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Appellant: [REDACTED]  
For: Personal Care Assistance  
Agency: [REDACTED] County  
Docket: 228108

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**DECISION OF  
STATE AGENCY  
ON APPEAL**

On November 21, 2019, Human Services Judge Kevin T. Slator held a hearing under Minnesota Statutes, section 256.045, subdivision 3.<sup>1</sup>

The following people appeared at the hearing:

[REDACTED], appellant;  
[REDACTED], Social Services Supervisor/MnCHOICES Supervisor, [REDACTED] County;  
[REDACTED], certified MnCHOICES assessor.

The human services judge, based on the evidence in the record and considering the arguments of the parties, recommends the following Findings of Fact, Conclusions of Law, and Order.

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<sup>1</sup>The Minnesota Department of Human Services conducts state fair hearings pursuant to Minnesota Statutes, section 256.045, subdivision 3. The Department also conducts maltreatment and disqualification hearings on behalf of the Minnesota Departments of Health and Education pursuant to Minnesota Statutes, sections 626.556, subdivision 10i; and 626.557, subdivision 9d.

## **STATEMENT OF ISSUES**

The issue raised in this appeal is:

Whether the agency correctly determined that appellant was eligible for 3.5 hours of personal care assistant (PCA) time per day.

Recommended Decision: REVERSE and order the agency to provide appellant with 19 service units (285 minutes or 4.75 hours) of PCA time per day.

## **PROCEDURAL HISTORY**

1. On September 24, 2019, [REDACTED] County (the agency) conducted a MnCHOICES assessment of [REDACTED] (appellant), including an assessment of appellant's PCA needs. *Exhibits 1 and 2*. On October 24, 2019, appellant filed an appeal. *Exhibit A*.

2. On November 21, 2019, the human services judge held an evidentiary hearing on the matter by telephone conference. Following the hearing, the agency submitted a copy of the PCA summary portion of appellant's MnCHOICES assessment. On November 21, 2019, the record closed consisting of the hearing testimony and three exhibits.<sup>2</sup>

## **FINDINGS OF FACT**

1. Appellant was born on [REDACTED], and is 54 years old. Appellant has been legally blind since birth, but can see well enough to use her phone and manage her finances. Appellant's other health conditions include bipolar disorder, PTSD, depression, an eating disorder (with related malnutrition and weakness), and ulcers. *Exhibits A, 1, and 2*.

2. On September 24, 2019, the agency conducted a long-term care consultation regarding appellant, including a MnCHOICES assessment. The agency determined that appellant was eligible for 3.5 hours of PCA time per day, and also qualified for medical assistance under a Community Access for Disability Inclusion (CADI) waiver. *Exhibit 1*. The agency provided appellant with a copy of the PCA summary and service agreement in late September 2019. [REDACTED] testimony; [REDACTED] testimony.

3. The agency determined that appellant was dependent in the activities of daily

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<sup>2</sup> Exhibit A – Appeal to State Agency. Exhibit 1 – Agency appeal summary. Exhibit 2 – PCA summary portion of 9/24/19 MnCHOICES assessment.

living (ADL) of dressing, grooming/hygiene, bathing, eating, and transfers, and independent in the ADL of mobility, positioning, and toileting. *Exhibit 2*. Appellant did not challenge these determinations by the agency. *Appellant testimony*.

4. The agency concluded that appellant had no behavior needs that qualified her for additional PCA time. In the cases of two behaviors, “Level I” behavior and “verbally aggressive or resistive to care,” the assessor determined that they occurred less than weekly. *Exhibits 1 and 2*. However, the assessor was unable to recall if he asked appellant about these behaviors. The assessor wrote “less than weekly” because he had no information from appellant and no collateral information or records, and he was unable to determine the frequency of the behaviors. The assessor noted that a subject’s responses to questions about behaviors, especially Level I behavior, is often unsatisfactory. [REDACTED] *testimony*.

5. Appellant stated in her written appeal (and in her testimony) that she picks at her skin on several areas of her body every day, causing open wounds that she has to treat with antibacterial ointments. Appellant acknowledged that she otherwise has no complex health-related needs. *Appellant testimony*.

6. Three or four times per week, appellant becomes “out of control,” yelling, screaming, cursing, pushing, shoving, and hitting others, including her husband, who remove themselves from appellant’s presence on such occasions. Appellant takes 750 mg of Depakote per day for bipolar disorder, and Trintellix for depression. Appellant treats at the [REDACTED] [REDACTED] for her eating disorder. *Appellant testimony*.

