

STATE OF NEW YORK  
DEPARTMENT OF HEALTH

REQUEST: October 5, 2018

AGENCY: MAP

FH #: 7839527K

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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 October 31, 2018, in New York City, before an Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant



For Centers Plan For Healthy Living (Centers Plan)

No Representation

**ISSUE**

Was the determination of Centers Plan to authorize Consumer Directed Personal Assistance Services (CDPAS) Personal Care Services for the Appellant in the amount of 30 hours weekly correct?

**FACT FINDING**

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, who is 83 years old, receives Medical Assistance from Centers Plan.

2. The Appellant has been a receipt of a Personal Care Services Authorization in the amount of 30 hours per week, at the rate of six hours a day, five days a week.

3. An application to increase the Appellant's authorization for personal care services to 8 hours a day, 5 days a week was made to Centers Plan by the Appellant.

4. By notice dated June 18, 2018, Centers Plan determined to continue to authorize Personal Care Services to the Appellant in the amount of 30 hours weekly, because the Appellant's request for 8 hours a day, 5 days a week, is not medically necessary, and the personal care services currently received by the Appellant are sufficient to meet her personal care needs. Centers Plan notified the Appellant that it authorized Personal Care Services to the Appellant in the amount of 30 hours, weekly; the Appellant was notified that 40 hours per week, would not be provided because based on a comparison of the most recent assessment done on 6/4/2018, and that of 2/14/2018, the clinical documentation and a thorough case review; there have been no changes in [Appellant's] abilities to perform her Activities of Daily Living (ADLs), and Instrumental Activities of Daily Living (IADLs); that Appellant's needs can still be met with the current plan of care ; specifically Appellant's activities of daily living such as bathing, dressing, toileting and housekeeping related services, and the additional hours are not medically necessary.

5. The Appellant requested an internal appeal, and on August 31, 2018, Centers Plan upheld the prior denial as per a "Centers Plan Appeal Final Adverse Decision" notice.

6. On October 5, 2018, this hearing was requested.

### **APPLICABLE LAW**

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).

Social Services Law §365-a(2) provides that "Medical Assistance" shall mean payment of part or all of the cost of medically necessary medical, dental and remedial care, services and supplies, as authorized in this title or the regulations of the department, which are necessary to prevent, diagnose, correct or cure conditions in the person that cause acute suffering, endanger life, result in illness or infirmity, interfere with such person's capacity for normal activity, or threaten some significant handicap and which are furnished an eligible person in accordance with this title and the regulations of the department.

Social Services Law §365-a(2)(k) provides that such care, services and supplies shall include

care and services furnished by an entity offering a comprehensive health services plan, including an entity that has received a certificate of authority pursuant to sections forty-four hundred three, forty-four hundred three-a or forty-four hundred eight-a of the public health law (as added by chapter six hundred thirty-nine of the laws of nineteen hundred ninety-six) or a health maintenance organization authorized under article forty-three of the insurance law, to eligible individuals residing in the geographic area served by such entity, when such services are furnished in accordance with an agreement approved by the department which meets the requirements of federal law and regulations.

The United State Department of Health and Human Services (Health Care Finance Administration) has granted the State of New York a waiver under Section 1115 of the Social Security Act to permit the operation of a demonstration waiver program for Managed Care Programs in which certain eligible Medicaid recipients are subject to mandatory enrollment. An "Operational Protocol" (Protocol) has been approved by the Health Care Finance Administration as required by the Terms and Conditions governing the demonstration waiver. Such Protocol details the day-to-day operations of the program.

GIS 11 MA/009 provides that effective August 1, 2011, personal care services for non-dual eligible individuals are the responsibility of Managed Care Organizations and are now part of the Medicaid Managed Care Benefits Package under the Medicaid Managed Care Contract.

Pursuant to Social Services Law §365-a(2)(e) Medicaid provides personal care services, including personal emergency response services, shared aide and an individual aide, subject to the provisions of subparagraphs (ii), (iii), and (iv) of this paragraph, furnished to an individual who is not an inpatient or resident of a hospital, nursing facility, intermediate care facility for the mentally retarded, or institution for mental disease, as determined to meet the recipient's needs for assistance when cost effective and appropriate, and when prescribed by a physician, in accordance with the recipient's plan of treatment and provided by individuals who are qualified to provide such services, who are supervised by a registered nurse and who are not members of the recipient's family, and furnished in the recipient's home or other location.

