	: 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 July 10, 2017, 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 (Centers Plan for Healthy Living)


Alisha Jacobs, Fair Hearing Representative

ISSUE

Was the Appellant's Long Term Care Plan's determination to deny a request to increase the Appellant's authorization for personal care services, 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 80, who resides in  for Nursing and Rehabilitation, has been in receipt of Medicaid benefits provided through a Managed Long Term Care Plan, Centers Plan for Healthy Living (CPHL).

2. On January 11, 2017, the Appellant was assessed and approved for Personal Care Service (PCS) in the amount of 7 hours per day, 7 days per week (49 total hours), which would begin once her enrollment was effective on February 1, 2017.

3. On January 16, 2017, the Appellant, who lived alone at the time, was found by the police confused and incoherent and was brought to [REDACTED]; Adult Protective Services issued a "do not discharge" due to safety concerns.

4. On February 8, 2017, an increase in PCS to 24 hours a day, 7 days a week (live-in) was requested for the Appellant.

5. By Initial Adverse Determination dated February 24, 2017, the Plan denied the request for additional PCS because the Appellant was still an in-patient at a hospital and a Uniform Assessment System (UAS) report needed to be completed.

6. Also on February 24, 2017, a fair hearing was requested for the Appellant; by a fair hearing decision dated April 27, 2017, CPHL's determination to initially authorize 49 hours weekly of PCS was found correct.

7. On March 1, 2017, the Appellant was discharged from the hospital and admitted to the [REDACTED] for Nursing and Rehabilitation.

8. On May 19, 2017, a UAL assessment was done in the nursing home, as suggested in the April 27, 2017 fair hearing decision.

9. On May 25, 2017, an increase in PCS from 7 hours per day, 7 days per week (49 total hours) to 24 hours a day, 7 days a week (live-in) was again requested for the Appellant.

10. On May 30, 2017, medical documentation concerning the Appellant's deteriorated mental condition was received from a physician at State University of New York Downstate Medical Center.

11. On June 2, 2017, CPHL issued to the Appellant an Initial Adverse Determination which advised the Appellant of the denial of her request for an increase in PCS authorization to 24 hours a day, 7 days a week (live-in) because the Appellant is currently in a skilled nursing facility.

12. On June 12, 2017, the Appellant requested this fair hearing.

APPLICABLE LAW

Section 505.14(a) of the Regulations defines "personal care services" to mean:

some or total assistance with personal hygiene, dressing and feeding; nutritional and environmental support functions; and health-related tasks. Such services must be

essential to the maintenance of the patient's health and safety in his or her own home.

Section 505.14(a)(4) of the Regulations provides that:

Personal care services, as defined in this section, shall be provided only if the patient's health and safety in the home can be adequately assured by the provision of such services.

- (i) The patient's medical condition shall be stable, which shall be defined as follows:
 - (a) the condition is not expected to exhibit sudden deterioration or improvement; and
 - (b) the condition does not require frequent medical or nursing judgment to determine changes in the patient's plan of care; and
 - (c)
 - (1) the condition is such that a physically disabled individual is in need of routine supportive assistance and does not need skilled professional care in the home; or
 - (2) the condition is such that a physically disabled or frail elderly individual does not need professional care but does require assistance in the home to prevent a health or safety crisis from developing.
- (ii) The patient shall be self-directing, which shall mean that he/she is capable of making choices about his/her activities of daily living, understanding the impact of the choice and assuming responsibility for the results of the choice. Patients who are non self-directing, and who require continuous supervision and direction for making choices about activities of daily living shall not receive personal care services, except under the following conditions:
 - (a) supervision or direction is provided on an interim or part-time basis as part of a plan of care in which the responsibility for making choices about activities of daily living is assumed by a self-directing individual living within the same household; or
 - (b) supervision or direction is provided on an interim or part-time basis as part of a plan of care in which the responsibility for making choices about activities of daily living is assumed by a self-directing individual not living within the same household; or
 - (c) supervision or direction is provided on an interim or part-time

basis as part of a plan of care in which the responsibility for making choices about activities of daily living is assumed by an outside agency or other formal organization. The local social services department may be the outside agency.

Section 505.14(b) of the Regulations provides that when the Agency receives a request for Personal Care Services it is required to determine whether the applicant is eligible for Medical Assistance. The authorization for services shall be based on a physician's order based on the patient's current medical status as determined by a medical examination within thirty days of the request for Personal Care Services, a social assessment and a nursing assessment. The physician's order is completed by the applicant's physician. The social assessment is completed by the Agency and the nursing assessment is completed by a nurse from a certified home health agency or by a nurse employed by the Agency or by a nurse employed by a voluntary or proprietary agency under contract with the Agency.

