



## PRELIMINARY STATEMENT

All parties appeared telephonically. Counsel for Petitioner, [REDACTED] appeared on behalf of the Petitioner. The following appeared as witnesses for Petitioner: [REDACTED] Petitioner's mother and legal guardian; [REDACTED] Petitioner's aunt; [REDACTED] Petitioner's Patient Directed Option ("PDO") Representative. [REDACTED] advocate for [REDACTED] [REDACTED] appeared as an observer.

Craig H. Smith, Counsel for Sunshine State Health Plan, Inc. ("Sunshine") appeared on behalf of Respondent. Megan Lyons, Case Manager for Sunshine; Alshonica Williams, Care Coordinator Supervisor for Sunshine; Tammy Swan, Director of Case Management for Sunshine; Christian Pachecko, Senior Director of Quality Improvement; Tracy Travis, Case Management Supervisor for Sunshine; and Dr. John Carter, Long-term Care Medical Director for Sunshine, attended as witnesses for Respondent.

Suzanne Chillari, Medical Health Care Program Analyst for the Agency for Health Care Administration ("Agency" or "AHCA"), appeared as an observer.

Prior to the hearing, Respondent sent to the Office of Fair Hearings and Petitioner a one hundred and twenty-one (121)-page evidence packet. The evidence packet included: a table of contents; a Medicaid Fair Hearing Summary, dated February 12, 2021; a Notice of Adverse Benefit Determination ("NABD"), dated December 9, 2020; a Long Term Care Person-Centered Care Plan, signed November 25, 2020; a second Long Term Care Person-Centered Care Plan, signed February 1, 2021; a Florida Department of Elder Affairs 701B Comprehensive Assessment ("701B"), dated November 24, 2020; second 701B, dated February 1, 2021; Petitioner's plan

appeal, dated December 18, 2020; a letter from Petitioner's legal guardian, dated November 27, 2020; a plan appeal acknowledgment, dated December 23, 2020; a Notice of Plan Appeal Resolution ("NPAR"), dated January 15, 2021; Sunshine Health Policy and Procedure LT.UM.09, last revised November 2019; Sunshine Health Policy and Procedure LT.UM.10, last revised July 2020; and Fla. Admin. Code R. 59G-1.010(166). Absent an objection from the Petitioner, the undersigned admitted the one hundred and twenty-one (121)-page evidence packet into evidence as Respondent's Composite Exhibit 1.

Prior to the hearing Petitioner submitted a three hundred and seventy-six (376)-page evidence packet.<sup>1</sup> The evidence packet included: a cover page titled Exhibit 1; a Letter from [REDACTED] Annual Guardianship Plan, and Competency Testing, dated [REDACTED] 2021; a cover page titled Exhibit 2; a referral from [REDACTED] dated December 18, 2020; a cover page titled Exhibit 3; Letters of Support from [REDACTED], dated March 27, 2020, February 18, 2020, June 3, 2019, January 7, 2019, and June 1, 2016; service authorizations, dated March 2, 2019, March 5, 2018, May 22, 2017, December 2, 2016, and March 14, 2014; a cover page titled Exhibit 6; 701Bs, dated July 10, 2020, June 18, 2020, April 28, 2020, December 5, 2019, September 16, 2019, June 18, 2019, April 3, 2019, September 4, 2018, July 25, 2018, February 9, 2018; a cover page titled Exhibit 6; ACHA Fair Hearing Final Order 20-FH [REDACTED], 20-FH [REDACTED] and 20-FH [REDACTED] issued November 18, 2020; and Respondent's Composite Exhibit one from AHCA Fair Hearing Case 20-FH [REDACTED] 20-FH [REDACTED] and 20-FH [REDACTED] Absent an objection from Respondent, the

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<sup>1</sup> Petitioner initially submitted the evidence packet on February 23, 2021. On February 26, 2021, Petitioner submitted a corrected packet numbering seventy-six (76)-pages corresponding the with the pages of the prior submission. In the seventy-six (76)-page submission Petitioner replaced the first thirteen (13) pages of the packet. The first thirteen (13) pages of Petitioner's second submission replaced the same numbered pages in the original submission and were admitted together.

undersigned admitted the three hundred and seventy-six (376)-page evidence packet as Petitioner's Composite Exhibit 1. Respondent also submitted a single page letter, dated November 30, 2020. Absent an objection from Respondent the undersigned admitted the letter as Petitioner's Exhibit 2.

