

STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST November 28, 2000
CIN
CENTER # HCSP
FH # 3432131R

In the Matter of the Appeal of :
NM :

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 September 28, 2001, in New York City, before Michael A. Vass, Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

NM, Appellant (by speakerphone)

For the Social Services Agency

G. Jerome, Fair Hearing Representative

ISSUES

Was the Agency's determination dated November 27, 2000, to reduce the Appellant's Personal Care Services Authorization effective December 14, 2000, from the amount of twelve hours daily, seven days weekly, to seven hours daily, seven days weekly, correct?

Was the Agency's determination, not to increase the Appellant's Personal Care Services Authorization to an amount greater than twelve hours daily, seven days weekly, correct?

FACT FINDINGS

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 58, was in receipt of a Personal Care Services Authorization in the amount of forty-nine hours weekly through the Cluster Care Program.

2. On December 23, 1999, the Appellant requested a fair hearing to review the Agency's determination as to the adequacy of her Personal Care Services.

3. On May 10, 2000, the Commissioner of the New York State Department of Health issued a Decision After Fair Hearing (F.H.# 3250386Y-held February 9, 2000) which reversed the Agency's determination to authorize Personal Care Services to the Appellant in the amount of forty-nine hours weekly through the Cluster Care Program and which directed the Agency to authorize Personal Care Services to the Appellant in the amount of twelve hours daily, seven days weekly, as a preventive measure, pending a proper evaluation of the Appellant's medical need for Personal Care Services pursuant to Section 505.14 of the Regulations.

4. On June 15, 2000, the Appellant submitted a medical request (M11Q) for Personal Care Services to the Agency which was completed by her physician on June 2, 2000.

5. On June 27, 2000, the Agency obtained a nursing assessment (M27R) which recommends that the Appellant receive an increase in her Personal Care Services Authorization to the amount of twenty-four hours daily by a "sleep-in" personal care aide.

6. On June 27, 2000, the Agency completed a form entitled "Personal Emergency Response Services (PERS) Evaluation Form" which determined that PERS is not appropriate for the Appellant.

7. On June 27, 2000, the Agency obtained a social assessment (M11S).

8. On July 25, 2000, the Agency completed an independent medical review which determined to obtain an affiliation report.

9. On August 2, 2000, the Agency obtained an affiliation report which was completed by an Agency physician and which recommends that the Appellant receive Personal Care Services seven days weekly through the Cluster Care Program.

10. On August 21, 2000, the Agency completed an independent medical review which determined to authorize Personal Care Services for the Appellant seven days weekly through task-based Services or the Cluster Care Program to be provided in two visits daily.

11. On August 22, 2000, the Agency completed a form called "Client Task Sheet MRT Plan of Care" which was completed by a registered nurse which recommends that the Appellant receive Personal Care Services in the amount of forty-nine hours weekly through the Cluster Care Program to be provided in two visits daily.

12. On November 27, 2000, the Agency sent a Notice of Decision of Initial Authorization/ Reauthorization/ or Increase of Task-Based Services Plan to the Appellant setting forth its determination to "reauthorize" Personal Care Services for the Appellant in the amount of seven hours daily, seven days weekly.

13. On November 28, 2000, this hearing was requested to contest the Agency's determination dated November 27, 2000. On July 9, 2001, she added the issue of the correctness of the Agency's determination not to authorize Personal Care Services to her in the amount of twenty-four hours daily by a "sleep-in" personal care aide.

APPLICABLE LAW

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The Regulations at 18 NYCRR 358-3.3(a) provide, in pertinent part, that a recipient has a right to timely and adequate notice when a social services agency proposes to take any action to reduce Services.

The Regulations at 18 NYCRR 358-2.2 provides, in pertinent part:

An adequate notice means a notice of action, or an adverse action notice or an action taken notice which sets forth all of the following:

the action the social services agency proposes to take or is taking...

when the agency action or proposed action is a reduction of Services the circumstances under which Services will be continued or reinstated until the fair hearing decision is issued.

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(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.

Section 505.14(b)(3)(iii) of the Regulations provides, in pertinent part, that the nursing assessment shall be completed by a nurse from the certified home health agency, or a nurse employed by the local social services department, or a nurse employed by a voluntary or proprietary agency under contract with the local social services department, it shall be completed within five working days of the request, it shall include a review and interpretation of the physician's order, and it shall include a recommendation for authorization of services.

Reauthorization of Personal Care Services provided by a home attendant (Level II) shall include an evaluation of the services provided during the previous authorization period. The evaluation shall include a review of nursing supervisory reports to assure that the patient's needs have been adequately met.

Section 505.14(a)(7) of the Regulations defines shared aide as a method

of providing personal care services under which a social services district authorizes one or more nutritional and environmental support functions, personal care functions, or health-related tasks for each personal care services recipient who resides with other personal care services recipients in a designated geographic area, such as in the same apartment building, and a personal care services provider completes the authorized functions or health-related tasks by making short visits to each such recipient.

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 shared aide program which is called "The Cluster Care Program" in New York City. The Program is designed to deliver care to groups of clients residing in designated geographical service areas. Under the Cluster Care Program, service delivery is task oriented, not time oriented, and the client continues to receive service in accordance with assessed needs.

