STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST: October 10, 2016
[redacted]
AGENCY: MAP
FH #: 7398850P

In the Matter of the Appeal of

[redacted]

from a determination by the New York City Department of Social Services

DECISION AFTER FAIR HEARING

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 November 3, 2016, in New York City, before an Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

[redacted]

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

Nureet Arzi, Representative
Alisha Jacobs, Representative

ISSUES

Was the determination of Centers Plan For Healthy Living to reduce the Appellant's Personal Care Services correct?

Was the determination by the Appellant's Managed Long Term Care Provider, Centers Plan For Healthy Living, to deny the Appellant's request for an increase of Personal Care Services to 56 hours per week (eight hours per day, seven days per week) 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 [redacted] old, receives Medical Assistance from Centers Plan

For Healthy Living.

2. Appellant has been in receipt of an authorization for Consumer Directed Personal Assistance Services (CDPAS) in the amount of 49 hours per week, at the rate of seven hours a day, seven days a week.

3. Appellant requested an increase to 56 hours per week, at the rate of eight hours per day, seven days per week.

4. On September 22, 2016, Centers Plan For Healthy Living notified the Appellant that it would reduce the Appellant's Personal Care Services from 49 hours per week to 38.5 hours per week because the health care service is not medically necessary.

5. Appellant requested a standard appeal.

6. By notice dated September 28, 2016, Centers Plan For Healthy Living notified the Appellant that the appeal had been reviewed and the determination to reduce the service was being upheld.

7. On October 10, 2016, the Appellant requested this fair hearing.

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.

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(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 (2nd 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, who is [redacted] old, receives Medical Assistance from Centers Plan For Healthy Living ("Center"). Appellant has been in receipt of an authorization for Consumer Directed Personal Assistance Services (CDPAS) in the amount of 49 hours per week, at the rate of seven hours a day, seven days a week. Appellant requested an increase to 56 hours per week, at the rate of eight hours per day, seven days per week. On September 22, 2016, Centers Plan For Healthy Living notified the Appellant that it would reduce the Appellant's Personal Care Services from 49 hours per week to 38.5 hours per week because the health care service is not medically necessary. Appellant requested a standard appeal. By notice dated September 28, 2016, Centers Plan For Healthy Living notified the Appellant that the appeal had been reviewed and the determination to reduce the service was being upheld.

The September 22, 2016 notice also, denied the Appellant's request to increase the Appellant's Consumer Directed Personal Assistance Services (CDPAS) to 56 hours per week, at the rate of eight hours per day, seven days per week. The reasons for denying the Appellant's request for an increase is the same reason the Centers provided for reducing the Appellant's Consumer Directed Personal Assistance Services (CDPAS) from 49 hours per week to 38.5 hours per week.

The September 22, 2016, notice contained a statement that based on the UAS-NY assessment performed on 9/13/2016 and the Plan Client Tasking Tool compared to the previous UAS NY assessment completed on 4/28/2016 the Appellant showed no changes in instrumental Activities of Daily Living ("adl") and the Appellant demonstrated an improvement in abilities to perform dressing –upper body, bathing, toilet transfer, walking, locomotion and bed mobility. It indicated that some of the personal care services hours were not medically necessary based on the Appellant's current medical condition, and were an overestimation of the time necessary to complete all level 2 tasks for activities of daily living. However, there is no credible evidence to support this statement. The September 13, 2016, assessment indicates that there has been no change in the ADL status and the Appellant's overall self-sufficiency as compared to 90 days ago. The record fails to support Centers Plan For Healthy Living's determination to reduce the Appellant's Personal Care Services.

At the hearing, the Appellant's daughter stated that her father cannot bath alone, he cannot walk without assistance. She testified that she was present during the September 13, 2016 assessment. She testified that she is not her father's CDPAP, although, the September 13, 2016 Uniform Assessment stated that otherwise. She testified that her father was prone during the assessment. She testified that he is not oriented x 3; he has [redacted] disease. She presented document from [redacted] MD, dated November 21, 2016, that states that "the Patient has [redacted] cannot walk without personal assistance for fear of falling." The UAS fails to establish an improvement in the Appellant's abilities to perform dressing –upper body, bathing, toilet transfer, walking, locomotion and bed mobility. Specifically, the UAS does not indicate that the Appellant was observed performing any of the above adls. Therefore, based on the document from the Appellant's physician and the lack of evidence from Center to support its determination, its

determination to deny the Appellant's request to increase the Appellant's Consumer Directed Personal Assistance Services (CDPAS) to 56 hours per week is not sustained.

DECISION AND ORDER

The determination of Centers Plan For Healthy Living to reduce the Appellant's Personal Care Services is not correct and is reversed.

The determination by the Appellant's Managed Long Term Care Provider, Centers Plan For Healthy Living , to deny the Appellant's request for an increase of Personal Care Services to 56 hours per week (eight hours per day, seven days per week) is not correct and is reversed.

1. Centers Plan For Healthy Living is directed to cancel the notice dated September 22, 2016, authorize the Appellant, to receive Consumer Directed Personal Assistance Services (CDPAS) in the amount of 56 hours per week, at the rate of eight hours per day, seven days per week and notify the Appellant in writing of its compliance with this fair hearing decision.

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

DATED: Albany, New York
11/25/2016

NEW YORK STATE
DEPARTMENT OF HEALTH

By

Commissioner's Designee