

STATE OF CONNECTICUT  
DEPARTMENT OF SOCIAL SERVICES  
OFFICE OF LEGAL COUNSEL, REGULATIONS, AND ADMINISTRATIVE HEARINGS  
55 FARMINGTON AVENUE  
HARTFORD, CT 06105

██████████ 2023  
Signature confirmation

Case: ██████████  
Client: ██████████  
Request: 214627

NOTICE OF DECISION

PARTY

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PROCEDURAL BACKGROUND

On ██████████ 2023, the Department of Social Services (the “Department”) issued a *Notice of Action* to ██████████ (the “Appellant”) denying his Acquired Brain Injury (“ABI”) Waiver II application.

On ██████████ 2023, ██████████, the Appellant’s conservator, filed an online request for an administrative hearing with the Office of Legal Counsel, Regulations, and Administrative Hearings (“OLCRAH”).

On ██████████, 2023, the OLCRAH scheduled an administrative hearing for ██████████, 2023. The Conservator requested two postponements; the OLCRAH granted these requests.

On ██████████ 2023, in accordance with sections 17b-60, 17b-61, and 4-176e to 4-189, inclusive, of the Connecticut General Statutes, the OLCRAH held an administrative hearing by videoconference. The following individuals participated:

████████████████████, Conservator (mother)  
Elizabeth Orejuela, RN, Community Options, Department Representative  
Lisa Dinino-Jones, Connecticut Community Care, Department Witness  
Eva Tar, Hearing Officer

On ██████████ 2023, the hearing record closed.

### STATEMENT OF ISSUE

The issue is whether the Department's ██████████ 2023 denial of the Appellant's ABI Waiver II application is supported by State statute and regulation.

### FINDINGS OF FACT

1. The Appellant is █ years old. (Dept. Exhibits C, D, and E)
2. The Appellant is a Medicaid recipient. (Dept. Exhibits C and E)
3. On ██████████ 2017, a tree limb fell on the Appellant. (Department Representative Testimony) (Dept. Exhibit D)
4. On ██████████ 2017, the Appellant was hospitalized and treated for left subdural hemorrhage, scattered frontal subarachnoid hemorrhage, intra parenchymal hemorrhage, severely comminuted fractures to the frontal bones with extension to the frontal sinuses, left clavicle fracture, right fibula fracture, and fractures of the lumbar sacral spine. (Dept. Exhibit D)
5. The Appellant is blind in one eye and has decreased vision in his second eye. (Conservator Testimony) (Dept. Exhibit D)
6. The Appellant's overall judgment and insight is impaired; he does not have insight into his own behavior, has had incidents in the past where he became physically confrontational with patients. (Conservator Testimony) (Dept. Exhibits E and D)
7. The Appellant has deficits in money management. (Appellant Exhibit 1)
8. The Appellant was treated at the ██████████ approximately two years prior to his admittance to ██████████ (Conservator Testimony)
9. ██████████ is a chronic disease hospital and an ABI-Nursing Facility. (Department Representative Testimony)
10. On ██████████ 2021, ██████████ admitted the Appellant as a patient for continuation of psychiatric care arising from his traumatic brain injury ("TBI"). (Dept. Exhibit D)
11. On ██████████ 2021, a licensed, registered occupational therapist completed an ASSESSMENT ADDENDUM outlining the Appellant's medical history associated with his TBI, his treatment therapies, his physical impairments, his interactions with peers and ██████████ staff, and his therapeutic goals. (Dept. Exhibit D)
12. On or around ██████████ 2022, the Conservator filed an ABI Waiver II application on the Appellant's behalf. (Dept. Exhibit E)

