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

:  
: **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 13, 2011, in New York City, before Robert Swiderski, Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

[REDACTED], Appellant's Representative  
[REDACTED], Witness

For the Social Services Agency

Osbert Aird, Representative  
Theresa Sandoval, Representative

**ISSUE**

Was the Agency's determination to discontinue the Appellant's Personal Care Services 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 94 years old, is in receipt of Medical Assistance, and has been authorized to receive Personal Care Services in the amount of 24 hours daily, 7 days weekly, provided on a "sleep-in" basis.

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2. On April 7, 2011, the Appellant's physician on the Appellant's behalf submitted physician's orders to the Agency regarding the Appellant's need for Personal Care Services.
3. On April 11, 2011, the Agency obtained a Home Care Social Assessment.
4. On April 27, 2011, the Agency obtained a Nurse's Assessment.
5. On July 7, 2011, the Agency obtained an Affiliation Assessment.
6. On July 11, 2011, the Agency obtained an independent medical review, which recommended the discontinuance of the Appellant's Personal Care Service.
7. On August 10, 2011, the Agency informed the Appellant of the Agency's determination to discontinue the Appellant Personal Care Services effective August 24, 2011.
8. On August 16, 2011, this hearing was requested.

### **APPLICABLE LAW**

Official notice may be taken of all facts of which judicial notice could be taken and of other facts within the specialized knowledge of the agency. §306(4), State Administrative Procedure Act.

At a fair hearing concerning the denial of an application for or the adequacy of Public Assistance, Medical Assistance, HEAP, Food Stamp 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, Food Stamp benefits or services, the social services agency must establish that its actions were correct. 18 NYCRR 358-5.9(a).

In general, a recipient of Public Assistance, Medical Assistance or Services (including child care and supportive services) has a right to a timely and adequate notice when the Agency proposes to discontinue, suspend, reduce or change the manner of payment of such benefits. An adequate, though not timely, notice is required where the Agency has accepted or denied an application for Public Assistance, Medical Assistance or Services; or has increased the Public Assistance grant; or has determined to change the amount of one of the items used in the calculation of a Public Assistance grant or Medical Assistance spenddown; or has determined that an individual is not eligible for an exemption from work requirements. 18 NYCRR 358-3.3(a). In addition, pursuant to 18 NYCRR 358-3.3(d), an adequate, though not timely, notice is required for a Public Assistance or Medical Assistance recipient when, for example, the Agency has factual information confirming the death of the recipient; the Agency has received a clear written statement from the recipient that he or she no longer wishes to receive Public Assistance or Medical Assistance; the Agency has reliable information that the recipient has been admitted to an institution or prison; the recipient's whereabouts are unknown and mail has been returned

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to the Agency; or the recipient has been accepted for Public Assistance or Medical Assistance in another district.

A timely notice means a notice which is mailed at least 10 days before the date upon which the proposed action is to become effective. 18 NYCRR 358-2.23.

The social services district must send a notice of discontinuance on a State-prescribed form to a Medical Assistance recipient if it determines that the recipient has become ineligible for Medical Assistance. 18 NYCRR 360-2.7(b). Recipient means a person who is, or has been, receiving a covered program or service. 18 NYCRR 358-2.18.

An adequate notice is a notice of action, an adverse action notice or an action taken notice which sets forth the action that the Agency proposes to take or is taking, and if a single notice is used for all affected assistance, benefits or services, the effect of such action, if any, on a recipient's other assistance, benefits or services. In addition, the notice must contain:

- for reductions, the previous and new amounts of assistance or benefits provided;
- the effective date of the action;
- the specific reasons for the action;
- the specific laws and/or regulations upon which the action is based;
- the recipient's right to request an agency conference and fair hearing;
- the procedure for requesting an agency conference or fair hearing, including an address and telephone number where a request for a fair hearing may be made and the time limits within which the request for a fair hearing must be made;
- an explanation that a request for a conference is not a request for a fair hearing and that a separate request for a fair hearing must be made;
- a statement that a request for a conference does not entitle one to aid continuing and that a right to aid continuing only arises pursuant to a request for a fair hearing;
- the circumstances under which public assistance, medical assistance, food stamp benefits or services will be continued or reinstated until the fair hearing decision is issued;

a statement that a fair hearing must be requested separately from a conference;

a statement that when only an agency conference is requested and there is no specific request for a fair hearing, there is no right to continued public assistance, medical assistance, food stamp benefits or services;

a statement that participation in an agency conference does not affect the right to request a fair hearing;

the right of the recipient to review the case record and to obtain copies of documents which the agency will present into evidence at the hearing and other documents necessary for the recipient to prepare for the fair hearing at no cost;

an address and telephone number where the recipient can obtain additional information about the recipient's case, how to request a fair hearing, access to the case file, and/or obtaining copies of documents;

the right to representation by legal counsel, a relative, friend or other person or to represent oneself, and the right to bring witnesses to the fair hearing and to question witnesses at the hearing;

the right to present written and oral evidence at the hearing;

the liability, if any, to repay continued or reinstated assistance and benefits, if the recipient loses the fair hearing;

information concerning the availability of community legal services to assist a recipient at the conference and fair hearing; and

a copy of the budget or the basis for the computation, in instances where the social services agency's determination is based upon a budget computation.