The record was held open until April 12, 2021, to allow the parties to submit additional briefs and for Respondent to submit Dr. Carter's Curriculum Vitae. No additional time was permitted for additional response from the parties. Absent an objection from Petitioner, the undersigned admits Dr. Carter's Curriculum Vitae numbering five (5)-pages as Respondent's Exhibit 2. The Office of Fair Hearing's received a brief titled Petitioner's Post Hearing Submission on April 12, 2021. The Office of Fair Hearings did not receive any additional Post Hearing Submissions from Respondent.

#### **FINDINGS OF FACT**

1. Petitioner is an enrolled member of Sunshine State Health Plan, Inc. ("Sunshine"). Respondent's Composite Exhibit 1 at 2. Sunshine is a managed care organization contracted by the Agency to provide services to eligible Medicaid recipients in Florida. *See Id.*
2. Petitioner is forty-two (42) years-old and diagnosed with anoxic encephalopathy residual deficit, obsessive compulsive disorder, and dementia. *Id.* at 54 and 61. Petitioner's anoxic encephalopathy residual deficit is the result of a brain injury. *Id.* at 56.
3. Petitioner lives with her mother, [REDACTED], who is also Petitioner's legal guardian. Petitioner's mother is Petitioner's direct service worker ("DSW" or "paid caregiver") under the Patient Directed Option ("PDO"). [REDACTED] works forty (40) hours per week as Petitioner's paid caregiver. Petitioner has twin sons, who are minors at least sixteen (16) years of age and live

in the home with Petitioner and [REDACTED]. See Respondents Composite Exhibit 1 at 55 and Petitioner's Composite Exhibit 1 at 95. Petitioner does not have any other family or friends who provide unpaid assistance with Petitioner's care. H.R. 3/29/21 at 45:00-45:14.

4. Pertaining to Activities of Daily Living ("ADLs"), Petitioner requires assistance but not total assistance with bathing. Respondent's Composite Exhibit 1 at 58. Petitioner is able to bathe on her own but is unable to properly wash or shave herself. As established by [REDACTED] testimony, Petitioner frequently overuses bathing products. H.R. 3/4/21 at 1:16:35-1:17:00. Petitioner showers at least twice per day from one and a half to two hours per day as desired by Petitioner. H.R. 3/4/21 at 1:23:00-1:25:00. Petitioner requires supervision or prompt with dressing or eating. *Id.* Petitioner is able to dress herself, but Petitioner receives assistance from her mother with clothing that has a button or zipper. Petitioner's mother also assists Petitioner with choosing appropriate clothing. H.R. 3/4/21 at 1:27:32-1:28:00. *Id.* Petitioner can feed herself but her mother cuts all of her food for her. Petitioner requires no assistance with using the bathroom, transferring, and walking. Petitioner always has assistance or supervision with her ADLs. *Id.*

5. Pertaining to Instrumental Activities of Daily Living ("IADLs"), Petitioner requires total assistance with heavy chores, managing money, managing medication, and using transportation. Petitioner does not have the cognitive ability to perform either activity. *Id.* As established through [REDACTED] testimony, Petitioner needs total assistance with preparing meals and using transportation. H.R. 2:10. Petitioner is unable to use appliances to prepare meals and requires and cannot operate a motor vehicle. Petitioner needs assistance but not total help with,

shopping. *Id.* Petitioner is able to perform light housekeeping tasks and use the telephone while being supervised. *Id.*

6. Petitioner requested an additional seventy-two (72) hours of “personal care /companion/homemaker service hours” in a letter dated November 30, 2020. Petitioner’s Exhibit

2. Respondent denied Petitioner’s request in an NABD, dated December 9, 2020. The NABD dated explained the basis of the termination as follows:

We determined that your requested services are not medically necessary because the services do not meet either of the reasons checked below: (*See Rule*)

...

- Meet all of the following criteria for all extended state plan services used for the purposes of maintenance therapy and all other home and community-based services:
  1. Be individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment, and not in excess of the patient’s needs;
  2. Be reflective of the level of service that can be safely furnished, and for which no equally effective and more conservative or less costly treatment is available statewide; and
  3. Be furnished in a manner not primarily intended for the convenience of the recipient, the recipient’s caretaker, or the provider;

and one of the following:

1. Enable the enrollee to maintain or regain functional capacity; or
2. Enable an enrollee receiving long-term services and supports to have access to the benefits of community living, to achieve person-centered goals, and live and work in the setting of their choice.