13. The ABI Waiver II currently operates under the Department's OPERATIONAL POLICY. (Department Representative Testimony) (Dept. Exhibit B)
14. Connecticut Community Care is the Department's access agency for completing assessments with respect to Medicaid waiver programs. (Department Witness Testimony)
15. On [REDACTED], 2022, a Connecticut Community Care employee completed a 69-page **Universal Assessment** after conducting interviews with the Appellant, his parents, and his [REDACTED] team that included his psychiatrist, his physical therapist, and his psychiatric social worker. (Department Witness Testimony) (Dept. Exhibit C)
16. Connecticut Community Care concluded that the Appellant did not meet the ABI Waiver II level of care criteria. (Dept. Exhibit C)
17. The [REDACTED], 2022 **Universal Assessment** did not address whether the Appellant's full-time institutionalization at [REDACTED] for more than one year met the Department's level of care requirements. (Dept. Exhibit C)
18. It is unclear from the hearing record whether the Medicaid program pays for the Appellant's care at [REDACTED] or if such care is paid by private insurance, through a lawsuit settlement, or by some other means. (Hearing record)
19. It cannot be determined from the hearing record when or if the Department's agent for Medicaid approval of in-patient level of care,<sup>1</sup> independent of Connecticut Community Care, has determined that the Appellant currently requires the level of care provided at [REDACTED].
20. On [REDACTED], 2023, the Department denied the Appellant's ABI Waiver II application. (Dept. Exhibit A)
21. On [REDACTED] 2023, the Conservator submitted a [REDACTED] 2023 Guideline for Occupational Therapy Assessment completed by a licensed, registered occupational therapist to the Department for its review. (Appellant Exhibit 1) (Hearing record)
22. Upon review of the [REDACTED] 2023 Guideline for Occupational Therapy Assessment, the Department did not rescind its [REDACTED] 2023 denial of the Appellant's ABI Waiver II application. (Dept. Exhibit F)
23. As of [REDACTED], 2023, [REDACTED] has not assigned the Appellant a proposed discharge date. (Conservator Testimony)
24. Connecticut General Statutes § 17b-61 (a) provides: "The Commissioner of Social Services or the commissioner's designated hearing officer shall ordinarily render a final

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<sup>1</sup> MAXIMUS is the Department's agent or contractor for completing level of care assessments associated with Medicaid payment for in-patient care at skilled nursing facilities.

decision not later than ninety days after the date the commissioner receives a request for a fair hearing pursuant to section 17b-60, and shall render a final decision ..., provided the time for rendering a final decision shall be extended whenever the aggrieved person requests or agrees to an extension, or when the commissioner documents an administrative or other extenuating circumstance beyond the commissioner's control....”

On [REDACTED], 2023, the OLCRAH received the Conservator’s online hearing request. The OLCRAH granted the Conservator’s postponement requests, resulting in a 36-day extension of the initial hearing deadline of 90 days from the date of the hearing request. This hearing decision would have become due by no later than [REDACTED] 2023. This final decision is timely.

### CONCLUSIONS OF LAW

1. Section 17b-2 of the Connecticut General Statutes in part designates the Department as the state agency for the administration of the Medicaid program pursuant to Title XIX of the Social Security Act.

Section 17b-260a (a) of the Connecticut General Statutes provides: “The Commissioner of Social Services shall seek a waiver from federal law to establish a Medicaid-financed, home and community-based program for individuals with acquired brain injury. Such waiver shall be submitted no later than October 1, 1995 and shall be operated continuously to the extent permissible under federal law....”

**The Department has the authority under State statute to administer the Medicaid program.**

**The Department has the authority under State statute to pursue federal approval of its proposed ABI Waiver II.**

2. Section 17b-10 (b) of the Connecticut General Statutes provides:  
The department shall adopt as a regulation in accordance with the provisions of chapter 54, any new policy necessary to conform to a requirement of an approved federal waiver application initiated in accordance with section 17b-8 and any new policy necessary to conform to a requirement of a federal or joint state and federal program administered by the department, including, but not limited to, the state supplement program to the Supplemental Security Income Program, but the department may operate under such policy while it is in the process of adopting the policy as a regulation, provided the department posts such policy on the eRegulations System prior to adopting the policy. Such policy shall be valid until the time final regulations are effective.