7. Five or more times per week, appellant refuses to eat or bathe. Appellant also experiences periods of days or weeks in which she refuses to leave her house, which interferes with her eating disorder treatment at the [REDACTED]. When appellant does go outside, she brings her PCA along because she feels like she is “not in control,” and testified that “anyone can make [her] do anything.” Appellant also feels vulnerable in public because of the possibility she will have a manic episode or “engage in other high-risk behaviors.” *Appellant testimony; Exhibit A*.

### **CONCLUSIONS OF LAW**

1. Jurisdiction and timeliness of the appeal. The Commissioner of Human Services has jurisdiction over appeals involving matters listed in Minnesota Statutes, section 256.045, subdivision 3(a).

2. Unless federal or Minnesota law specifies a different time frame in which to file an appeal, an individual or organization specified in this section may contest the specified action by submitting a written request for a hearing to the state agency within 30 days after receiving

written notice of the action or within 90 days of such written notice if the person shows good cause why the request was not submitted within the 30 day time limit. *Minn. Stat. § 256.045, subd. 3(i)*. The individual filing the appeal has the burden of proving good cause by a preponderance of the evidence. *Id.* This appeal is timely and the Commissioner of Human Services has jurisdiction under Minnesota Statutes, section 256.045, subdivision 3.

3. PCA assessments and assessors. PHNs and other certified PCA assessors are qualified and disinterested experts who identify “what is important to the person, the person's needs for supports, health and safety concerns, and the person's abilities, interests, and goals.” Assessors are charged with ensuring, among other things, that the person being assessed is “offered objective, unbiased access to resources.” *Minnesota Statutes, section 256B.0911, subdivisions 2b(a) and 3a(a)*. The findings and opinions of PHNs, as disinterested and objective experts, are generally entitled to considerable weight.

4. Burden of proof. In an administrative appeal, the burden of proof is governed by state or federal laws that apply to the hearing. Minnesota Statutes, section 256.0451, subdivision 17. When there is no specific burden of proof provision, the party seeking that a certain action be taken must prove the facts at issue by a preponderance of the evidence. *Id.* Because appellant was assessed for the first time on September 24, 2019, she has the burden to prove why the agency’s assessment and determinations were not correct.

5. Preponderance of the evidence. “Preponderance of the evidence” means, in light of the record as a whole, the evidence leads the human services judge to believe that the finding of fact is more likely to be true than not true. *Minnesota Statutes, section 256.0451, subdivision 22*. The legal claims or arguments of a participant do not constitute either a finding of fact or a conclusion of law, except to the extent the human services judge adopts an argument as a finding of fact or conclusion of law. *Id.* The human service judge's recommended order must be based on all relevant evidence. *Minnesota Statutes, section 256.045, subdivision 5*.

6. Personal care assistance law. Medical assistance covers personal care assistance services in a recipient's home. Minnesota Statutes, section 256B.0625, subdivision 19a, says that a person must be dependent in at least one activity of daily living as defined in Minnesota Statutes, section 256B.0659, subdivision 1(b), or exhibit Level I behavior as defined in Minnesota Statutes, section 256B.0659, subdivision 1(c), in order to get any personal care assistance services.

7. Under Minnesota Statutes, section 256.0652, subdivision 6(b), the amount of the personal care assistance services authorized must be based on the recipient's home care rating. The home care rating is based on the following:

- a. total number of dependencies of activities of daily living;

- b. presence of complex health-related needs; and
- c. presence of Level I behavior.

8. Level I behavior is defined as physical aggression towards self, others, or destruction of property that requires the immediate response of another person. *Minnesota Statutes, section 256B.0659, subdivision 1(c)*.

9. Minnesota Statutes, section 256B.0659, subdivision 1(b), describes activities of daily living as grooming, dressing, bathing, transferring, mobility, positioning, eating, and toileting. Also, Minnesota Statutes, section 256B.0659, subdivision 1(e), describes four of these, transferring, mobility, eating, and toileting, as critical activities that entitle the person to additional time.

10. Minnesota Statutes, section 256B.0659, subdivision 4(b)(1), says that a person must be assessed as dependent in an activity of daily living based upon the person's daily need or need on the days the activity is completed, for: (i) cuing and constant supervision to complete the task; or (ii) hands-on assistance to complete the task. "Cuing" means "verbal step-by-step instructions to start and complete all steps of the task." "Constant supervision" means "continued interaction (not episodic or intermittent) and/or visibility to ensure person's safety and task completion."<sup>3</sup>

11. Minnesota Statutes, section 256B.0659, subdivision 4(d), says that a person qualifies as having a need for assistance due to behaviors if her or his behavior requires assistance at least four times per week and shows one or more of the following characteristics:

- a. physical aggression towards self or others, or destruction of property that requires the immediate response of another person;
- b. increased vulnerability due to cognitive deficits or socially inappropriate behavior; or
- c. verbally aggressive and resistive to care.