The facts that we used to make our decision are: The request for an extra 72 hours/week of Personal Care Services is denied as not medically needed. Based on the assessment, the member's currently approved services are adequate to meet the member's care needs. The member's present care plan includes:

- 20 hours/week of Personal Care Services
- 7 hours/week of Homemaker Services
- 13 hours/week of Companion Care Services.

This decision was made with Sunshine Health Policy LT.UM.09 Long Term Care Ancillary Service Criteria. Criteria.

Respondent's Composite Exhibit 1 at 4-5.

7. The pertinent portion of Sunshine's Long Term Care Ancillary Criteria ("LT.UM.09") provides as follows:

### **B. Medical Necessity Determination**

To assist in determining the medical necessity of any ancillary services, the clinical criteria established in this policy will be applied. Any decision to deny, reduce, suspend, or terminate services must be made by a Sunshine Health Medical Director as outlined in the policy Medical Necessity Review FL.UM.02.01 and Use of Clinical Criteria FL.UM.02 Sunshine Health will respond to requests within the timelines as outlined in the policy Timeliness of UM Decisions FL UM 05.

### **C. Criteria for Type of Service:**

Criteria for each of the benefits noted in the Policy section will be used when reviewing the medical necessity of any ancillary services. In addition, the Medical Necessity Review policy FL.UM.02.01 is considered when determining medical necessity of ancillary services. The Florida Coverage Policies and Limitations Handbooks are used to determine benefits, any benefit limitations, and additional criteria. The ancillary services of this policy are intended to augment and support the existing informal care and community services being provided to allow the member to remain safely in their home.

#### **1. Determinants for Services**

When considering the level of support the member requires and which of the ancillary services may support the member's cognitive, functional, environmental, and social needs, several elements are to be considered. The review for the medical necessity of the ancillary services includes consideration of the member's support needed due to ADL deficits, living situation, and supervision needs.

- a) Activities of Daily Living (ADL's)/Instrumental Activities of Daily Living (IADL's)
- Independent where member is able to provide the task without support, with or without assistive devices
  - Minimal functional impairment where the ADL's require one of the following:
    - Supervision
    - At least minimal assistance
    - Member ambulates with assistance of a person or a device

- Member transfers require at least minimum assistance
- Moderate functional impairment where two of the follow apply:
  - Member has ADLs requiring at least minimal assistance
  - Member ambulates with assistance of a person or device
  - Member transfers require at least minimum assistance
- Maximum and persistent functional impairment without available caregiver support where all of the following exist:
  - Member has ADLs requiring total assistance
  - Member is non-ambulatory
  - Member transfers require one (1) to two (2) person assist
  - Member's treating physician has certified that member meets Maximum functional impairment.

b) Living situation consideration

- Lives alone
- Lives with family (with consideration of the number of days and hours that family members are not available to assist the member).
- Lives with non-family (with consideration of the number of days and hours that nonfamily members are not available to assist the member).

c) Supervision needs, including:

- Wandering risk: Member has already been found to leave their home unsafely and/or is unable to find their way back.
- Confused/disoriented and at risk to themselves: Member is confused and/or disoriented to the point that they are unable to perform functional activities, and if they do are at risk of harm to themselves.
- Member has a cognitive impairment that prevents them from knowing when or how to carry out personal care tasks and caregivers are not able to provide the services. The member is incapable of learning despite efforts to train in the care tasks. The member has memory deficits, which prevent them from managing care tasks.
- Member is unable to call for help, even with a personal emergency response unit. Member's medical status will not permit the member to all for help, even with assistance of a personal emergency response unit.

...

d) Available Supports

- No assistance needed or Always has assistance
- Has assistance most of the time
- Rarely has assistance
- Never has assistance

Services in Place

- Provided by Sunshine Health
- Provided by other Provider insurance

The criteria for each ancillary service is described below:

## **2. Adult Companion Care**

Adult Companion Care services provide non-medical care, supervision, and socialization to a functionally impaired adult. Companions supervise the member with tasks such as meal preparation, laundry, and/or shopping, but do not perform these activities as discreet services. The provision of companion services does not entail hands-on nursing care. The service includes light housekeeping tasks incidental to the care and supervision of the member. The provision of services is provided at the member's residence when supervision is necessary.