Conn. Gen. Stat. § 17b-10 (b).

Effective July 1, 2016, the Department’s ABI WAIVER OPERATIONAL POLICY (PR2015-169) (“OPERATIONAL POLICY”) consists of proposed regulations Sections 17b-260a-1 through 17b-260a-18, inclusive, for the Regulations of Connecticut State Agencies.

**Pursuant to Conn. Gen. Stat. § 17b-10 (b), the Department has the authority to administer the ABI Waiver II under its OPERATIONAL POLICY while in the process of adopting such policy into regulation.**

3. Title 42, Code of Federal Regulations (“C.F.R.”), Section 441.301 (b)(1) addresses the requirements of a waiver request submitted by an agency that furnishes home and community-based services, as defined in 42 C.F.R. § 440.180.

ABI WAIVER OPERATIONAL POLICY-Implementation Date 7/1/2016, (PR2015-169) (“OPERATIONAL POLICY”), proposed regulation Sec. 17b-260a-3 in part provides the following definitions:

“Acquired brain injury” or “ABI” means the combination of focal and diffuse central nervous system dysfunctions, immediate or delayed, at the brainstem level or above. These dysfunctions may be acquired through physical trauma, oxygen deprivation, infection, or a discrete incident that is toxic, surgical, or vascular in nature. The term “ABI” does not include disorders that are congenital, developmental, degenerative, associated with aging, or that meet the definition of intellectual disability as defined in section 1-1g of the Connecticut General Statutes.”

“Acquired brain injury nursing facility” or “ABI NF” means a type of nursing facility that provides specialized programs for persons with an acquired brain injury.

“Department or “DSS” means the state of Connecticut Department of Social Services or its agent.

OPERATIONAL POLICY, p. 1 of 22.

**For the purposes of the ABI Waiver II, the Appellant has an ABI, as “ABI” is defined in the Department’s OPERATIONAL POLICY.**

4. “The Commissioner of Social Services shall extend the provisions of section 17-134d-11 of the regulations of Connecticut state agencies to monitor and control Medicaid recipient utilization of outpatient mental health services. The commissioner shall contract, through a competitive bidding process, for recipient surveillance and review services. Such contract shall authorize the imposition of utilization controls, including but not limited to, prior authorization requirements based on medical appropriateness and cost effectiveness.” Conn. Gen. Stat. § 17b-263 (a).

Section 17b-259b (a) of the Connecticut General Statutes defines the terms “medically necessary” and “medical necessity” for the purposes of the Department’s administration of the medical assistance program.

“Clinical policies, medical policies, clinical criteria or any other generally accepted clinical practice guidelines used to assist in evaluating the medical necessity of a requested health service shall be used solely as guidelines and shall not be the basis for a final determination of medical necessity.” Conn. Gen. Stat. § 17b-259b (b).

The Department has the authority under Conn. Gen. Stat. § 17b-263 (a) to contract out to Connecticut Community Care the ABI Waiver II level of care evaluations.

**Connecticut Community Care correctly completed the Appellant's Universal Assessment.**

5. ABI WAIVER OPERATIONAL POLICY-Implementation Date 7/1/2016, (PR2015-169), proposed regulation Sec. 17b-260a-9 (d)(2) provides:

“To qualify for services under the ABI waiver program, the individual shall meet one of the following institutional level-of-care categories: (1) ..., (2) Category II (ABI NF level of care): If the individual were not receiving services under the ABI waiver program, the individual would require care in an ABI NF. *The individual is considered to require care in an ABI NF if the individual resides in such a facility and the department or its agent determines that the individual currently requires such level of care, or if the individual does not reside in such a facility but has impaired cognition, impaired behavior requiring daily supervision or cueing, as described in section 17b-260a-3 (46) of the Regulations of Connecticut State Agencies, with two or more ADLs, and a mental illness that manifested itself before the brain injury occurred.*”

OPERATIONAL POLICY, p. 16 of 22. (emphasis added)

