

STATE OF NEW YORK  
DEPARTMENT OF HEALTH

REQUEST: October 25, 2019

AGENCY: MAP  
FH #: 8052475J

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In the Matter of the Appeal of	:
<div style="background-color: black; width: 150px; height: 1.2em; margin: 2px 0;"></div>	: <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 December 5, 2019, 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

Deborah Ferguson, Fair Hearing Representative

**ISSUE**

Was the determination of the Managed Long-Term Care Plan dated June 19, 2019 to deny the Appellant's request for personal care service hours in the amount of 24 hours per day split-shift, 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, , resides alone. The Appellant has been in receipt of a Medical Assistance authorization and is enrolled as a participant in the Centers Plan for Healthy Living Managed Long-Term Care Plan (hereinafter referred to as "the Plan"). The Appellant has been in receipt of a Personal Care Services authorization (hereinafter referred to as "PCS") in the amount of 24 hours per day live-in, 7 days a week.

2. The Appellant's daughter requested an increase in Appellant's authorization for PCS services to 24 hours a day continuous care by more than one personal care aide ("split-shift").

3. By means of an Initial Adverse Determination dated June 19, 2019, the Plan notified the Appellant of the Plan's determination to deny the Appellant's request for personal care service hours in the amount of 24 hours per day with two aides. A final adverse determination of July 5, 2019 upheld the Plan's denial of split shift 24/7 services.

4 On October 25, 2019, this hearing was requested.

### **APPLICABLE LAW**

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 some or total assistance with personal hygiene, dressing and feeding; and nutritional and environmental support 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) Some or total assistance shall be defined as follows:

- (i) Some assistance shall mean that a specific function or task is performed and completed by the patient with help from another individual.
- (ii) Total assistance shall mean that a specific function or task is performed and completed for the patient.

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(6) 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.

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Note: Effective April 1, 2011 Social Services Law §365-a(2)(e)(iv), which is reflected in this regulation, was amended to provide 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.

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- (ii) Level II shall include the performance of nutritional and environmental support functions and personal care functions.
  - (a) Personal care functions shall include some or total 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) preparing meals in accordance with modified diets, including low sugar, low fat, low salt and low residue diets;
    - (8) feeding;
    - (9) 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;
    - (10) providing routine skin care;

- (11) using medical supplies and equipment such as walkers and wheelchairs; and
- (12) changing of simple dressings.

Section 505.14(a)(2) provides that *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.

In Rodriguez v. City of New York, 197 F.3d 611 (2d 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.

GIS 12 MA/026 provides that the Department has been directed by the U.S. District Court for the Southern District of New York, in connection with the case of Strouchler v. Shah, to clarify the proper interpretation and application of 18 NYCRR 505.14 with respect to the availability of 24-hour, split-shift personal care services for needs that are predicted and for Medicaid recipients whose only nighttime need is turning and positioning. It is the Department's policy that 24-hour split-shift care should be authorized only when a person's nighttime needs cannot be met by a live-in aide or through either or both of the following: (1) adaptive or specialized equipment or supplies including, but not limited to, bedside commodes, urinals, walkers, wheelchairs, and insulin pens, when the social services district determines that such equipment or supplies can be provided safely and cost-effectively; and (2) voluntary assistance available from informal caregivers or formal services provided by an entity or agency. When a person's nighttime needs cannot be met by the use of adaptive or specialized equipment or supplies or voluntary assistance from informal caregivers or formal services, a determination

must be made whether the person needs 24-hour split-shift care (included within the regulatory definition of “continuous personal care services”) or live-in 24-hour personal care services. Under Section 505.14, this depends on whether the person needs “some” or “total” assistance with toileting, walking, transferring, or feeding, and whether these needs are “frequent” or “infrequent”, and able to be “scheduled” or “predicted”. The intent of the regulation is to allow the identification of situations in which a person’s needs can be met by a live-in aide and still allow the aide to have an uninterrupted five hours for sleeping. The Department is considering changes to the regulations to better achieve this goal. In the meantime, the Department provides the following clarifications:

1. The fact that a person’s needs are predictable does not preclude the receipt of 24-hour split-shift care, if the person has a documented medical need for the tasks to be performed with a frequency that would not allow a live-in aide to perform them and still obtain an uninterrupted five hours of sleep.
2. The need for turning and positioning and/or the need for diaper changes, by themselves, neither preclude nor justify the receipt of 24-hour split-shift care. In order to receive 24-hour split-shift care, the person must have a documented medical need for those tasks to be performed so frequently that a live-in aide cannot provide them and still obtain an uninterrupted five hours of sleep.
3. A person with a documented medical need for turning and positioning may, if otherwise appropriate, qualify for either 24-hour split-shift care or live-in care depending on the frequency at which turning and positioning is required at night, regardless of whether the person has a nighttime need for transferring.
4. When determining whether a person requires 24-hour split-shift care or live-in care, the local professional director must consider whether the physician’s order and other required assessments document the following:
  - The existence of a medical condition that directly causes the person to need frequent assistance with personal care services tasks during the night;
  - The specific task or tasks with which the person requires frequent assistance during the night;
  - The frequency at which the person requires assistance with these tasks during the night;
  - Whether the person requires similar assistance with these tasks during the daylight hours and, if not, why not;
  - The informal supports or formal services that are willing, able and available to provide assistance with the person’s nighttime tasks;

- The person's ability to use adaptive or specialized equipment or supplies to meet his or her documented medical need for assistance with nighttime tasks; and whether the person's physician has documented that, due to the person's medical condition, he or she could not safely use the equipment or supplies; and,
- Whether a live-in aide would likely be able to obtain an uninterrupted five hours of sleep were live-in services to be authorized.