12. Minnesota Statutes, section 256B.0659, subdivision 4(c), describes complex health needs such as tube feedings, wounds, parenteral/IV therapy, respiratory interventions, catheter insertion or maintenance, bowel program, neurological interventions, and other congenital or acquired diseases. A recipient qualifies as having complex health-related needs if the recipient has one or more of the interventions that are ordered by a physician, specified in a personal care assistance care plan or community support plan. *Minnesota Statutes, section 256B.0659*,

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<sup>3</sup> Source: "PCA Assessment and Service Plan Instructions and Guidelines," form DHS-3244A-ENG 3-14.

subdivision 4(c).

13. Minnesota Statutes, section 256B.0652, subdivision 6(c), sets forth the methodology to determine total time for personal care assistance for each home care rating, which is based on the median paid units per day for each home care rating from fiscal year 2007 data for the personal care assistance program. Each home care rating has a base level of hours assigned. Additional time is added through the assessment and identification of the following:

- a. 30 additional minutes per day for a dependency in each critical activity of daily living;
- b. 30 additional minutes per day for each complex health-related function; and
- c. 30 additional minutes per day for each behavior issue. *Minnesota Statutes, section 256B.0652, subdivision 6(c).*

14. The chart below clarifies the methodology:

<b>Step 1: Person has one dependency in an Activity of Daily Living (ADL) and/or Level 1 Behavior. Use the home care rating LT with two units of PCA services (30 minutes) per day. Steps 2-3 do not apply to this home care rating.</b>			
# Dependencies in ADLs	Level I Behavior	Complex Health Needs	Home Care Rating Base Units-Minutes
0	Yes	----	LT = 2u – 30 m
1	Yes or No	----	LT = 2u – 30 m

<b>Step 2: Person has two or more dependencies in ADLs. Use steps 2 and 3 below to determine the home care rating and total time.</b>			
# Dependencies in ADLs	Level I Behavior	Complex Health Needs	Home Care Rating Base Units-Minutes
2-3	----	----	P = 5 u – 75 m
2-3	Yes	----	Q = 6 u – 90 m
2-3	Yes or No	Yes	R = 7 u – 105 m

4-6	----	----	S = 10 u – 150 m
4-6	Yes	----	T = 11 u – 165 m
4-6	Yes or No	Yes	U = 14 u – 210 m
7-8	----	----	V = 17 u – 255 m
7-8	Yes	----	W = 20 u – 300 m
7-8	Yes or No	Yes	Z = 30 u – 450 m
Vent Dependent			EN = \$29,314/month

### Step 3: Determination of Total Time

If the PCA assessment shows a person has one or more of the following descriptions, add an additional 2 units or 30 minutes to base time per day for each:

- Dependency in critical Activity of Daily Living (ADL)
- Behavior issue as defined

Complex health-related need

Critical ADLs	Behaviors (4 times/week)	Complex Health
Eating	Physical aggression towards self, others, or destruction of property	Tube Feeding
Transferring	Increased vulnerability due to cognitive deficits or socially inappropriate behavior	Wounds
Mobility	Verbally aggressive and resistive to care	Parenteral/IV Therapy
Toileting		Respiratory Interventions
		Catheter

		Bowel Program
		Neurological Intervention
		Other Congenital or Acquired Diseases
<b>Potential Maximum Total</b> 8 units-120 minutes	<b>Potential Maximum Total</b> 6 units-90 minutes	<b>Potential Maximum Total</b> 16 units-240 minutes

15. ***Analysis and conclusion.***

A. ***Level I behavior.*** A recipient “qualifies as having a need for assistance due to behaviors if the recipient's behavior requires assistance at least four times per week...” *Minnesota Statutes, section 256B.0659, subdivision 4(d)*. Appellant’s “out of control” physical behavior would meet the definition Level I behavior, which is “physical aggression towards self or others, or destruction of property that requires the immediate response of another person.” *Id.* However, because it occurs 3-4 times per week and not 4 times per week, it would not qualify appellant for additional PCA time for a behavior need. *Id.*

B. ***Other behavior needs.*** The agency’s assessment of appellant’s other behavior needs was incomplete. Appellant’s refusal to eat or bathe five times per week would give rise to an “increased need for assistance for recipients who are verbally aggressive or resistive to care so that the time needed to perform activities of daily living is increased.” In addition, appellant’s feeling of being “not in control” in public and that she could be taken advantage of, and her worry about having a manic attack or engaging in other high-risk behaviors in public, would meet the definition of “increased vulnerability due to cognitive deficits or socially inappropriate behavior.” Both behavior needs qualify appellant for additional PCA time.

