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

, 2019 SIGNATURE CONFIRMATION

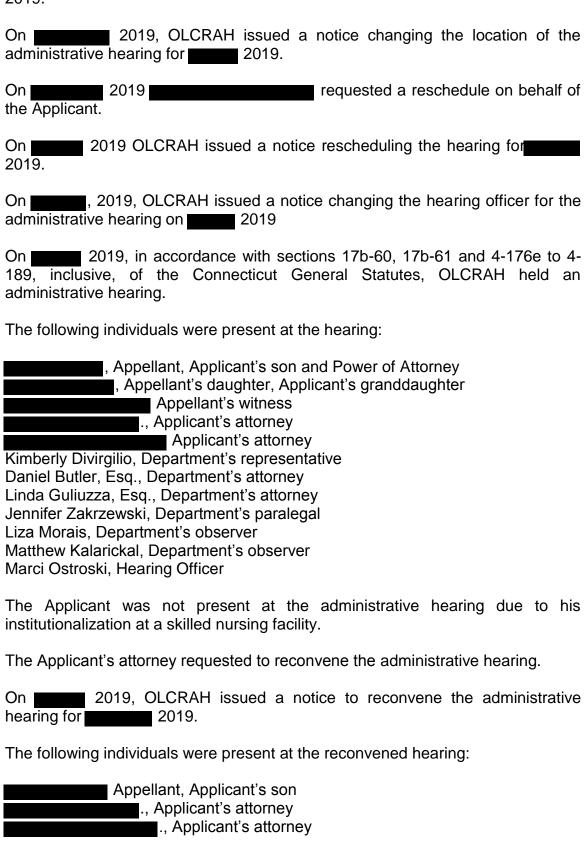
Client ID #:	
Hearing Request #: 135934	
	NOTICE OF DECISION