### Approval Criteria

To be considered for Adult Companion Care Services, a member must have a qualifying trigger diagnosis and meet the minimal criteria for the four (4) dimensions of determination as discussed here.

a) Trigger diagnosis include:

- Advanced Alzheimer's disease & dementia
- Mental Illness requiring supervision
- Parkinson's disease
- Multiple Sclerosis
- ALS
- Congestive Heart Failure
- COPD
- Cancer
- End Stage Renal disease
- TBI
- Other diagnosis as deemed medically necessary by Medical Director

b) Four (4) Dimensions of Determination

- Need for Supervision – safety risk if left without supervision
  - See Section C.1.c. for more details
- Informal Supports
  - None
  - Few friends/family in area
  - Family nearby
- Living Situation
  - Lives alone
  - Lives with others but is alone for extended periods of time due to the necessary absence of a caregiver
  - Lives with caregiver and others
- Services in Place

- Sunshine Health provided and provided by other provider/insurance

Exclusions and Limitations for Adult Companion Care include but are not limited to:

1. Service must be provided at member's residence.
2. Member must reside in a non-facility based setting.
3. Member resides alone or resides with others and is left alone for long periods where member is at risk.
4. Member is at risk of social isolation.
5. Member has cognitive impairment that prevents them from knowing when or how to carry out personal care tasks.
6. The member has memory deficits, which prevent him or her from managing care tasks.
7. Member requires hands on assistance to carry out ADL tasks.
8. Member attends Adult day care or engages in community group or social events, unless service is needed for supervision. The provider must be awake during the provision of companion services, and the services shall not be provided overnight.
9. Adult Companion Care services provided by Sunshine Health may not duplicate services that are provided under by another provider.
10. Cognitive ability of member to engage in and comprehend conversation with others
11. Care, grooming, or feeding of pets and animals
12. Yard work, gardening, or home maintenance work
13. Escort Services

...

#### **6. Homemaker Services**

Homemaker provides assistance with essential shopping, light housework laundry, and meal preparation. These services are provided to members who exhibit a functional deficit that impairs their ability to complete these tasks and lack an available support system. Services are provided to support member's health, safety, and ensure basic standards are met. Services are provided by a trained homemaker when the individual regularly responsible for these services is temporarily absent or unable to manage these activities.

#### **Approval Criteria**

Homemaker Service reviews include four (4) criteria:

- a) Instrumental Activity of Daily Living (IADL) limitations
- b) Living situation
- c) Supervision needs
- d) Available Supports

...

## 7. Personal Care Services

A service that provides assistance with eating, bathing, dressing and personal hygiene, and other activities of daily living. The service includes assistance with preparation of meals, but does not include the cost of meals. The service may also include housekeeping tasks such as bed making, dusting and vacuuming, which are incidental to the care furnished or are essential to the health and welfare of the member, rather than the member's family. Personal care services include the following:

- a. Assistance to the member to complete personal hygiene (bathing, grooming, mouth care, etc.)
- b. Assistance with bladder and bowel requirements that include assisting the member to and from the bathroom or with bedpan routines
- c. Assisting the member in following through with physician orders  
The Personal Care provider cannot not administer any medications, but may bring medications to the member and remind the member to take the medicine at specific times
- d. Assisting with food, nutrition, and diet activities, including preparing meals, when required and other incidental services, (i.e. housekeeping chores) essential to the health and welfare of the member
- e. Performing household services (changing bed linen or arranging furniture), when such services are essential to the member's health and comfort.

Personal Care workers must be supervised by a registered nurse, licensed to practice nursing in Florida and who conducts a supervisory home visit every 60 days to observe the personal care worker. The services may be provided in the member's home or other location.

### Approval Criteria

Personal Care Services reviews include four (4) criteria:

- a) Activity of Daily Living (ADL) limitations
- b) Living situation
- c) Supervision needs
- d) Available Supports

*Id.* at 94-97, 101, and 107-108.

