

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,	:	
<i>EX REL.</i> DR. GABRIEL FELDMAN,	:	Case No. 09 Civ. 8381 (JSR)
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
THE CITY OF NEW YORK,	:	
	:	
Defendant.	:	
	:	
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UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
THE CITY OF NEW YORK,	:	
	:	
Defendant.	:	
	:	
-----X		

NOTICE OF MOTION

PLEASE TAKE NOTICE THAT, upon the accompanying memorandum of law dated the 8th day of February, 2011, and the exhibit attached thereto, defendant The City of New York will move this Court pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b), at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, New York 10007, for an Order dismissing the United States of America's Complaint and for such other and further relief as this Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE that, in accordance with the schedule approved by the Court, opposition papers shall be served and filed on or before March 7, 2011; reply papers

shall be served and filed on or before March 14, 2011; and oral argument shall be held on March 30, 2011, at 2:00 p.m.

Dated: February 8, 2011
New York, New York

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EXHIBIT A

QAH-4482/30B (Rev. 6/06)

From: New York State Office of Temporary and Disability Assistance
P.O. Box 1930
Albany, NY 12201 - 1930

TRANSMITTAL OF FAIR HEARING DECISION
TO SOCIAL SERVICES AGENCY

Fair Hearing #: 5014053H
Hearing Date: 07/11/08
Decision Date: 09/19/08
Case #: REDACTED
Category/Subcategory: MA

Primary Agency: New York City OSC
Appellant: REDACTED
Representative: REDACTED

Other Agencies: NYS6

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* ENCLOSED IS THE DECISION RENDERED *
* IN THE ABOVE FAIR HEARING *
*

If this decision reverses or does not affirm the action intended to be taken by your Agency and directs your Agency to take certain other action, you must do so and so notify the Appellant forthwith (as quickly as possible). The Appellant has been advised to contact the state's Compliance Unit if compliance is not effected within ten (10) days after receipt of this decision.

In accordance with the provisions of Title 18 NYCRR, if this decision indicates that the social services official has misapplied provisions of the law, State regulation, or such official's own state-approved policy, the social services official is required to review other cases with similar facts for conformity with the principles and findings in the decision.

If you have questions about directions contained in this decision, please contact:

New York State Office of Temporary and Disability Assistance
Office of Administrative Hearings
Compliance Unit
P. O. Box 1930
Albany NY 12201 - 1930

The following agencies have been notified of the issuance of this fair hearing decision:

- HRA MAP FAIR HEARINGS, MARY-ANN E. MALONEY DIRECTOR
- HRA MAP FAIR HEARINGS, ROBIN SATCHELL, MGR COMPLIANCE UNIT
- HRA MAP FAIR HEARINGS, ANGELICA GOMEZ
- HRA MAP FAIR HEARINGS, CYNTHIA COMMINGS-FINNEY, COMP. MGR.
- HRA MAP FAIR HEARINGS, RICHARDIO SAMUDIO, COMPLIANCE MGR.
- NYSDOH BUREAU OF LONGTERM CARE, ATT: GAIL PHELAN
- HRA MAP FAIR HEARINGS, ANTHONY CIRIGLIANO, HC FH LIAISON

STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST: April 17, 2008
CASE #: REDACTED
CENTER #: HCSP
FH #: 5014053H

<p>In the Matter of the Appeal of</p> <p style="text-align: center;">REDACTED</p> <p>from a determination by the New York City Department of Social Services</p>	<p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p>	<p>DECISION AFTER FAIR HEARING</p>
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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 July 11, 2008, in New York City, before Scott Nuchow, Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

REDACTED Appellant's Daughter
REDACTED Appellant's Daughter

For the Social Services Agency

Ebony Bell, Fair Hearing Representative
Maritza Durio, Fair Hearing Representative

ISSUE

Was the Agency's determination to authorize Personal Care Services for Appellant in the amount of twenty-four hours per day, seven days per week daily by a "sleep-in" personal care aide 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, age 74, has been in receipt of a Personal Care Services Authorization in the amount of twelve hours per day, seven days per week.