C. ***Complex health-related needs.*** A complex health-related need “must meet criteria” in the statute, and must include “interventions that are ordered by a physician, specified in a personal care assistance care plan or community support plan developed under section 256B.0911.” *Minnesota Statutes, section 256B.0659, subdivision 4(c)*. For a wound to meet the definition of complex health-related need, it must be one of the following:



- Stage III or stage IV;
- Multiple wounds;
- Requiring sterile or clean dressing changes or a wound vac;
- Open lesions such as burns, fistulas, tube sites, or ostomy sites that require specialized care.

Appellant's open sores from picking at her skin would not meet any of the above wound criteria for a complex health-related need.

16. **Recalculation of PCA time.** Appellant's PCA units should therefore be recalculated as follows:

Base units (determined by the number of dependencies in activities of daily living [5] and whether appellant has complex health-related needs [no] or Level 1 behavior [yes]).	11
Home Care Rating: <b>T</b>	
Additional units for complex health-related needs (2 service units each)	0
Additional units for behavior needs (2 service units each)	4
Additional units for dependencies in critical activities of daily living (eating, transferring, mobility, toileting -- 2 service units for each)	4
<b>Total Service Units<sup>4</sup></b>	<b>19 (equals 285 minutes or 4.75 hours)</b>

17. Use of PCA services pending appeal. This decision is effective back to the date the new service agreement took effect. As such, the following applies to appellant's use of PCA services pending the outcome of this appeal:

- (1.) *Consistent.* If, pending appeal, appellant received PCA services consistent with the amount approved in this decision, appellant may continue to use such level of services until a change in circumstances (e.g., new assessment, end of service agreement, loss of coverage, etc.) dictates a different level of service.
- (2.) *More than approved.* If, pending appeal, appellant received PCA services at a level higher than approved in this decision, appellant may be liable for the cost of such additional services received.

<sup>4</sup> One service unit equals 15 minutes of time. *Minnesota Statutes, section 256B.4914, subdivision 2(p).*

- (3.) *Less than approved.* If, pending appeal, appellant received services at a level lower than approved in this decision, appellant will be not be compensated for such unused time. Appellant may begin using the higher level of services as of the date of this decision.

### **RECOMMENDED ORDER**

Based on all of the evidence, I recommend that the Commissioner of Human Services:

- REVERSE and order the agency to provide appellant with 19 service units (285 minutes or 4.75 hours) of PCA time per day.

\_\_\_\_\_  
KEVIN T. SLATOR

\_\_\_\_\_  
Date

### **ORDER**

On behalf of the Commissioner of Human Services and for the reasons stated above, I adopt the recommended Findings of Fact, Conclusions of Law, and Recommended Order as the final decision of the Department of Human Services.

\_\_\_\_\_  
Date

cc:



County Northern Services Intake Center

, DHS

## **FURTHER APPEAL RIGHTS**

**This decision is final unless you take further action.**

Appellants who disagree with this decision should consider seeking legal counsel to identify further legal action. If you disagree with this decision, you may:

- **Request the appeal be reconsidered.** The request must state the reasons why you believe your appeal should be reconsidered. The request may include legal arguments and may include proposed additional evidence supporting the request. If you propose additional evidence, you must explain why the evidence was not provided at the hearing. **The request must be in writing and be made within 30 days of the date this decision was issued by the co-chief human services judge.** You can mail the request to: Appeals Division, Minnesota Department of Human Services, P.O. Box 64941, St. Paul, MN 55164-0941. You can also fax the request to (651) 431-7523. **You must send a copy of the request to the other parties.** To ensure timely processing of your request, please include the name of the human services judge assigned to your appeal and the docket number. The law that describes this process is Minnesota Statutes, section 256.0451, subdivision 24.
- **Start an appeal in the district court.** This is a separate legal proceeding that you must start **within 30 days of the date this decision was issued by the co-chief human services judge.** You start this proceeding by: 1) serving a written copy of a notice of appeal upon the Commissioner of Human Services and upon any other adverse party of record; and 2) filing the original notice and proof of service with the court administrator of the county district court. The law that describes this process is Minnesota Statutes, section 256.045, subdivision 7.<sup>5</sup>

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<sup>5</sup> County agencies do not have the option of appealing decisions about Supplemental Nutrition Assistance Program (SNAP), Minnesota Family Investment Program (MFIP), or Diversionary Work Program (DWP) benefits to district court under 7 Code of Federal Regulations, section 273.15(q)(2), and Minnesota Statutes, section 256J.40. A prepaid health plan may not appeal this order under Minnesota Statutes, section 256.045, subdivision 7.