8. Petitioner requested a plan appeal and Respondent issued an NPAR dated January 15, 2021, upholding the denial of an additional seventy-two (72) hours of personal care services. *Id.* at 83. The NPAR explained as follows:

On December 18, 2020 we received your timely plan appeal request about Sunshine Health's Notice of Adverse Benefit Determination dated December 9, 2020, Notice of Adverse Benefit Determination Number [REDACTED] denying, the request for an additional 72 hours weekly of Personal Care (the person who helps bathe and dress you), provided to [REDACTED]

On January 13, 2021 after consideration of the information you provided to Sunshine Health in support of your plan appeal, Sunshine Health hereby denies your plan appeal. As a result, [REDACTED] will not receive an additional 72 hours weekly of Personal Care (the person who helps bathe and dress you) effective January 13, 2021.

The reason for our decision was: The appeal to overturn the denial of an extra 72 hours per week of Personal Care Services is denied for lack of medical necessity. Based on the assessment, the member's currently approved services are adequate to meet the member's care needs. The member's present care plan includes 20 hours per week of Personal Care Services, 7 hours per week of Homemaker Services, and 13 hours per week of Companion Care Services. This decision was made with Sunshine Health Policy LT.UM.09 Long Term Care Ancillary Service Criteria.

*Id.*

9. [REDACTED] provided Petitioner with a letter, dated [REDACTED] 2021, regarding the medical necessity of Petitioner's request and a competency evaluation performed on Petitioner. The letter stated as follows:

This is a note to confirm that [REDACTED] was seen in my office [REDACTED] for an appointment for competency evaluation.

[REDACTED] unfortunately suffered an anoxic brain injury while undergoing a medical procedure, during a C section at the end of a pregnancy. She has made a slow partial recovery, but has residual physical and mental sequela. She has continued dysarthria, with affected gait, some ataxia and posturing, as well as hyperreflexia and spasticity. Mentally she has cognitive impairment issues: short term memory problems, unlikely capable of managing financial or other complex issues, and completely unable to care for her children on her own. She also has been exhibiting obsessive compulsive behavior, and also mild passive aggressive [sic] behavior. Unless monitored she tends to wander away.

[REDACTED] is her mother and legal guardian, also has been main care giver for her and her children. This is a 24/7 job, caring for both the patient and her

children. It is my opinion that she is doing a very [sic] good job as I have been following [REDACTED] for several years. With my ongoing knowledge of the ongoing situation, believe that [REDACTED] should continue as legal guardian, and full time care giver for [REDACTED]. Due to [REDACTED] emotional liability, and not dealing well with new people, and that she will sometimes exhibit passive aggressive [sic], or defiant/confrontational behavior with others that she is not comfortable [sic] with would cause increased problems. It is my medical opinion that the best overall situation medically necessary for [REDACTED] would be for [REDACTED] to continue as caregiver and legal guardian. Owing to the fact that this is essentially a 24/7 job, she should not have a reduction in the care giving hours allotted [sic]. I also feel that bringing in other care givers could possibly exacerbate problems with [REDACTED] as noted above.

Petitioner's Composite Exhibit 1 at 2-3.

10. [REDACTED] requested a Fair Hearing on behalf of Petitioner on January 22, 2021. On February 12, 2021, the undersigned issued an Order Scheduling Fair Hearing by Telephone and Prehearing Instructions, setting the hearing for March 4, 2021, at [REDACTED]. [REDACTED] The was continued and reconvened on [REDACTED].

11. Petitioner was previously a party to a consolidated Fair Hearing in AHCA Case numbers 20-FH [REDACTED] 20-FH [REDACTED] and 20-FH [REDACTED]. The Final Order in that case was issued November 18, 2020. Petitioner's Composite Exhibit 1 at 234-265. At that hearing [REDACTED] testified that she is unwilling to continue to provide unpaid natural support services to Petitioner. *Id.* at 242.

12. Petitioner's services in place include twenty (20) hours of personal care services per week, seven (7) hours of homemaker services per week, and thirteen (13) hours of adult companion services. Respondent's Composite Exhibit 1 at 58. Petitioner also has a caregiver paid for by her mother. H.R. 3/4/21 at 1:24:55-1:25:16.

13. During the hearing, [REDACTED] testified that while she acts as Petitioner's paid caregiver for forty hours per week, she provides care for one hundred and sixty-eight hours per

week. H.R. 3/4/21 at 2:12:00-2:12:40. ██████████ asserted that she has financial difficulties caring for Petitioner with the limits on paid care that she can provide. ██████████ argued that additional hours are needed so that she can work outside of the home in addition to supplement the income from the paid care she provides for Petitioner. ██████████ explained that the current income she receives limited to working forty (40) hours per week as Petitioner's DSW is not a "living wage". ██████████ also asserted that she is not willing to provide care for Petitioner as an unpaid caregiver outside of eight (8) hours per night during which Petitioner is usually but not always asleep.