Social Services Law §365-a(2)(e)(iv) provides that personal care services pursuant to this paragraph shall not exceed eight hours per week for individuals whose needs are limited to nutritional and environmental support functions.

18 NYCRR 505.14(a) governs the scope of personal care services available under the Medicaid Program for both fee-for-service and Medicaid Managed Care.

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.

Section 505.14(a) of the Regulations provides in part that:

- (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.

- (3) Personal care services, as defined in this section, can be provided only if the services are medically necessary and the social services district reasonably expects that the patient's health and safety in the home can be maintained by the provision of such services, as determined in accordance with this section.
- (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.
    - (a) Nutritional and environmental support functions include assistance with the following:
      - (1) making and changing beds;
      - (2) dusting and vacuuming the rooms which the patient uses;
      - (3) light cleaning of the kitchen, bedroom and bathroom;
      - (4) dishwashing;
      - (5) listing needed supplies;
      - (6) shopping for the patient if no other arrangements are possible;
      - (7) patient's laundering, including necessary ironing and mending;
      - (8) payment of bills and other essential errands; and
      - (9) preparing meals, including simple modified diets.
    - (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 specified in clause (i)(a) of this paragraph 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 of 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.
- (b) Before continuous personal care services or live-in 24-hour

personal care services may be authorized, additional requirements for the authorization of such services, as specified in clause (b)(4)(i)(c) of this section, must be met.

In Rodriguez v. City of New York, 197 F.3d 611 (2<sup>nd</sup> Cir. 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 Agency 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.

Section 505.14(c)(9) of the Regulations provides that each local social services department shall have a plan to monitor and audit the delivery of personal care services provided by arrangements or contracts.

New York City has received approval to deliver Personal Care Services through a Task Based Assessment methodology. Service delivery is task oriented, not time oriented, and the client continues to receive service in accordance with assessed needs.

Section 505.14(b)(5)(iv)(c) of the Regulations provides: The social services district's determination to deny, reduce or discontinue personal care services must be stated in the client notice, and,

- (1) Appropriate reasons and notice language to be used when denying personal care services include but are not limited to the following:
  - (i) the client's health and safety cannot be assured with the provision of personal care services. The notice must identify the reason or reasons that the client's health and safety cannot be assured with the provision of personal care services;
  - (ii) the client's medical condition is not stable. The notice must identify the client's medical condition that is not stable;
  - (iii) the client is not self-directing and has no one to assume those responsibilities;
  - (iv) the services the client needs exceed the personal care aide's scope of practice. The notice must identify the service or services that the client needs that exceeds the personal care aide's scope of practice;
  - (v) the client refused to cooperate in the required assessment;

- (vi) a technological development, which the notice must identify, renders certain services unnecessary or less time-consuming;
  - (vii) the client resides in a facility or participates in another program or receives other services, which the notice must identify, which are responsible for the provision of needed personal care services; and
  - (viii) the client can be more appropriately and cost-effectively served through other Medicaid programs or services, which the notice must identify.
- (2) Appropriate reasons and notice language to be used when reducing or discontinuing personal care services include but are not limited to the following:
- (i) the client's medical or mental condition or economic or social circumstances have changed and the district determines that the personal care services provided under the last authorization or reauthorization are no longer appropriate or can be provided in fewer hours. For proposed discontinuances, this includes but is not limited to cases in which: the client's health and safety can no longer be assured with the provision of personal care services; the client's medical condition is no longer stable; the client is no longer self-directing and has no one to assume those responsibilities; or the services the client needs exceed the personal care aide's scope of practice. The notice must identify the specific change in the client's medical or mental condition or economic or social circumstances from the last authorization or reauthorization and state why the services should be reduced or discontinued as a result of the change;
  - (ii) a mistake occurred in the previous personal care services authorization or reauthorization. The notice must identify the specific mistake that occurred in the previous authorization or reauthorization and state why the prior services are not needed as a result of the mistake;
  - (iii) the client refused to cooperate in the required reassessment;
  - (iv) a technological development, which the notice must identify, renders certain services unnecessary or less time-consuming;
  - (v) the client resides in a facility or participates in another program or receives other services, which the notice must identify, which are responsible for the provision of needed personal care services; and
  - (vi) the client can be more appropriately and cost-effectively served through other Medicaid programs and services, which the notice must identify.