PARTY

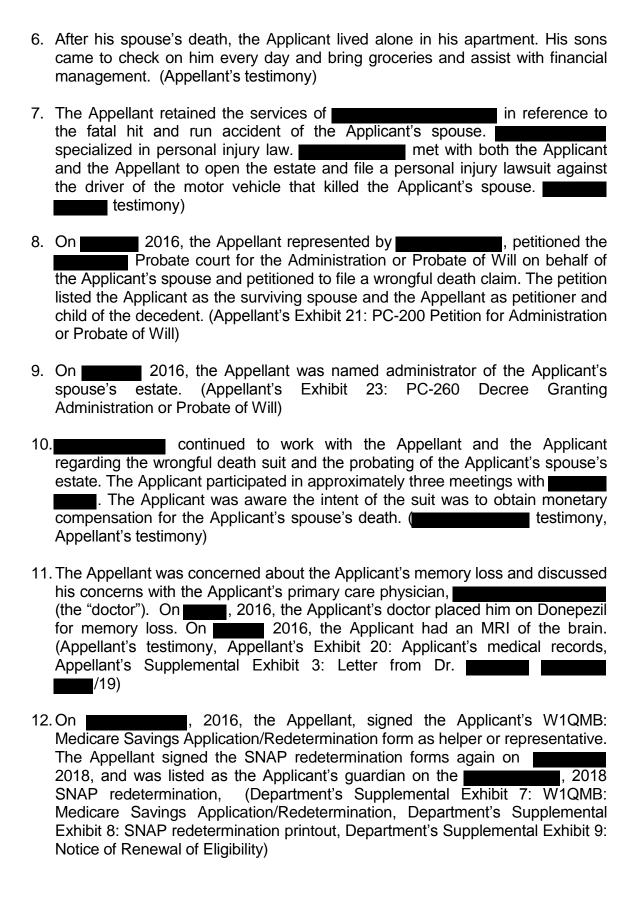
PROCEDURAL BACKGROUND

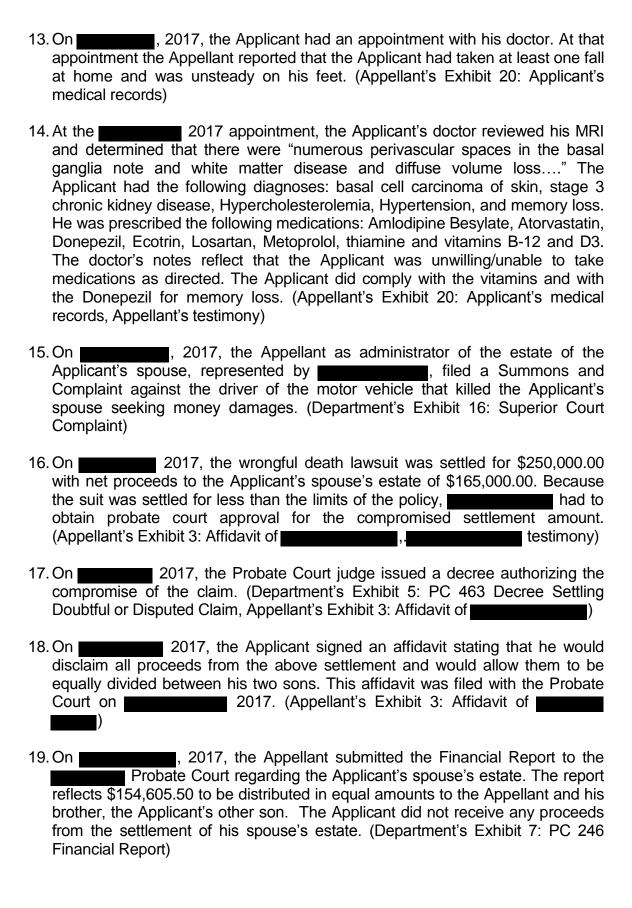
assets penalty	the Appella on the Med	Department of sant), a Notice of side of the discount of the congister of the "Applicant"),	f Action (Term Ca	"NOA") impare benefits	oosing a trans for the Appel	fer of
requested an	administrati	ve hearing on mpose a penalty	behalf of	the Applic	ant to contes	t the
Administrative	Hearings	the Office o ("OLCRAH") 2019.				
On Contract On the Applicar			req	uested a re	schedule on b	ehalf
On 2	2019 OLCRA	AH issued a not	ice resch	eduling the	hearing for	