14. Dr. Carter is a medical doctor board certified in geriatric medicine and internal medicine. During the hearing, Dr. Carter testified that there he is not aware of any requirement that Petitioner's DSW be paid any particular wages for work. Dr. Carter asserted that even with testimony from Petitioner's witnesses, Petitioner's services in place are still appropriate for Petitioner.

#### **CONCLUSIONS OF LAW**

15. The Agency's Office of Fair Hearings has jurisdiction over the subject matter of this proceeding and the parties pursuant to Fla. Stat. § 409.285(2). This order is the final administrative decision of AHCA under Fla. Stat. § 409.285(2)(a).

16. This hearing was held as a *de novo* proceeding pursuant to Fla. Admin. Code R. 59G-1.100(17)(b).

17. Because Petitioner is requesting new services Fla. Admin Code R. 59G-1.100(17)(g) assigns the burden of proof to Petitioner. The standard of proof in an administrative hearing is a

preponderance of the evidence. The preponderance of the evidence standard requires proof by “the greater weight of the evidence” Black’s Law Dictionary at 1201, 7th Ed.

18. The LTC Policy, incorporated by reference in Fla. Admin. Code R. 59G-4.192, establishes and regulates Long-Term Care services available under Florida Medicaid. The LTC Policy provides the following:

**1.1 Description and Program Goal**

Under the Statewide Medicaid Managed Care Long-Term Care (LTC) program, managed care plans (LTC plans) are required to provide an array of home and community-based services that enable enrollees to live in the community and to avoid institutionalization.

...

**1.3.1 Activities of Daily Living (ADLs)**

ADLs include:

- Bathing
- Dressing
- Eating (oral feedings and fluid intake)
- Maintaining continence (examples include taking care of a catheter or colostomy bag or changing a disposable incontinence product when the recipient is unable to control bowel or bladder functions)
- Toileting
- Transferring

...

**1.3.9 Instrumental Activities of Daily Living (IADLs)**

When necessary for the recipient to function independently, including:

- Grocery shopping
- Laundry
- Light housework
- Meal preparation
- Money Management
- Personal hygiene
- Transportation
- Using the telephone to take care of essential tasks (examples include paying bills and setting up medical appointments)

...

**1.3.16 Natural Supports**

Unpaid supports that are provided voluntarily to the individual in lieu of home and community-based services and supports.

...

#### **4.1 General Criteria**

Florida Medicaid LTC plans cover services that meet all of the following:

- Are determined medically necessary, as defined in this rule
- Do not duplicate another service
- Meet the criteria as specified in this policy

...

#### **4.2.1.1 Adult Companion Care**

The provision of non-medical care, supervision when necessary to protect the health, safety, and well-being of the enrollee, or social enrichment of a functionally impaired enrollee. This includes assistance or supervision with meal preparation, laundry, and light housekeeping tasks incidental to the care and supervision of the enrollee.

...

#### **4.2.1.9 Homemaker Services**

The provision of general household activities (such as meal preparation) and routine household care (including laundry and pest control) by a trained homemaker, when the individual regularly responsible for these activities is temporarily absent or unable to manage these activities.

...

#### **4.2.2.6 Personal Care**

In accordance with Rule 59G-4.215, F.A.C., for enrollees under the age of 21 years. To provide assistance with ADLs and IADLs, including assistance with preparation of meals, and housekeeping chores which are incidental to the care furnished or are essential to the health and welfare of the enrollee. The scope and nature of these services do not otherwise differ from personal care services furnished to persons under the age of 21 years.

19. The LTC Policy also addresses medical necessity:

#### **1.3.14 Medically Necessary or Medical Necessity**

For the purposes of this policy, the service must meet either of the following criteria:

(a) Nursing facility services and mixed services must meet the medical necessity criteria defined in Rule 59G-1.010, F.A.C.