**DISCUSSION**

The Appellant applied for an increase of Personal Care Services, according to the Appellant, because she lives alone, and suffers from a serious medical condition; Appellant 14 years ago had her anal muscles cut due to a colon cancer diagnose, which makes her wear diaper for bowel incontinence. According to the Appellant, this condition prevents her from going anywhere but her doctor's appointments, and she does not eat before going out. Appellant also needs additional hours to have her aide cook her lunch and dinner, clean the house everyday as Appellant is allergic to dust. Appellant requires the additional hours because she is afraid to cook after the aide leaves, as she might leave the stove on and burn down the house, and also the solitude of being alone after the aide leaves makes the Appellant sad.

The Appellant has been in receipt of CDPAS Personal Care Services Authorization in the amount of 30 hours per week. Her diagnoses include: Age related osteoporosis without current pathological fracture, Allergy, unspecified, Essential (primary) hypertension, Gastro-esophageal reflux disease without esophagitis, and Primary generalized (osteo)arthritis, amongst others.

On June 18, 2018, Centers Plan notified the Appellant that it had determined not to increase the amount of the Appellant's Personal Care Services and to continue to provide the Appellant with a Personal Care Services authorization in the amount of 30 hours weekly, because the Appellant's request for 8 hours a day, 5 days a week, is not medically necessary, and the personal care services currently received by the Appellant are sufficient to meet her personal care needs. Centers Plan notified the Appellant that it authorized Personal Care Services to the Appellant in the amount of 30 hours, weekly; the Appellant was notified that 40 hours per week, would not be provided because based on a comparison of the most recent assessment done on 6/4/2018, and that of 2/14/2018, the clinical documentation and a thorough case review; there have been no changes in [Appellant's] abilities to perform her Activities of Daily Living (ADLs), and Instrumental Activities of Daily Living (IADLs); that Appellant's needs can still be met with the current plan of care ; specifically Appellant's activities of daily living such as bathing, dressing, toileting and housekeeping related services, and the additional hours are not medically necessary. . Centers Plan's determination is consistent with the evaluation that was made of the Appellant in June 2018

The Appellant at the hearing testified further that Appellant requires the additional hours because Appellant faints sometimes gets dizzy and falls, has panic attacks, and needs the aide to provide her proper diet and meals after 3pm, as the Appellant is losing weight as she is not eating properly.

With regard to the Appellant's contention that; the Appellant needs additional hours and assistance to have someone around to prevent her from being alone and sad, and to avoid Appellant leaving the stove on, clean the house, do grocery shopping and cook; this testimony was considered but found not persuasive. The record establishes that the Appellant is currently receiving more than adequate hours weekly to support her activities of daily living as allotted in her assessment; the Appellant did not establish that the allotted time were insufficient. The



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request is really an attempt to obtain companionship and safety monitoring as a standalone task. Requiring an aide to perform these tasks borders on companionship and safety supervision. The provider is not required to include companionship and or safety monitoring as a separate task. The Appellant failed to establish the Appellant's other alleged needs are anything other than an attempt to obtain safety monitoring and companionship. Also, the Appellant failed to establish a need for additional hours for tasks already being provided to the Appellant.

The evidence in this matter has been considered. The record fails to establish a change in the Appellant's medical condition such that an increase to 40 hours per week, CDPAS Personal Care services is medically necessary. The Appellant has failed to establish a criterion of need for an increase in CDPAS personal care services, nor has the Appellant established that the Plan had erred in its determination dated June 18, 2018, to provide the Appellant with a 30-hour weekly CDPAS personal care services. The Appellant failed to meet her burden of proof and did not establish that her application for additional hours, beyond that which Centers Plan now provides, of CDPAS Personal Care Services was based on medical necessity. The Appellant failed to meet her burden of proof.

### **DECISION**

The determination of Centers Plan to authorize Consumer Directed Personal Assistance Services (CDPAS) Personal Care Services for the Appellant in the amount of 30 hours weekly is correct.

DATED: Albany, New York  
12/11/2018

NEW YORK STATE  
DEPARTMENT OF HEALTH

By

A handwritten signature in black ink, appearing to read "Thomas M. Halper". The signature is fluid and cursive, with the first name "Thomas" being the most prominent part.

Commissioner's Designee