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## **DISCUSSION**

On August 10, 2011, the Agency informed the Appellant of the Agency's determination to discontinue the Appellant Personal Care Services effective August 24, 2011.

The Agency's August 10, 2011, notice is void. A notice must allow for the preparation of an adequate defense. Perry v. Wing, 242 A.D.2d 964, 665 N.Y.S.2d 947 (4<sup>th</sup> Dept. 1997); Mecca v. Dowling, 210 A.D.2d 821, 620 N.Y.S.2d 584 (3d Dept. 1994). The Agency's notice in this case, among other things, contained blank spaces where information was to be written, provided a citation for its action that lacks even a minimum of detail such that it is meaningless, provided a phone number for record access that is not even an Agency (and not even a New York City government) phone number, and provided a phone number for legal assistance information that is a fax number (meaning that no legal assistance information would ever be obtained by phoning the number). In addition, the Agency provided the Spanish only language Appellant with an English and a Spanish version of its August 10, 2011, notice, but wrote the 80+ word explanation for its action only in English.

## **DECISION AND ORDER**

The Agency's determination to discontinue the Appellant Personal Care Services is not correct and is reversed.

1. The Agency is directed to restore, subject to other Agency actions or hearing decisions, the Personal Care Services lost by the Appellant as a direct result of the August 10, 2011, notice.

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

DATED: Albany, New York  
11/17/2011

NEW YORK STATE  
DEPARTMENT OF HEALTH

By



Commissioner's Designee

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Human Resources  
Administration  
Department of  
Social Services

### NOTICE OF INTENT TO INCREASE, REDUCE OR DISCONTINUE PERSONAL CARE SERVICES

NOTICE DATE: 08/10/2011		EFFECTIVE DATE: 08/24/2011		NAME AND ADDRESS OF AGENCY/CENTER OR DISTRICT OFFICE	
CASE NUMBER		CIN/RID NUMBER		NEW YORK CITY HUMAN RESOURCES ADMINISTRATION MEDICAL INSURANCE AND COMMUNITY SERVICES ADMINISTRATION HOME CARE SERVICES PROGRAM CASA 3 132 West 125th St - 5th floor New York NY 10027	
CASE NAME (And C/O Name if Present) AND ADDRESS					
[REDACTED]					
GENERAL TELEPHONE NO. FOR QUESTIONS OR HELP					
OR Agency Conference					
Fair Hearing Information and Assistance					
Record Access (800) 342-3334					
Legal Assistance Information (212) 630-9897					
OFFICE NO. CASA 3	UNIT NO.	WORKER NO. B-5	UNIT OR WORKER NAME Paul Gibson	TELEPHONE NO. (212) 274-5351	

This is to advise you that effective 08/24/2011, this agency intends to:

**INCREASE YOUR PERSONAL CARE SERVICES**

Your personal care services have been increased from:  
\_\_\_\_\_ hours per day, \_\_\_\_\_ days per week to:  
\_\_\_\_\_ hours per day, \_\_\_\_\_ days per week.

The personal care services have been determined to be:  
 Level I (Environmental and Nutritional Functions)  
 Level II (Personal care, Environmental and Nutritional Functions)

Your authorization period is from \_\_\_\_\_ to \_\_\_\_\_.

We intend to take this action because:

**REDUCE YOUR PERSONAL CARE SERVICES**

Your personal care services have been reduced from:  
\_\_\_\_\_ hours per day, \_\_\_\_\_ days per week to:  
\_\_\_\_\_ hours per day, \_\_\_\_\_ days per week.

Level I (Environmental and Nutritional Functions)  
 Level II (Personal care, Environmental and Nutritional Functions)

Your authorization period is from \_\_\_\_\_ to \_\_\_\_\_.

We intend to take this action because:

**DISCONTINUE YOUR PERSONAL CARE SERVICES**

We intend to take this action because:

Your health and safety cannot be assured with the provision of personal care services, you require constant safety supervision to maintain your health and safety at home as you have confirmed hallucinations, uncontrolled agitation, trying to hit people with cane, falls due to impulsiveness, losing weight at home. The level of service you need is beyond the scope of personal care services of CDPAP. A Skilled Nursing Facility will be a more appropriate setting to meet your needs. Contact Mr. James Archer for further information at (212) 665-4614.

The law and/or regulation(s) which allow us to do this are 18 NYCRR 505.14.