(b) All other LTC supportive services must meet all of the following:

- Be individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment, and not in excess of the patient's needs
- Be reflective of the level of service that can be safely furnished, and for which no equally effective and more conservative or less costly treatment is available statewide

- Be furnished in a manner not primarily intended for the convenience of the recipient, the recipient's caretaker, or the provider

And, one of the following:

- Enable the enrollee to maintain or regain functional capacity; or
- Enable the enrollee to have access to the benefits of community living, to achieve person-centered goals, and to live and work in the setting of his or her choice.

20. The Florida Medicaid Definitions Policy, incorporated by reference in Fla. Admin. Code R.

59G-1.010, defines "Medically Necessary" or "Medical Necessity" as follows:

The medical or allied care, goods, or services furnished or ordered must meet the following conditions:

- Be necessary to protect life, to prevent significant illness or significant disability, or to alleviate pain
- Be individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment, and not in excess of the patient's needs
- Be consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational
- Be reflective of the level of service that can be safely furnished, and for which no equally effective and more conservative or less costly treatment is available statewide
- Be furnished in a manner not primarily intended for the convenience of the recipient, the recipient's caretaker, or the provider

The fact that a provider has prescribed, recommended, or approved medical or allied care, goods, or services does not, in itself, make such care, goods or services medically necessary or a medical necessity or a covered service.

21. Appendix 9.1 of the Florida Medicaid Personal care Services Coverage Policy (November 2016) ("PC Policy") provides review criteria for personal care services. Specifically, the criteria include a chart that first level reviewers use to determine whether the amount of requested

personal care services requested will be approved. The chart contains the following pertinent personal care tasks:

**Bathing:**

Full-body Bath: Tub, shower or sponge/bed bath. Up to 30 minutes. May rotate with partial bath based on recipient's needs.

Partial Bath: A sponge bath includes, at minimum, bathing of the face, hands, and perineum – 15 – 20 minutes per partial bath.

22. Respondent denied Petitioner's request for an additional (72) hours of "personal care /companion/homemaker service hours". *Supra* ¶ 6. On the NABD, Respondent denied Petitioner's request indicating that personal care services were not medically necessary but did not identify which component of medical necessity the denial was based on. *Id.*

23. The most recent 701B, dated February 1, 2021, shows that Petitioner always has assistance with her IADLs and ADLs. *Supra* ¶ 5. The 701B also shows that [REDACTED] is Petitioner's legal guardian. *Id.* The record shows that [REDACTED] testified that she is not willing to provide care for Petitioner for any time that she is not paid to provide care with the exception of eight (8) hours per night when Petitioner is usually asleep. *Supra* ¶ 13. [REDACTED] testified that she provides care for Petitioner one hundred and sixty-eight (168) hours per week and that Petitioner takes at least two baths per day that can be as long as two hours each. *Supra* ¶ 4 and ¶ 13. [REDACTED] also testified that she cannot afford meet her financial needs providing care Petitioner and being limited to forty (40) hours of paid care per week. *Supra* ¶ 13. The evidence also shows that Petitioner is diagnosed with anoxic encephalopathy residual deficit, obsessive compulsive disorder, and dementia. *Supra* ¶ 2.

24. As provided in the LTC Policy, personal care services are to provide assistance with ADLs and IADLs. *Supra* ¶ 18. The personal care services requested must be "individualized, specific,

and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment, and not in excess of the patient's needs." *Supra* ¶ 20. [REDACTED] indicated that she is not willing to provide unpaid care for Petitioner; however, at the last hearing [REDACTED] testified to the same yet has continued to provide unpaid caregiver services for Petitioner. In addition to the inconsistency of the previous hearing's testimony with [REDACTED] continued actions as a natural support, [REDACTED] has not provided any reliable evidence that her assistance provided to Petitioner is not voluntary.

25. Even if [REDACTED] is no longer willing to provide natural support outside of the time that Petitioner is asleep, Petitioner has not justified the service level request for assistance with IADLs and ADLs. The extent of the detail offered by Petitioner to justify the request was that providing care is 24/7 job and that Petitioner bathes at least twice per day lasting as long as two hours. As noted in the Personal Care policy the general time allowance for bathing is thirty (30) minutes per bath. While Petitioner's diagnosis of obsessive compulsive disorder is relevant, Petitioner has not demonstrated a compelling reason why this activity requires the amount of time asserted in [REDACTED] testimony. It also unreasonable to accept that Petitioner's caregiver literally provides personal care for one hundred and sixty-eight (168) hours per week or 24/7. The letter from [REDACTED] dated [REDACTED] 2021, does not add any additional justification to Petitioner's request and itself does not make the request medically necessary. *Supra* ¶ 20. Given that Petitioner's need for assistance with ADLs and IADLs are already met through the combination of natural supports and services in place and Petitioner has not justified the service level requested. Further, even absent natural support while Petitioner is awake, Petitioner has not justified a need for ADL and IADL assistance in the requested amount. Thus,

Petitioner has not met the burden of proof to show that the personal care services requested are “individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment, and not in excess of the patient’s needs.”