Where there is a disagreement between the physician's order and the social and nursing 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 twenty-four-hour Personal Care Services (i.e., uninterrupted care by more than one person), 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.

Administrative Directive 92 ADM-49 provides in pertinent part:

B. Health and Safety of Recipient

Personal care services may only be authorized when the district reasonably expects that the recipient's health and safety can be maintained in the home. This determination must consider the following:

1. Stability of the Recipient's Medical Condition

The assessing nurse has primary responsibility for determining stability of the recipient's medical condition. The recipient and/or any informal caregiver should be given the opportunity to be involved in this determination. The determination should be based on information included in the nursing assessment and a review of the physician's order. In situations where there is a question about this determination, the assessing nurse may wish to involve the case manager or obtain consultation from the local professional director or his/her designee.

If the recipient's medical condition is not stable, the provision of personal care services is inappropriate unless a determination is made that the provision of personal care services in combination with the intervention of appropriate skilled nursing services, home health aide and/or therapy can adequately meet the recipient's needs.

2. Ability of the Recipient to be Self-Directing

The case manager has primary responsibility for determining the recipient's self-directing capability. The determination should be based on a review of available information in the physician's order and the social and nursing assessments. The case manager must be sensitive to the recipient's habits, factors in the recipient's physical environment and relationships with informal caregivers that might impede the recipient's ability to consistently be self-directing. In situations where there is a question about the final determination, the case manager should consult with the assessing nurse, the local professional director or his/her designee or protective services for adults case managers. The case manager may also wish to obtain a psychiatric evaluation.

Self-directing means that the recipient has the capability to make choices about activities of daily living, understand the impact of these choices and assume responsibility for the results of these choices...

A non-self-directing recipient lacks the capability to make choices about the activities of daily living, understand the implications of these choices, and assume responsibility for the results of these choices. Characteristics of a non-self-directing recipient include:

- a. the recipient may be delusional, disoriented at times, have periods of agitation, or demonstrate other behavior which is inconsistent and unpredictable; or
- b. the recipient may have a tendency to wander during the day or night and to endanger his or her physical safety through exposure to hot water, extreme cold, or misuse of equipment or appliances in the home; or
- c. the recipient may exhibit other behaviors which are harmful to himself or herself or to others such as hiding medications, taking medications without his or her physician's knowledge, refusing to seek assistance in a medical emergency, or leaving lit cigarettes unattended. The recipient may not understand what to do in an emergency situation or know how to summon emergency assistance.

Personal care services may only be provided to non-self-directing recipients if the responsibility for direction is assumed by another individual or an outside agency and any needed supervision or direction is provided on a part-time or interim basis by that individual or agency....

Responsibility for part-time or interim supervision may be assumed by:

- o a self-directing individual who resides in the recipient's household; or

- o a legally or non-legally responsible relative, friend, neighbor, or other informal caregiver who is self-directing; or
- o a formal agency such as an area office for the aging; or
- o a self-directing individual who lives in another household.

If the individual assuming part-time or interim supervision resides outside of the recipient's home, consideration should be made as to whether that individual has substantial daily contact with the recipient in the recipient's home.

Factors used to determine whether substantial daily contact in the recipient's home is being made include:

- o the individual is physically present in the home at times throughout the day or night as necessary to assure the safety of the recipient; and
- o any discretionary decisions or choices involved in carrying out the functions and tasks identified in the recipient's plan of care are conveyed to the person providing personal care services.

Substantial daily contact does not mean the individual must be physically present in the home for a specified amount of time. The frequency of contact needed to assure a safe situation and provide discretionary direction should be based on each recipient's case situation as reflected in the social and nursing assessments and in the recipient's plan of care.

Supervision and direction of non-self-directing recipients is not an appropriate role for individuals providing personal care services. Such individuals can perform the functions or tasks specified in the recipient's plan of care as instructed by another person. They can also observe and monitor the recipient for possible changes in his/her functioning. However, when changes are noted, the individual is responsible for reporting his/her observations to the appropriate professional for review and decisions about the recipient's plan of care.

If the recipient has no individual or outside formal agency willing to assume responsibility for his/her supervision and direction, a referral should be made to the protective services for adults program for a protective services assessment. Denial or termination of personal care services may be required if the recipient's health and safety cannot be assured by involvement of other individuals, outside formal agencies or the protective services for adults (PSA) program....

