

STATE OF NEW YORK  
DEPARTMENT OF HEALTH

REQUEST: August 20, 2018

AGENCY: MAP  
FH #: 7811326N

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In the Matter of the Appeal of  
[REDACTED]  
from a determination by the New York City  
Department of Social Services

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**DECISION  
AFTER  
FAIR  
HEARING**

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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 17, 2018, in New York City, before an Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

[REDACTED]

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

Deborah Ferguson, Fair Hearing Representative

**ISSUE**

Was Centers Plan for Healthy Living to partially approve the Appellant's request for an increase in the Appellant's Personal Care Assistance services from 84 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, age 79, has been in receipt of Medicaid benefits provided through a Managed Long Term Care Plan, Centers Plan for Healthy Living.
2. The Appellant's representative applied for an increase in the Appellant's Personal Care Assistance services from 84 hours weekly to 24 hours daily, 7 days weekly, continuous service provided by more than one Personal Care Services aide ("split shift").

3. On April 10, 2018, a nursing assessor finalized a Uniform Assessment System evaluation of the Appellant's personal care needs.

4. On May 9, 2018, Centers Plan for Healthy Living partially approved the Appellant's representative's request for an increase in the Appellant's Personal Care Assistance services from 84 hours per week and grant an increase to 24 hours a day, 7 days a week (live-in).

5. The Appellant requested an internal appeal.

6. By notice dated June 1, 2018, the Plan determined to uphold its determination to partially approve the Appellant's representative's request for an increase in the Appellant's Personal Care Assistance services from 84 hours per week and grant an increase to 24 hours a day, 7 days a week (live-in).

7. On August 20, 2018, this hearing was requested.

### **APPLICABLE LAW**

Part 438 of 42 Code of Federal Regulations (CFR) pertains to provision of Medicaid medical care, services and supplies through Managed Care Organizations (MCOs), Prepaid Inpatient Health Plans (PIHPs), Prepaid Ambulatory Health Plans (PAHPs) and Primary Care Case Managers (PCCMs), and the requirements for contracts for services so provided.

Section 438.210 of 42 CFR Subpart D provides, in pertinent part:

- (a) Coverage - Each contract with an MCO, PIHP, or PAHP must do the following:
  - (1) Identify, define, and specify the amount, duration, and scope of each service that the MCO, PIHP, or PAHP is required to offer.
  - (2) Require that the services identified in paragraph (a)(1) of this section be furnished in an amount, duration, and scope that is no less than the amount, duration, and scope for the same services furnished to beneficiaries under fee-for-service Medicaid, as set forth in Sec. 440.230.

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

FH# 7811326N

unlikely to obtain, on a regular basis, five hours daily of uninterrupted sleep during the aide's eight hour period of sleep.

MLTC Policy 16.07 provides, in part, that:

All plans, including those that use task-based assessment tools, must evaluate and document when and to what extent the enrollee requires assistance with IADLs and ADLs and whether needed assistance can be scheduled or may occur at unpredictable times during the day or night. All plans must assure that the plan of care that is developed can meet any unscheduled or recurring daytime or nighttime needs that the enrollee may have for assistance.

GIS 97 MA/033 provides that, when the district has determined that the MA recipient is medically eligible for split-shift or live-in services, it must next determine the availability of informal supports such as family members or friends and formal supports such as Protective Services for Adults, a certified home health agency or another agency or entity. This requirement is no different from current practice. And, as under current practice, the district must assure that the nursing and social assessments fully document and support its determination that the recipient does, or does not, have informal or formal supports that are willing and able to provide hours of care.

Contribution of family members or friends is voluntary and cannot be coerced or required in any manner whatsoever. A district may choose to implement so-called "statements of understanding" to reflect a family member's or friend's voluntary agreement to provide hours of care to a recipient whom the district has determined is medically eligible for split shift or live-in services. (See 95 LCM-76, section III, issued July 18, 1995, for a description of statements of understanding.)

Once the district has determined that the recipient is medically eligible for split-shift or live-in services and determined whether the recipient has informal or formal supports that are willing and able to provide hours of care, the district can assure that it is complying with the Mayer case by following the appropriate guidelines set forth [in the GIS message].