26. Additionally, the personal care services requested must be furnished in a manner “not primarily intended for the convenience of the recipient, the recipient’s caretaker, or the provider.” *Supra* ¶ 20. Here, [REDACTED] provided testimony asserting that she would suffer significant financial hardship without the additional hours paying her to care for Petitioner. The testimony offered by [REDACTED] taken with the 701B showing that all of Petitioner’s need for assistance with IADLs and ADLs indicate that the request is intended for the convenience of Petitioner’s caregiver, at least in part. Specifically, Petitioner’s request appears to be intended to assist with [REDACTED] financial status. As such, Petitioner has not met the burden of proof to show that the requested personal care services are “not primarily intended for the convenience of the recipient, the recipient’s caretaker, or the provider.”

27. During the hearing the undersigned heard testimony from Dr. Carter regarding the review of Petitioner’s request and his medical opinion regarding the medical necessity of the request. The undersigned did not rely upon the testimony from Dr. Carter to establish any fact by itself or in arriving at any conclusion.

28. The undersigned also considered Petitioner’s argument that Petitioner’s request was denied improperly because Respondent did not provide adequate notice documents to Petitioner’s initial request for services which requested “personal care/companion/homemaker service hours.” The undersigned has no authority to go outside of the jurisdiction of the NPAR. Rule 59G-1.1100(3)(b)(3), Florida Administrative Code, provides a means through which a

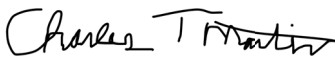
Petitioner may request a Fair Hearing where the Plan has failed to issue an NABD as required. There is no indication that Petitioner has requested a fair hearing on any other related issue pertaining to the instant case and no other related cases have been docketed. As such, the undersigned declines to make any conclusions on services other than the personal care services at issue.

29. Therefore, upon consideration of the testimony provided, evidence submitted, and applicable policies, the undersigned concludes that Petitioner did not prove by a preponderance of the evidence that Respondent's denial of personal care services was incorrect.

**IT IS THEREFORE ORDERED AND ADJUDGED THAT:**

Respondent's denial of an additional seventy-two (72) hours of personal care services per week is **AFFIRMED**. Petitioner's appeal based on the denial of an additional seventy-two (72) hours of personal care services hours per week is **DENIED**.

**DONE** and **ORDERED** this 7th day of May, 2021, in Tallahassee, Leon County, Florida.

 Charles Martin  
21-FH [REDACTED]  
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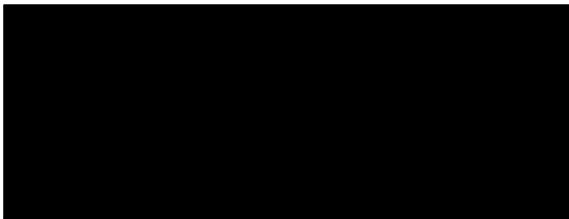
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**CHARLES MARTIN, Hearing Officer**  
**Agency for Health Care Administration**  
**Office of Fair Hearings**  
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**Office: (850) 412-3649**  
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**Email: OfficeOfFairHearings@ahca.myflorida.com**

**NOTICE OF A RIGHT TO JUDICIAL REVIEW**

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW, WHICH SHALL BE INSTITUTED BY FILING THE ORIGINAL NOTICE OF APPEAL WITH THE AGENCY CLERK OF AHCA, AND A COPY, ALONG WITH THE FILING FEE PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE AGENCY MAINTAINS ITS HEADQUARTERS OR WHERE A PARTY RESIDES. REVIEW PROCEEDINGS SHALL BE CONDUCTED IN ACCORDANCE WITH THE FLORIDA APPELLATE RULES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF THE RENDITION OF THE ORDER TO BE REVIEWED.

**Copies Furnished To:**



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