The United States Court of Appeals for the Second Circuit has reversed the lower court decision in Rodriguez et al v. DeBuono and Wing (S.D.N.Y.) that safety monitoring should be an included task in task based assessments. This means that social services districts that use TBA

plans in their Personal Care Services Programs are NOT required to include safety monitoring as a separate task on their TBA forms, assess the need for safety monitoring as a separate task or calculate any minutes allotted for safety monitoring as part of the total personal care services hours authorized for Personal Care Services applicants and recipients.

At a fair hearing concerning the denial of an application for or the adequacy of Public Assistance, Medical Assistance, HEAP, SNAP 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. 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. 18 NYCRR 358-5.9(a).

DISCUSSION

The hearing record establishes the following: The Appellant, age 80, who resides in [REDACTED] for Nursing and Rehabilitation, has been in receipt of Medicaid benefits provided through a Managed Long Term Care Plan, CPHL. On January 11, 2017, CPHL did an assessment and the Appellant was approved for PCS in the amount of 7 hours per day, 7 days per week (49 hours total), to begin once her enrollment was effective on February 1, 2017. However, on January 16, 2017, the Appellant, who lived alone at the time, was found by the police confused and incoherent and was brought to [REDACTED]. Adult Protective Services issued a "do not discharge" due to safety concerns.

The record also establishes that on February 8, 2017, an increase in PCS to 24 hours a day, 7 days a week (live-in) was requested for the Appellant. By Initial Adverse Determination dated February 24, 2017, the Plan denied the request for additional PCS because the Appellant is still an in-patient at a hospital and a UAS report needed to be completed. Also on February 24, 2017, a fair hearing was requested for the Appellant. A fair hearing decision dated April 27, 2017, found that CPHL's determination to initially authorize 49 hours weekly of PCS was found correct.

The record establishes that on March 1, 2017, the Appellant was discharged from the hospital and admitted to the [REDACTED] for Nursing and Rehabilitation; upon medical review and clinical documentation received from [REDACTED], CPHL suggested long term placement for the Appellant, which was declined. On May 19, 2017, a UAL assessment was done in the nursing home, as suggested in the April 27, 2017 fair hearing decision. According to that UAL, the Appellant requires constant supervision, cueing and assistance with ADLs and IADLs due to dementia. The UAL determined that the Appellant requires maximal assistance for dressing upper and lower body, personal hygiene, walking indoors and outdoors/locomotion, bathing and toilet transfer and use; and is totally dependent for meal preparation, medication management and housework; and requires supervision for eating. The UAL found that the Appellant is frequently incontinent of bladder, lives alone and is unable to make safe decisions or direct care.

On May 25, 2017, an increase in PCS to 24 hours a day, 7 days a week (live-in) was again requested for the Appellant. On May 30, 2017, medical documentation regarding the Appellant's deteriorated mental condition was received from a physician at State University of New York Downstate Medical Center. It stated that the Appellant is unable to follow simple commands, is profoundly impaired and unable to comprehend appropriately. The Appellant's neuropsychiatric evaluation found evidence of delusions, hallucinations, anxiety, aggressiveness, agitation, sleep disturbances and depression. Further, the Appellant lives alone and is socially isolated, it stated.

On June 2, 2017, CPHL issued to the Appellant an Initial Adverse Determination which advised the Appellant of the denial of her request for an increase in PCS authorization to 24 hours a day, 7 days a week (live-in) at this time because the Appellant is currently in a skilled nursing facility. The denial notice stated that CPHL will re-assess the Appellant once her status improves where she can be safely discharged home.

At the hearing, it was determined that there are no written discharge papers, no agreed upon discharge plan or scheduled time to discharge the Appellant. The Appellant's representative stated that the family only wishes to have the Appellant discharged if the Appellant is authorized to receive the requested increase of PCS to 24 hours, 7 days a week (live-in). However, the CDHL representative stated the Plan's position that the Appellant belongs in long-term nursing care. At the hearing, the Appellant's representative continued to decline long-term nursing home care for the Appellant, while the CPHL representative stated that the Plan's opinion continued to be that the Appellant is not safe in the community and she that belongs in a nursing home.