SIGNATURE OF WORKER: Agnes Alexander

REGULATIONS REQUIRE THAT YOU IMMEDIATELY NOTIFY THIS DEPARTMENT OF ANY CHANGES IN NEEDS, INCOME, RESOURCES, LIVING ARRANGEMENTS OR ADDRESS

**YOU HAVE THE RIGHT TO APPEAL THIS DECISION  
BE SURE TO READ THE BACK OF THIS NOTICE ON HOW TO APPEAL THIS DECISION**

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**CONFERENCE AND FAIR HEARING INFORMATION**

**CONFERENCE:** (Informal meeting with us); If you think our decision was wrong or if you do not understand our decision, please call Denise Heyward at 2126666267, or write to us at Medical Assistance Programs, Conference Unit, 132 West 125th St - 5th floor New York, NY 10027, to arrange a meeting. Sometimes this is the fastest way to solve any problems you may have. We encourage you to do this even when you ask for a fair hearing. This is not the way to request a fair hearing. If you ask for a conference, you are still entitled to a fair hearing. If you want to have your benefits continue unchanged (aid continuing) until you get a fair hearing decision, you must request a fair hearing in the way described below. Read below for fair hearing information.

**STATE FAIR HEARING - Deadline for Request:** If you want the State to review our decision about your Medical Assistance you must ask for a fair hearing within 60 days from the date of this notice.

**How to Request a Fair Hearing:** You can ask for a fair hearing in writing, by telephone, in person, or over the Internet.

**Write:** Send a copy of this notice *completed*, to the Office of Administrative Hearings, New York State Office of Temporary and Disability Assistance, P.O. Box 1930, Albany, New York 12201. Please keep a copy for yourself.

**Telephone:** (800) 342-3334 (*PLEASE HAVE THIS NOTICE WITH YOU WHEN YOU CALL*)

**Fax:** Send a copy of this notice to fax number (518) 473-6735.

**Walk-In:** Bring a copy of this notice to the New York State Office of Temporary and Disability Assistance at:  
♦ 14 Bocrum Place, 1st Floor, Brooklyn, or  
♦ 330 West 34th Street, 3rd Floor, Manhattan

**On-Line:** Complete and send the online request form at: <http://www.otda.state.ny.us/oah/forms.asp>

If you cannot reach the State by phone or the Internet, please write to request a fair hearing before the deadline for requesting a fair hearing.

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**REQUEST FOR A FAIR HEARING**

I want a fair hearing. This agency's action was wrong because: \_\_\_\_\_

\_\_\_\_\_

Print Name: \_\_\_\_\_ Case Number: \_\_\_\_\_

Address: \_\_\_\_\_ Telephone: \_\_\_\_\_

Signature of Client: \_\_\_\_\_ Date: \_\_\_\_\_

**YOU HAVE 60 DAYS FROM THE DATE OF THIS NOTICE TO REQUEST A FAIR HEARING**

If you request a fair hearing, the State will send you a notice informing you of the time and place of the hearing. You have the right to be represented by legal counsel, a relative, a friend or other person, or to represent yourself. At the hearing you, your attorney or other representative will have the opportunity to present written and oral evidence to demonstrate why the action should not be taken, as well as an opportunity to question any persons who appear at the hearing. Also, you have a right to bring witnesses to speak in your favor. You should bring to the hearing any documents such as this notice, pay stubs, receipts, medical bills, hearing bills, medical verification, letters, etc. that may be helpful in presenting your case. If you need an interpreter, please advise the State when you request the hearing.

**CONTINUING YOUR BENEFITS:** If you request a fair hearing before the effective date stated in this notice, you will continue to receive your benefits unchanged until the fair hearing decision is issued. However, if you lose the fair hearing, we may recover the cost of any Medical Assistance benefits that you should not have received. If you want to avoid this possibility, check the box below to indicate that you do not want your aid continued, and send this page along with your hearing request. If you do check the box, the action described above will be taken on the effective date listed above.

I agree to have the action taken on my Medical Assistance benefits, as described in this notice, prior to the issuance of the fair hearing decision.

**LEGAL ASSISTANCE:** If you need free legal assistance, you may be able to obtain such assistance by contacting your local Legal Aid Society, other legal advocate group, or by checking your Yellow Pages under "Lawyers."

**TO OBTAIN DOCUMENTS FROM THE HUMAN RESOURCES ADMINISTRATION (HRA) FOR YOUR FAIR HEARING:** Prior to your hearing date, HRA can provide you with free copies of the documents from your case file which HRA will present at the fair hearing, or, other documents from your file which you think you may need to prepare for your fair hearing. To request documents for your fair hearing, you may: **fax** your request (212) 630-9897 **OR** **mail** your request to the HRA Medicaid Fair Hearing Division, Rivera Liaison, 330 W. 34th Street, Third Floor, New York 10001 **OR** **call** (212) 643-3697. You must include your fair hearing number with your request.

**ATTENTION:** Children under 19 years of age who are not eligible for Child Health Plus A or other health insurance may be eligible for the Child Health Plus B Insurance Plan (Child Health Plus B). The plan provides health care insurance for children. Call 1-800-522-5006 for information.