Section 505.14(b)(3)(ii) of the Regulations provides in pertinent part that the social assessment shall include a discussion with the patient to determine perception of his/her circumstances and preferences. The social assessment shall include an evaluation of the potential contribution of informal caregivers, such as family and friends, to the patient's care, and shall consider all of the following:

- (1) number and kind of informal caregivers available to the patient;
- (2) ability and motivation of informal caregivers to assist in care;
- (3) extent of informal caregivers' potential involvement;
- (4) availability of informal caregivers for future assistance; and
- (5) acceptability to the patient of the informal caregivers' involvement in his/her care.

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.

DISCUSSION

The record establishes that the Appellant age 58, was in receipt of a Personal Care Services Authorization in the amount of forty-nine hours weekly through the Cluster Care Program. On December 23, 1999, the Appellant requested a fair hearing to review the Agency's determination as to the adequacy of her Personal Care Services.

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On May 10, 2000, the Commissioner of the New York State Department of Health issued a Decision After Fair Hearing (F.H.# 3250386Y-held February 9, 2000) which reversed the Agency's determination and which directed the Agency to authorize Personal Care Services to the Appellant in the amount of twelve hours daily, seven days weekly, pending a proper reevaluation.

On August 27, 2000, the Agency obtained a nursing assessment (M27R) which found that the Appellant was continent of both bowel and bladder and required the assistance of another person to ambulate and to transfer. However on page 5 of the assessment, the nurse stated that the Appellant required partial assistance with toileting and transferring. The nurse stated that the Appellant required total assistance with bathing, dressing, grooming, preparation with bed, indoor and outdoor ambulation, meal preparation, feeding and medication activities plus chore services. The nurse made a recommendation to increase the Appellant's task and provide Personal Care Services in the amount of twenty-four hours daily by a "sleep-in" personal care aide.

On November 27, 2000, the Agency sent a Notice of Decision of Initial Authorization/ Reauthorization/ or Increase of Task-Based Services Plan to the Appellant indicating that it was "reauthorizing" Services to the Appellant in the amount of seven hours daily, seven days weekly. Since the Appellant has been in receipt of Personal Care Services in the amount of twelve hours daily, seven days weekly, the Agency was required to send a Notice of Intent to reduce her Personal Care Services. Also, the Agency determined to provide such Services in two visits daily, but the Notice does not so state. Therefore, the Agency's Notice therefore fails to adequately inform the Appellant of the action the social services agency proposes to take or is taking and fails to inform her of the circumstances under which Services will be continued or reinstated until the fair hearing decision is issued. Therefore, said Notice is not adequate as defined in the Regulations. Furthermore, the Agency failed to establish that it obtained and considered any nursing supervisory reports. This violates the Regulations. Therefore, the Agency's determination dated November 27, 2000, cannot be sustained.

As to the adequacy of the Appellant's current Personal Care Services Authorization, at the hearing the Appellant submitted a copy of a medical request which was completed by her psychiatrist on March 13, 2001, which the Appellant testified was submitted to the Agency on or about that date. Her testimony is found to be credible based on her demeanor, her responses to questions, and the documentary evidence. The Agency failed to establish that it obtained current social and nursing assessments of the Appellant's medical need for Personal Care Services following such submission. Therefore, the Agency failed to establish that it has properly evaluated the Appellant's medical need for Personal Care Services in accordance with the Regulations.

The Appellant testified that she was in the hospital in or about June, 2001, that she fell about two weeks ago, and that she was injured as a result. She testified that she is incontinent, that she needs assistance during the night to toilet, and that she also needs assistance to take medications during the night. She further testified that there is room in her apartment for a "sleep-in" aide.

It should be noted that at the previous Fair Hearing (F.H.# 3250386Y) the Appellant submitted two medical requests (M11Q), one from her psychiatrist

and one from her physician who specializes in general medicine. Therefore, the Appellant should submit a medical request from both of her physicians.

DECISION AND ORDER

The Agency's determination dated November 27, 2000, to reduce the Appellant's Personal Care Services Authorization effective December 14, 2000, from the amount of twelve hours daily, seven days weekly, to the amount of seven hours daily, seven days weekly, was not correct and is reversed.

1. The Agency is directed to take no action on its Notice dated December 14, 2001.

The Agency's determination, not to increase the Appellant's Personal Care Services Authorization to an amount greater than twelve hours daily, seven days weekly, was not correct and is reversed.

The Agency is directed to:

1. Authorize Personal Care Services to the Appellant in the amount of twenty-four hours daily by a "sleep-in" personal care aide as a preventive measure, pending a proper evaluation of the Appellant's medical need for Personal Care Services; and
2. Conduct a proper evaluation of Appellant's medical need for Personal Care Services pursuant to Section 505.14 of the Regulations, including obtaining a current physician's order, social assessment and nursing assessment; and if there is a disagreement between the physician's order and the social and nursing assessments, or if there is a question about the level and amount of service to be provided, or if the case involves the provision of twenty-four hour continuous care, to complete an independent medical review by the local professional director, or his designee, who shall make the final determination; and
3. Inform the Appellant, in writing, of said determination.

As required by Regulations at 18 NYCRR 358-6.4, the Agency must comply immediately with the directives set forth above.

DATED: Albany, New York
November 1, 2001

NEW YORK STATE DEPARTMENT
OF HEALTH

By

Commissioner's Designee