## **DISCUSSION**

Evidence presented at the hearing held on December 5, 2019, establishes that the Appellant, age 86, resides alone. The Appellant has been in receipt of a Medical Assistance authorization and is enrolled as a participant in the Centers Plan for Healthy Living Managed Long-Term Care Plan (hereinafter referred to as "the Plan"). The Appellant has been in receipt of a Personal Care Services authorization (hereinafter referred to as "PCS") in the amount of 24 hours per day live-in, 7 days a week.

The Appellant's diagnoses include Alzheimer's disease, unspecified disorientation, depression, chronic pain, hypertension, and muscle weakness generalized, among others.

The Appellant's daughter requested an increase in Appellant's authorization for PCS services to 24 hours a day continuous care by more than one personal care aide ("split-shift") because the Appellant's health is declining and she needs supervision day and night, assisting with personal care around the clock. . By means of an Initial Adverse Determination dated June 19, 2019, the Plan notified the Appellant of the Plan's determination to deny the Appellant's request for personal care service hours in the amount of 24 hours per day with two aides.

By Initial Adverse Determination dated June 19, 2019, the Plan determined that an increase of PCS to split-shift was not medically necessary. In the Final Adverse Determination, dated July 5, 2019, upholding the Initial Adverse Determination, Centers Plan for Healthy Living stated that the Appellant's daughter claimed the Appellant's health condition has worsened, that she has insomnia, and that she had had two falls within the past two months.

At the hearing, the Appellant's representative, who is also her daughter, stated that the Appellant has toileting needs 5 to 6 times per night, and the aide helps her. The Appellant's daughter and aide both stated that the Appellant's live-in aide cannot obtain an uninterrupted five hours of sleep during the night. The Appellant's daughter and aide both testified that the Appellant needs assistance to get to the bathroom or a commode. The aide must help the Appellant to get out of bed. The Appellant uses adult diapers, but has bowel movements during the night when the aide is sleeping. When asked why the Appellant was not present to testify the Appellant's representative stated that she has medical issues, however it should be noted that the Appellant is not bedbound or hospitalized.

In an attempt to support her claims, the Appellant's daughter presented an Incident

Statement, dated July 2, 2019, in which the Appellant's aide wrote that the Appellant the Appellant went to bed at 9:00 p.m., and fell around 11:00 pm. The aide wrote that she observed bruises and cuts on the Appellant. The Appellant's daughter also presented a Sleep and Meal Period Exception Certification Form, signed by the Appellant's witness and aide, on October 1, 2019, in which the witness/aide wrote that the Appellant wakes up every night and leaves the bedroom, and complains that she is scared. The witness wrote that the Appellant needs help some nights because she does not sleep at all. Finally, the Appellant's representative presented a Sleep and Meal Period Exception Certification Form, dated October 5, 2019, and signed by another aide who wrote that the Appellant wakes up at least three times every night, some nights she does not sleep at all, and she needs help with toilet and walking without the walker at night time.

In her request for this hearing, the Appellant's daughter wrote that the Appellant's "health condition is such that she needs constant help at night. She doesn't sleep at night or often wakes up, doesn't understand where she is, tries to get up on her own, go out, she doesn't remember that someone is with her, that dangerous in her condition. She was already falling at night. Therefore, her personal caregiver must watch her all night and daytime."

With regard to the Appellant's contention that the Appellant needs additional hours because she does not sleep at night and needs constant help at night, the record establishes that the request for 24 hour split-shift services is really an attempt to obtain companionship and safety monitoring as a standalone task. The Appellant's representative failed to establish that the aide would be unable to sleep at least five hours uninterrupted because the Appellant has unscheduled nighttime needs. Requiring an aide to watch the Appellant all night and daytime so as to prevent falls, or to prevent the Appellant from going out, constitutes safety supervision as an independent task. 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 24 hours per day split-shift Personal Care Services is medically necessary. The Appellant has failed to establish a criterion of need for an increase in personal care services, nor has the Appellant established that the Plan had erred in its determination dated June 19, 2019, to provide the Appellant with 24 hour live-in services, seven days per week. 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, was based on medical necessity. The Appellant failed to meet her burden of proof.



FH# 8052475J

**DECISION**

The determination of the Managed Long-Term Care Plan dated June 19, 2019 to deny the Appellant's request for personal care service hours in the amount of 24 hours per day split-shift, is correct.

DATED: Albany, New York  
12/16/2019

NEW YORK STATE  
DEPARTMENT OF HEALTH

By

A handwritten signature in black ink, appearing to be 'Yuh' followed by a stylized flourish.

Commissioner's Designee