## **DISCUSSION**

The credible evidence establishes that the Appellant has been in receipt of Medicaid benefits provided through a Managed Long Term Care Plan, Centers Plan for Healthy Living. The credible evidence also establishes that the Appellant's representative applied for an increase in the Appellant's Personal Care Assistance services from 84 hours weekly to 24 hours daily, 7 days weekly, continuous service provided by more than one Personal Care Services aide ("split shift"). The credible evidence further establishes that by notice dated May 9, 2018, the Plan determined to partially approve the Appellant's representative's request for an increase in the Appellant's Personal Care Assistance services from 84 hours per week and grant an increase to 24 hours a day, 7 days a week (live-in). It further establishes that the Appellant requested an internal appeal, and that by notice dated June 1, 2018, the Plan determined to uphold its determination to partially approve the Appellant's representative's request for an increase in the

FH# 7811326N

Appellant's Personal Care Assistance services from 84 hours per week and grant an increase to 24 hours a day, 7 days a week (live-in).

18 NYCRR 505.14(a)(2) provides a definition of "Continuous Personal Care Services" ("Split-Shift Care") as follows: 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.

The uniform assessment system evaluation of the Appellant's personal care needs finalized on April 10, 2018, was carefully reviewed.

With regard to walking, the Uniform Assessment System evaluation of the Appellant's personal care needs finalized on April 10, 2018, establishes that a need for maximal assistance (weight-bearing support, including lifting of limbs, by 2+ helpers – OR - weight-bearing support for more than 50% or more of subtasks).

With regard to locomotion, the Uniform Assessment System evaluation of the Appellant's personal care needs finalized on April 10, 2018, establishes a need for total dependence assistance (full performance by others during all episodes).

With regard to toilet transfers and toilet use, the Uniform Assessment System evaluation of the Appellant's personal care needs finalized on April 10, 2018 establishes a need for total dependence assistance (full performance by others during all episodes).

With regard to bed mobility, the Uniform Assessment System evaluation of the Appellant's personal care needs finalized on April 10, 2018, establishes a need for maximal assistance (weight-bearing support, including lifting of limbs, by 2+ helpers – OR - weight-bearing support for more than 50% or more of subtasks).

The Medical Review Form presented by the Plan states in part that "HCP Sandra informed assessor of presence of pressure ulcer, however was resistive to SN coming to assess mbr, telling CM that ulcers are healed. There is no treatment in place, for the wounds reported on PCP note. Mbr has a pending CNHA-SN assessment. If mbr has currently or a history of pressure ulcers it would indicate a need for turning and positioning at night. Sandra works during the day and states she has provided personal and all care for the mbr when she returned from work and during the night, but finds that she is unable to provide the adequate care that the mbr requires. Sandra states that her health is now being affected because she is not getting the sleep that she needs to function and go to work".

The Appellant's Representative presented a letter from her own Physician that confirms the Plan's Medical Review that the Appellant's Representative's health is being affected. Also, the

FH# 7811326N

Appellant presented letters from the Appellant's Physician that supports the Plan's Medical Review that if mbr has history of pressure ulcers it would indicate a need for turning and positioning.

Policy directives (see GIS MA/033) establishes that contribution of family members or friends is voluntary and cannot be coerced or required in any manner whatsoever. Therefore, the Appellant's Representatives's prior assistance was voluntary and it cannot be coerced now whether or not she is capable of providing assistance to the Appellant.

The evidence has been considered. The credible evidence establishes that the Appellant needs assistance during such calendar day with toileting, walking, and transferring, turning and positioning, and needs 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.

The credible evidence establishes that the Appellant is entitled to a Personal Care Services authorization in the amount of continuous personal care services (split-shift care).

### **DECISION AND ORDER**

The Managed Long Term Care Plan's determination dated June 1, 2018, to partially approve the Appellant's request for an increase in the Appellant's Personal Care Assistance services from 84 hours weekly, is not correct and is reversed.

1. The Managed Long Term Care Plan is directed to approve the Appellant's application for a Personal Care Services authorization in the amount of continuous personal care services (split-shift care).

Should the Managed Long Term Care Plan need additional information from the Appellant in order to comply with the above directives, it is directed to notify the Appellant and the Appellant's Representative promptly in writing as to what documentation is needed. If such information is required, the Appellant or the Appellant's Representative must provide it to the Managed Long Term Care Plan promptly to facilitate such compliance.

FH# 7811326N

As required by Section 358-6.4 of the Regulations, the Managed Long Term Care Plan must comply immediately with the directives set forth above.

DATED: Albany, New York  
11/05/2018

NEW YORK STATE DEPARTMENT  
OF HEALTH

By

A handwritten signature in black ink, appearing to read "T. A. Selekm", with a horizontal line above the first letter "T".

Commissioner's Designee