The Appellant has a documented history of unsafe wandering. The record shows that the Appellant was found wandering on the street with blood on her clothes and she suffered a busted lip and chin laceration due to an apparent fall while wandering. The record shows that an investigation of the Appellant's eligibility for Adult Protective Services was commenced in early 2017, but the results of that investigation still remain unknown. The record establishes that the Appellant's condition is unstable. As stated above, the medical documentation regarding the Appellant's deteriorating mental health shows that the Appellant is unable to follow simple commands, is profoundly impaired, is unable to comprehend appropriately, and has delusions, hallucinations, anxiety, aggressiveness, agitation, sleep disturbances and depression. The record reflects that the Appellant speaks to deceased relatives and thinks she lives in the 1960s.

The evidence clearly establishes that the Appellant is not self-directing and is incapable of making safe decisions for herself. Therefore, someone else must be available to direct and make decisions for the Appellant. It is not the role of the health care aide to do so when an infirm person cannot self-direct. Administrative Directive 92 ADM-49 provides in pertinent parts: Supervision and direction of non-self-directing recipients is not an appropriate role for individuals providing personal care services. If the recipient has no individual or outside formal agency willing to assume responsibility for his/her supervision and direction, a referral should be made to the protective services for adults program for a protective services assessment... Personal care services may only be authorized when the district reasonably expects that the recipient's health and safety can be maintained in the home... This determination must consider the stability of the recipient's medical condition and the ability of the recipient to be self-

directing...Personal care services may only be provided to non-self-directing recipients if the responsibility for direction is assumed by another individual or an outside agency and any needed supervision or direction is provided on a part-time or interim basis by that individual or agency.... Further, Administrative Directive 92 ADM-49 provides that an individual may assume part-time or interim supervision of a recipient who is not self-directing even if such individual resides outside of the recipient's home. The Administrative Directive goes on to state that if such individual resides outside the recipient's home, consideration should be made as to whether such individual has "substantial daily contact" with the recipient in the recipient's home.

The record is inconsistent and unclear as to whether the Appellant has ever lived with her niece. However, at the hearing, it was established that the Appellant's niece is the person with whom the Appellant will live, if and when she leaves the nursing home. The May 19, 2017 UAL assessment states that the niece makes all decisions for the Appellant, that she is the sole caretaker, and that the Appellant cannot be left alone. Notably, the UAL points out that although the niece "would live with [the Appellant], she "travels frequently." When asked at the hearing what role any relative will play in light of the Appellant's deteriorated mental condition, the niece answered as "back-up."

It must also be noted that the UAL states that the nursing care facility staff administers all medications to the Appellant. Given that home health aides are not allowed to administer medications, and the niece travels often, it was not certain that someone will be available when needed to administer medications to the Appellant.

This record does not establish that the Appellant's health and safety can be assured through the provision of home care services. The record indicates that the Appellant cannot direct the aide. The record notes the Appellant's inappropriate responses to questions relating to judgement. The record also fails to establish that adequate supervision is available for Appellant. The assessment does not indicate that the niece can always be relied upon in an emergency, and although the May 19, 2017 UAL stated the Appellant's niece will be responsible for the Appellant and make all decisions for her, the fact that the niece travels frequently and that she identifies herself as "back-up," calls into question whether she is indeed fully capable and willing to assume that role.

The record supports the Agency's determination. The record does not establish adequate supervision of the Appellant is available in the home and it does not establish that an increase in PCS would assure Appellant's safety in the home. At a fair hearing concerning the adequacy of or denial of medical assistance, the burden is on the Appellant to establish that the Appellant is eligible for a greater amount of assistance or benefits. As the Appellant has not, at this time, proven that she would be eligible to be returned to her residence, the Appellant has not met the burden to prove eligibility for additional care hours.

DECISION

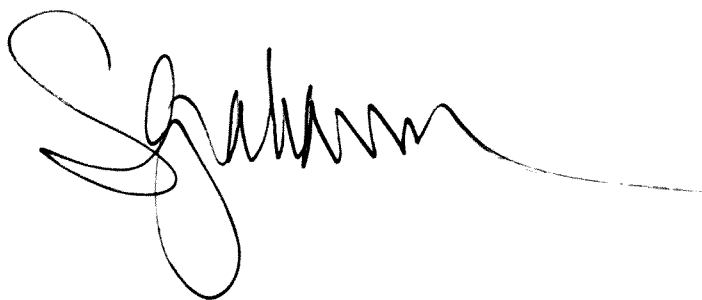
The Appellant's Long Term Care Plan's determination to deny a request to increase the Appellant's authorization for personal care services is correct.

FH# 7551238J

DATED: Albany, New York
07/27/2017

NEW YORK STATE DEPARTMENT
OF HEALTH

By

A handwritten signature in black ink, appearing to be 'S. Gahm', with a long horizontal flourish extending to the right.

Commissioner's Designee