FH# 5014053H

2. On March 12, 2008, the Agency received a medical request for Personal Care Services for Appellant which was completed by the Appellant's physician on March 10, 2008.
3. On March 24, 2008, the Agency obtained a nursing assessment which recommends that the Appellant continue to receive Personal Care Services in the amount of twenty-four hours daily by a sleep-in aide.
4. On March 24, 2008, the Agency completed a "Personal Emergency Response System (PERS) Evaluation Form" for Appellant.
5. On March 13, 2008, the Agency completed a social assessment of the Appellant.
6. On April 7, 2008, the Agency completed an independent medical review which determined to authorize Personal Care Services for the Appellant in the amount of twenty-four hours daily by a sleep-in personal care aide.
7. On or about April 17, 2008, the Agency advised Appellant of its determination to authorize Personal Care Services to the Appellant in the amount of twenty-four hours per day, seven days per week by a sleep-in personal care aide.
8. One of the Appellant's daughters informed the Agency by letter dated April 17, 2008 that a twenty-four hours per day, seven days per week sleep-in authorization for a personal care aide was not wanted and the Agency, in turn, issued a Service Deferment dated April 18, 2008.
9. On April 17, 2008, 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 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.**
- (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**

FF# 5014053H

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 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.

- (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

FH# 5014053H

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 medical condition as determined by a medical examination conducted within 30 days of the physician's order. A completed and signed physician's order must be forwarded to the social services district within 30 days of the medical examination;
- 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;

FJH# 5014053H

(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 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.

Reauthorization for personal care services requires similar assessments as for the initial authorization; however a nursing assessment is not required for Level I services if the physician's order indicates that the patient's medical condition is unchanged. Reauthorization of Level II services must include an evaluation of the services provided during the previous authorization period and must include a review of the nursing supervisory reports to assure that the patient's needs have been adequately met during the initial authorization period.

When there is a change in the patient's services needs which results solely from a change in his/her social circumstances, including, but not limited to, loss or withdrawal of support provided by informal caregivers, the social services department must review the social assessment, document the patient's social circumstances and make changes in the authorization as indicated. A new physician's order and nursing assessment is not required.

When there is a change in the patient's services needs which results from a change in his/her mental status including, but not limited to, loss of his/her ability to make judgments, the social services department must review the social assessment, document the changes in the patient's mental status and take appropriate action as indicated.

When there is a change in the patient's services needs which results from a change in his/her medical condition, the social services department must obtain a new physician's order and a new nursing assessment and shall complete a new social assessment. If the patient's medical condition continues to require the provision of personal care services, and the nursing assessment cannot be obtained within five working days of the request from the local social services department, the local department may make changes in the authorization in accordance with the procedures specified in 18 NYCRR 505.14(b)(5)(iv).

Section 505.14(b)(3)(ii) of the Regulations provides in pertinent part that the social

FH# 5014053H

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.

General Information Service message 97 MA 033 includes a reminder concerning "statements of understanding". The GIS Message advises that the contribution of family members or friends to the care of a Personal Care Services applicant or recipient 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.) In New York City, the form statement of understanding is entitled "Agreement of Friend or Relative."

DISCUSSION

The Appellant has been in receipt of a Personal Care Services Authorization in the amount of twelve hours per day, seven days per week. The Appellant's children, her daughters as co-representatives, testified that the Agency's determination to authorize a sleep-in personal care aid is insufficient. They claim that the Appellant, cannot be left unattended, that a sleep-in attendant will not be able to sleep and that the Appellant will not accept a stranger in the residence. "This is like a child who needs continuity," testified the Appellant's daughter, who resides with the Appellant and has first-hand knowledge, when explaining about wanting to retain the present care givers who "already know how to deal with her," but will not do sleep-in.

In this instance, the testimony of REDACTED is inconsistent. She testified that caring for her mother at night is affecting her ability to perform her daytime employment. REDACTED testified that she is an elementary school teacher who leaves for work by 6:00 a.m. and sometimes does not return home until 6:00 p.m. or 7:00 p.m. Thus, someone is needed at night to care for the Appellant. This would introduce a stranger in the household. To resolve this, REDACTED said she would remain on the premises. This contradicts the argument that the Appellant "is like a child who needs continuity" and REDACTED claim that she needs relief

FH# 5014053H

from providing care for her mother. In response to inquiry, REDACTED testified that a stranger will be accepted because a sleep-in home attendant cannot get up more than two times per night and was told the vendor cannot be responsible if the Appellant wanders off.

According to the Appellant's daughter, the Appellant, despite sleeping medication, awakens and walks around in the middle of the night, and needs monitoring. It is not that the Appellant requires escort to a bathroom or help obtaining food. Rather, the Appellant might get up to go to the bathroom and sometimes "does it all over the bathroom, day or night." At other times, the Appellant is searching for her parents. She will drink milk, getting up at night just to drink it, forgetting she had food; this can happen five to seven times per night. Related to her searches for milk, the representative testified that anything pourable – soaps, liquids, etc., – have to be hidden. Further, they both testified, the Appellant does not recognize cups and will pour what she believes to be ingestible into anything she perceives capable of being a vessel.

