

STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST September 30, 2002
CASE # WSxxxxxQ
CENTER # HCSP
FH # 3789016H

In the Matter of the Appeal of :

L N

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 April 22, 2003, in New York City, before David Traum, Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

D V, Appellant's Friend

Eleonara Novova, Appellant's Daughter

For the Social Services Agency

F. Kronfle, Fair Hearing Representative

ISSUE

Was the Agency's determination to discontinue 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 age 87, has been authorized to receive Personal Care Services in the amount of 24 hours daily, 7 days weekly, provided by more than one Personal Care Services aide since August 3, 1999; Appellant had been authorized to receive Personal Care Services in a lesser amount prior to August 3, 1999.

2. On April 24, 2002, the Appellant's physician on Appellant's behalf submitted physician's orders to the Agency.

3. On June 10, 2002, the Agency obtained a Social Assessment.

4. On August 19, 2002, the Agency obtained a Nurse's Assessment.

5. On August 21, 2002, the Agency obtained an affiliation physician's report.

6. On September 25, 2002, the Agency obtained an independent medical review.

7. By "Notice of Denial" dated September 26, 2002 and addressed to "L N", the Agency informed, or attempted to inform, Appellant of its intent to discontinue Appellant's Personal Care Services effective October 7, 2002, with the following statement:

"The Home Care Services Program has determined that your request for Home Care Services should be denied. You were denied these requested services because you require a higher level of care than can be authorized by this agency. It has been determined that you require decubitus care; oxygen administration via nasal cannula; bed-bound care; you require continuous monitoring of the oxygen during the day and night. Your current medical condition is unstable. You have skilled care needs that are beyond the scope of the home attendant responsibilities."

8. On September 30, 2002, the Appellant requested this fair hearing.

APPLICABLE LAW

Section 505.14(a)(1) 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(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.

(3) **Continuous 24 hour personal care services** shall mean the provision of uninterrupted care, by more than one person, for a patient who, because of his/her medical condition and disabilities, requires total assistance with toileting and/or walking and/or transferring and/or feeding at unscheduled times during the day and night.

(6) Personal care services shall include the following three 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.

- (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(b) of the Regulations provides that when a social services district receives a request for personal care services, it must determine whether the individual is eligible for Medical Assistance. The initial authorization for services shall be based on :

- o a physician's order from the patient's physician based on the patient's current medical status as determined by a medical examination within 30 days of the request for Personal Care Services;
- o a social assessment which must include a discussion with the patient to determine perception of his/her circumstances and preferences, an evaluation of the potential contribution of informal caregivers, such as family and friends, to the patient's care, and consideration of the number and kind of informal caregivers available to the patient, ability and motivation of informal caregivers to assist in care, extent of informal caregivers' potential involvement, availability of informal caregivers for future assistance, and acceptability to the patient of the informal caregivers' involvement in his/her care. The social assessment is completed by the Agency
- o a nursing assessment. The nursing assessment is completed by a nurse from a certified home health agency or by a nurse employed by the local social services department or by a nurse employed by a voluntary or proprietary agency under contract with the local social services department. The nursing assessment must be completed within 5 working days of the request and must include the following:
 - (1) a review and interpretation of the physician's order;
 - (2) the primary diagnosis code;
 - (3) an evaluation of the functions and tasks required by the patient;
 - (4) the degree of assistance required for each function and task;
 - (5) the development of a plan of care in collaboration with the patient or his/her representative; and
 - (6) recommendations for authorization of services.
- o a home care assessment. This may be included in the social or nursing assessment.
- o an assessment of the patient's appropriateness for hospice services and an assessment of the appropriateness and cost effectiveness of a variety of other services; and

Where there is a disagreement between the physician's order and the social, nursing, and other required 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.

Section 505.14(a) of the Regulations states that Personal Care Services shall not be provided to patients whose condition requires frequent nursing judgment or monitoring of an unstable medical situation.

Under Section 505.14(a)(4) of the Regulations, 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 the regulations of the Department of Health.