**For the purposes of determining the Appellant's eligibility to participate in the ABI Waiver II, the undersigned hearing officer finds that the evidence provided for the hearing record is inconclusive as to whether the Appellant meets the criteria at the OPERATIONAL POLICY p. 16 of 22—i.e., proposed regulation Sec. 17b-260a-9 (d)(2) of the Regulations of Connecticut State Agencies—as it is unclear whether a *different agent* or contractor of the Department previously or concurrently has determined that the Appellant requires ABI NF level of care as a condition of Medicaid payment to █████.**

### DECISION

The Appellant's appeal is REMANDED to the Department for further review.

### ORDER

1. The Department will reinstate the Appellant's ABI Waiver II application.
2. The Department will review its records to determine whether one of its agents or contractors with respect to the Medicaid program previously has found the Appellant meets the level of care requirement for in-patient care at █████:
  - Should the Department find that one of its agents or contractors has endorsed or approved the Appellant's current level of care at █████ for the purposes of Medicaid payment of his current in-patient treatment, the Department will update its records to show that the Appellant met the level of care criteria of the ABI Waiver II program found at OPERATIONAL POLICY p.16 of 22 and will continue to evaluate the Appellant's eligibility to participate in the program.

- Should the Department find that one of its agents or contractors has NOT endorsed or approved the Appellant's current level of care at [REDACTED] for the purposes of Medicaid payment of his current in-patient treatment, the Department may deny the Appellant's ABI Waiver II application for failure to meet the ABI Waiver II level of care criteria, as defined at OPERATIONAL POLICY p. 16 of 22, provided that the Department issues a *Notice of Action* to the Appellant and his Conservator to preserve the Appellant's right to appeal that decision, should they file the hearing request timely.
3. Within 14 calendar days of the date of this decision, or [REDACTED], 2023, documentation of compliance is due to the undersigned.

*Eva Tar-electronic signature*  
Eva Tar  
Hearing Officer

Pc: Elizabeth Orejuela, DSS-Central Office, Community Options  
Amy Dumont, DSS-Central Office, Community Options

### **RIGHT TO REQUEST RECONSIDERATION**

The appellant has the right to file a written reconsideration request within **15** days of the mailing date of the decision on the grounds there was an error of fact or law, new evidence has been discovered or other good cause exists. If the request for reconsideration is granted, the appellant will be notified within **25** days of the request date. No response within 25 days means that the request for reconsideration has been denied. The right to request a reconsideration is based on § 4-181a (a) of the Connecticut General Statutes.

Reconsideration requests should include specific grounds for the request: for example, indicate what error of fact or law, what new evidence, or what other good cause exists.

Reconsideration requests should be sent to: Department of Social Services, Director, Office of Administrative Hearings and Appeals, 55 Farmington Avenue Hartford, CT 06105.

### **RIGHT TO APPEAL**

The appellant has the right to appeal this decision to Superior Court within **45** days of the mailing of this decision, or **45** days after the agency denies a petition for reconsideration of this decision, provided that the petition for reconsideration was filed timely with the Department. The right to appeal is based on § 4-183 of the Connecticut General Statutes. To appeal, a petition must be filed at Superior Court. A copy of the petition must be served upon the Office of the Attorney General, 165 Capitol Avenue, Hartford, CT 06106 or the Commissioner of the Department of Social Services, 55 Farmington Avenue Hartford, CT 06105. A copy of the petition must also be served on all parties to the hearing.

The 45-day appeal period may be extended in certain instances if there is good cause. The extension request must be filed with the Commissioner of the Department of Social Services in writing no later than 90 days from the mailing of the decision. Good cause circumstances are evaluated by the Commissioner or the Commissioner's designee in accordance with § 17b-61 of the Connecticut General Statutes. The Agency's decision to grant an extension is final and is not subject to review or appeal.

The appeal should be filed with the clerk of the Superior Court in the Judicial District of New Britain or the Judicial District in which the appellant resides.