Per the Appellant's representative, the Appellant can become obsessed. The obsession can concern a perceived medical problem that will last for a month, claiming something is bothering her, then she is onto another obsession. Another example is where the Appellant will clean the kitchen five times in one day. One time, she pulled the stove out, causing a gas leak. One of the more recent compulsive behaviors of the Appellant is to cover her ears with plastic bags. The Appellant's representatives expressed concern that the Appellant, if left unsupervised, will cover her nostrils and asphyxiate herself. They have had to install extra locks and doors so as to slow their mother when she attempts to wander. Per the Appellant's representative, the Appellant has become dangerous.

On March 12, 2008, the Agency received a medical request for Personal Care Services for Appellant which was completed by the Appellant's physician on March 10, 2008. On March 24, 2008, the Agency obtained a nursing assessment which recommends that the Appellant continue to receive Personal Care Services in the amount of twenty-four hours daily by a sleep-in aide. Both reports list one diagnosis – dementia. The nurse, in concurrence with the Appellant's representatives' testimonies, noted that the Appellant complains of generalized pain, talks about people who have died, and looks for her parents.

According to the Appellant's physician, the Appellant cannot administer her medications, needs reminding, requires supervision, needs help with preparation, and needs administration. Both reports note the Appellant is continent of bowel and bladder and is fully ambulatory. Both concur that the Appellant is disorient to time and place, has anxiety, is agitated, has impaired short-term memory, always wanders, is a danger to herself. She is sometimes abusive according to the physician and verbally aggressive according to the nurse.

Per the nurse, the Appellant's daughter is supervising care. According to the physician and nurse, the Appellant is incapable of supervising a home care worker. Both note the Appellant requires assistance with chore services and some degree of assistance with personal care services. The nurse's report is unclear as to the reason for the Appellant's need for outdoor ambulation assistance; the background of both reports implicitly indicate it is for safety monitoring, anecdotally noting in a narrative that "client wandered out of the apartment and was

FH# 5014053H

not found until the next morning some months ago." The nurse recommended the provision of home attendant services by way of a sleep-in personal care aide.

On March 13, 2008, the Agency completed a social assessment of the Appellant. According to this report, in concurrence with the nurse and physician, the Appellant is ambulatory. In concordance with the testimony of the Appellant's representative, the Appellant wanders, including at night, leaving the residence. As to liquids, the social worker anecdotally reported that the Appellant was found washing her teeth with bathroom cleaning solution. The social worker also reported that the Appellant's daughter, "works full-time as a school teacher and is overwhelmed with not resting at night....The daughter provides care after service hours, meals, finances and supervises the home attendant....The daughter needs assistance at night because the client wanders."

In support of their contention, the Appellant's representatives submitted a copy of a letter dated April 18, 2008 from the physician managing the Appellant's dementia. He wrote that the Appellant "suffers from severe Alzheimer's disease and needs constant supervision. She is at risk for danger to self as she tends to wander if not supervised. I recommend that she have split 24 hour HHA."

The record establishes that the Appellant requires twenty four hour safety monitoring and that the Appellant's daughter has been providing the supervision over the Appellant and direction of the home attendants and providing assistance to the Appellant with some of her required tasks. The Appellant's representative stated that she is no longer a willing or able to continue to be an informal caregiver, at least to the extent of services she has provided until the present time, because of the extensive needs of her mother. However, despite this evidence, reviewed by the local medical director, the April 7, 2008, independent medical review determined to authorize Personal Care Services for the Appellant in the amount of twenty-four hours daily by a sleep-in personal care aide.

Upon review of the local medical director's rationale, its determination appears, due to grammatical inexactitudes in his narrative, to be premised upon the continued services provided by REDACTED. The local medical director wrote, "dt'r prepours meds, directs and manages finances, can self medicate, needs reminders...." There is no written agreement in evidence that the Appellant's daughter has agreed to continue to provide services to her mother in the manner that she had been up to the present. Furthermore, based on his review of the forms M-11q (physician's report), M-11r (nurse's report), and M-11s (social assessment), the evidence establishes that the Local Medical director failed to provide proper weight to the evidence. He states there are "no excessive n.t. [nighttime] needs warranting a s.s. [split shift] service." Yet, all the evidence indicates the Appellant has excess nighttime needs. Based on the foregoing, the Agency's determination cannot be sustained.

FH# 5014053H

DECISION AND ORDER

The Agency's determination to authorize Personal Care Services for Appellant in the amount of twenty-four hours per day, seven days per week, "sleep-in" personal care aide correct is not correct and is reversed.

I. The Agency is directed to authorize Personal Care Services to the Appellant in the amount of twenty four hours continuous care by more than one personal care aide.

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

DATED: Albany, New York
09/19/2008

NEW YORK STATE
DEPARTMENT OF HEALTH

By



Commissioner's Designee