- (i) The patient's medical condition shall be stable, which shall be defined as follows:
 - (a) the condition is not expected to exhibit sudden deterioration or improvement; and
 - (b) the condition does not require frequent medical or nursing judgment to determine changes in the patient's plan of care; and
 - (c)
 - (1) the condition is such that a physically disabled individual is in need of routine supportive assistance and does not need skilled professional care in the home; or
 - (2) the condition is such that a physically disabled or frail elderly individual does not need professional care but does require assistance in the home to prevent a health or safety crisis from developing.
- (ii) The patient shall be self-directing, which shall mean that he/she is capable of making choices about his/her activities of daily living, understanding the impact of the choice and assuming responsibility for the results of the choice. Patients who are nonself-directing, and who require continuous supervision and direction for making choices about activities of daily living shall not receive personal care services, except under the following conditions:
 - (a) supervision or direction is provided on an interim or part-time basis as part of a plan of care in which the responsibility for making choices about activities of daily living is assumed by a self-directing individual living within the same household; or
 - (b) supervision or direction is provided on an interim or part-time basis as part of a plan of care in which the responsibility for making choices about activities of daily living is assumed by a self-directing individual not living within the same household; or

- (c) supervision or direction is provided on an interim or part-time basis as part of a plan of care in which the responsibility for making choices about activities of daily living is assumed by an outside agency or other formal organization. The local social services department may be the outside agency.

Administrative Directive 92 ADM-49 provides in pertinent part:

B. Health and Safety of Recipient

Personal care services may only be authorized when the district reasonably expects that the recipient's health and safety can be maintained in the home. This determination must consider the following:

1. Stability of the Recipient's Medical Condition

The assessing nurse has primary responsibility for determining stability of the recipient's medical condition. The recipient and/or any informal caregiver should be given the opportunity to be involved in this determination. The determination should be based on information included in the nursing assessment and a review of the physician's order. In situations where there is a question about this determination, the assessing nurse may wish to involve the case manager or obtain consultation from the local professional director or his/her designee.

A stable medical condition is defined as follows:

- a. the condition is not expected to exhibit sudden deterioration or improvement; and
- b. the condition does not require frequent medical or nursing judgment to determine changes in the recipient's plan of care; and
- c. the condition is such that a physically disabled individual is in need of routine supportive assistance to maintain his or her level of functioning and does not need skilled professional care in the home; or
- d. the condition is such that a physically disabled or frail elderly individual does not need professional care but does require assistance in the home to prevent a health or safety crisis from developing.

If the recipient's medical condition is not stable, the provision of personal care services is inappropriate unless a determination is made that the provision of personal care services in combination with the intervention of appropriate skilled nursing services, home health aide and/or therapy can adequately meet the recipient's needs.

2. Ability of the Recipient to be Self-Directing

The case manager has primary responsibility for determining the

recipient's self-directing capability. The determination should be based on a review of available information in the physician's order and the social and nursing assessments. The case manager must be sensitive to the recipient's habits, factors in the recipient's physical environment and relationships with informal caregivers that might impede the recipient's ability to consistently be self-directing. In situations where there is a question about the final determination, the case manager should consult with the assessing nurse, the local professional director or his/her designee or protective services for adults case managers. The case manager may also wish to obtain a psychiatric evaluation.

Self-directing means that the recipient has the capability to make choices about activities of daily living, understand the impact of these choices and assume responsibility for the results of these choices...

A non-self-directing recipient lacks the capability to make choices about the activities of daily living, understand the implications of these choices, and assume responsibility for the results of these choices. Characteristics of a non-self-directing recipient include:

- a. the recipient may be delusional, disoriented at times, have periods of agitation, or demonstrate other behavior which is inconsistent and unpredictable; or
- b. the recipient may have a tendency to wander during the day or night and to endanger his or her physical safety through exposure to hot water, extreme cold, or misuse of equipment or appliances in the home; or
- c. the recipient may exhibit other behaviors which are harmful to himself or herself or to others such as hiding medications, taking medications without his or her physician's knowledge, refusing to seek assistance in a medical emergency, or leaving lit cigarettes unattended. The recipient may not understand what to do in an emergency situation or know how to summon emergency assistance.

Personal care services may only be provided to non-self-directing recipients if the responsibility for direction is assumed by another individual or an outside agency and any needed supervision or direction is provided on a part-time or interim basis by that individual or agency....

Responsibility for part-time or interim supervision may be assumed by:

- o a self-directing individual who resides in the recipient's household; or
- o a legally or non-legally responsible relative, friend, neighbor, or other informal caregiver who is self-directing; or

- o a formal agency such as an area office for the aging; or
- o a self-directing individual who lives in another household.

If the individual assuming part-time or interim supervision resides outside of the recipient's home, consideration should be made as to whether that individual has substantial daily contact with the recipient in the recipient's home.

Factors used to determine whether substantial daily contact in the recipient's home is being made include:

- o the individual is physically present in the home at times throughout the day or night as necessary to assure the safety of the recipient; and
- o any discretionary decisions or choices involved in carrying out the functions and tasks identified in the recipient's plan of care are conveyed to the person providing personal care services.

Substantial daily contact does not mean the individual must be physically present in the home for a specified amount of time. The frequency of contact needed to assure a safe situation and provide discretionary direction should be based on each recipient's case situation as reflected in the social and nursing assessments and in the recipient's plan of care.

Supervision and direction of non-self-directing recipients is not an appropriate role for individuals providing personal care services. Such individuals can perform the functions or tasks specified in the recipient's plan of care as instructed by another person. They can also observe and monitor the recipient for possible changes in his/her functioning. However, when changes are noted, the individual is responsible for reporting his/her observations to the appropriate professional for review and decisions about the recipient's plan of care.

If the recipient has no individual or outside formal agency willing to assume responsibility for his/her supervision and direction, a referral should be made to the protective services for adults program for a protective services assessment. Denial or termination of personal care services may be required if the recipient's health and safety cannot be assured by involvement of other individuals, outside formal agencies or the protective services for adults (PSA) program....

Regulation 505.14(b)(5)(v)(b) provides:

- (b) The social services district must notify the patient in writing of its decision to authorize, reauthorize, increase, decrease, discontinue or deny personal care services on forms required by the department. The patient is entitled to a

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fair hearing and to have such services continued unchanged until the fair hearing decision is issued (aid-continuing) in accordance with the requirements outlined in Part 358 of this Title.

18 NYCRR 358-3.3(a) states that a recipient of Public Assistance, Medical Assistance or Services has a right to an adequate notice when the Agency proposes to discontinue, suspend, reduce or change the manner of payment of such benefits.

An adequate notice is a notice of action, an adverse action notice or an action taken notice which sets forth, among other things: the action that the Agency proposes to take or is taking.

18 NYCRR 358-2.2

DISCUSSION

The record establishes that the Agency, on September 26, 2002, issued a Notice to "L N", but addressed to XXXX E. XXth Street, Brooklyn, NY XXXXX, which is the Appellant's address (Appellant's name is L N, a.k.a., L N). Although Appellant had been in receipt of Personal Care Services in the amount of 24 hours daily, 7 days weekly since a date in the year 1999, the Notice sent to Appellant's address was titled "Notice of Denial of Home Care Services."

The Agency's Notice did not accurately state the action the Agency planned to take. Said Notice was thus not "adequate" as defined in Part 358 of Regulations. The failure to even approximate Appellant's surname in that Notice also violated the basic due process meant to be assured by the requirement of issuing a Notice. The Agency's September 26, 2002 Notice is void.

It can be added that, despite the Orders of Appellant's physician having been submitted in April 2002, the Nurse's Assessment placed into evidence at the hearing is dated August 19, 2002. Said Nurse's Assessment was untimely.

The Agency's determination is not sustained.

It is noted that, despite the comment in the Agency's Notice that Appellant required a higher level of care, the Agency produced no evidence establishing that the private vendor of Personal Care Services has experienced an unduly difficult time in caring for Appellant in the home. Appellant's representative vigorously contested the Agency's finding that Appellant requires a higher level of care.

DECISION AND ORDER

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

1. The Agency is directed to cancel its Notice dated September 26, 2002.

2. The Agency is directed to continue to authorize the Appellant to receive Personal Care Services in the amount of 24 hours daily, 7 days

weekly, provided by more than one Personal Care Services aide.

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

DATED: Albany, New York
June 16, 2003

NEW YORK STATE DEPARTMENT
OF HEALTH

By

Commissioner's Designee