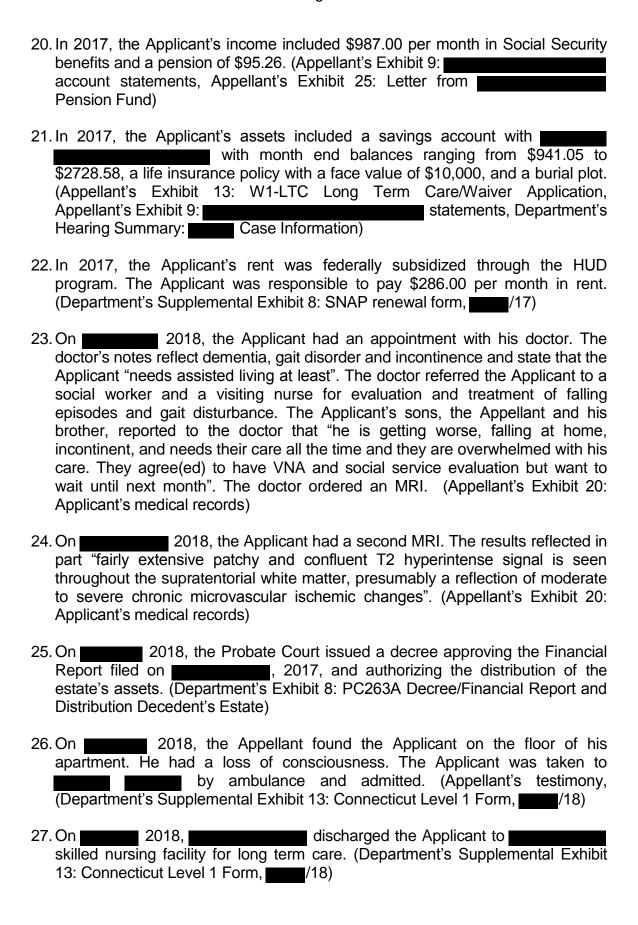


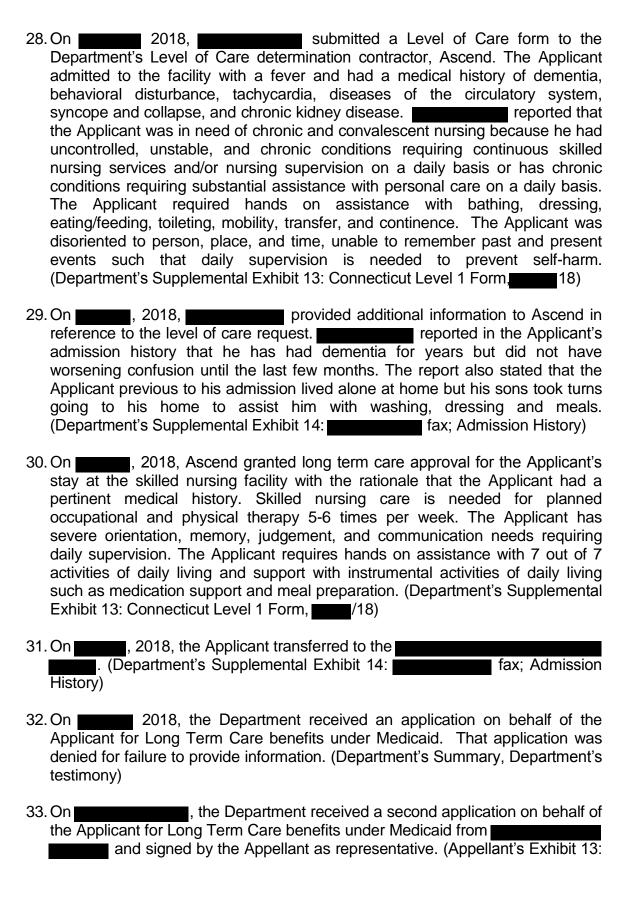


Kimberly Divirgilio, Department's representative, participated by telephone Daniel Butler, Esq., Department's attorney Marci Ostroski, Hearing Officer The hearing record remained open until 2019, for the submission of briefs and additional evidence from the Appellant and the Department and until 2019, for a rebuttal brief and exhibits from the Appellant and the Department. Additional exhibits were received from both parties and on 2019, the record closed. STATEMENT OF THE ISSUE The issue to be determined is whether assets transferred by the Applicant result in a penalty period for Long Term Care Medicaid. **FINDINGS OF FACT** 1. The Applicant's date of birth is 1935. (Appellant's Exhibit 20: Applicant's medical records) On 2009, the Department received an application for community Medicaid coverage for the Applicant's spouse (the "spouse"). The Department met with the Applicant's son on , 2009 to review the Medicaid application process and request bank statements for the application. The Applicant's spouse received community Medicaid coverage through 2010. (Department's Supplemental Exhibit 1: Case Notes) . 2014, the Applicant and his spouse submitted an application for assistance with the Department for the Supplemental. Nutrition Assistance Program ("SNAP"). They also submitted a separate application for the Medicare Savings Programs which would pay the cost of their Medicare part B premiums. Both the Applicant and his spouse signed the applications. (Department's Supplemental Exhibit 3: W1E General Application, Department's Supplemental Exhibit 4: W1QMB: Medicare Savings Application/Redetermination) 2014, the Applicant's spouse verbally requested the Department to name her son as her authorized representative ("AREP") so he could assist them with their documents. (Department's Supplemental Exhibit 5: Case Notes) 5. On 2016, the Applicant's spouse died from injuries she sustained as a pedestrian in a hit and run motor vehicle accident. (Hearing Record, Appellant's Exhibit 1: Police Incident Report)









W1-LTC Long Term Care/Waiver Application)

34.	As part of the application process, the Department reviewed the Applicant's assets during the 60 month look back period, to determine whether the Applicant transferred assets. (Record)
35.	The Department determined that the probate laws of intestacy supported that the Applicant was entitled to the first \$100,000.00 and half of the remainder of his spouse's estate proceeds of \$154,605.50 (100,000 + (54,605.50 / 2) = \$127,302.75). The Department determined that his disclaimer of the estate proceeds on
36.	On 2018, the Department mailed the Appellant a Preliminary Decision Notice, advising him that the \$127,302.75 transferred from the Applicant to his sons through the spousal share disclaimer would be subject to a transfer of asset penalty. The Department allowed until 2018 for the Applicant's rebuttal. (Department's Exhibit 2: W-495A Transfer of Assets Preliminary Decision Notice)
37.	On 2018, the Applicant's representative requested an extension of time to provide the rebuttal to the Department's W495-A Transfer of Assets Preliminary Decision Notice. (Hearing Summary)
38.	On 2019, the Department was contacted by the Applicant's new attorney. The Department allowed an extension of time until 2019, for counsel to review the Applicant's case and provide a rebuttal to the W495-A Transfer of Assets Preliminary Decision Notice. (Hearing Summary)
39.	On 2019, the Department had not received a rebuttal from the Applicant regarding the proposed penalty. The Department sent the Appellant a W495B Transfer of Assets Notice of Response to Rebuttal. The notice stated in part "we have not received a rebuttal for review. You made the transfers on 17 and 17. We will set up a penalty period starting 18. The penalty will end on 19. (Department's Exhibit 2: W-495B Transfer of Assets Notice of Response to Rebuttal)
40.	On 2019, the Department sent the Appellant a W-495C Transfer of Assets Final Decision Notice. The notice stated in part "We have decided that you transferred \$127,302.75 on 177 and 177 to become eligible for Medicaid. Although you are eligible for certain Medicaid benefits beginning 187 we are setting up a penalty period starting 187 188. This penalty ends

/19". (Department's Exhibit 2: W-495C Transfer of Assets Final Decision

Notice)

- 42. At the administrative hearing on 2019, the Applicant's attorney signed the Waiver of Right to a Timely Hearing Decision under Section 17b-61(a) of the Connecticut General Statutes waiving the requirement that a final decision be issued by the Hearing Officer within 90 days of the date the hearing was requested. (Hearing Record)

CONCLUSIONS OF LAW

- 1. Section § 17b-260 of the Connecticut General Statutes provides that the Department will administer Title XIX of the Social Security Act ("Medicaid") in the State of Connecticut.
- 2. Section § 17b-261b(a) of the Connecticut General Statutes provides that the Department "shall be the sole agency to determine eligibility for assistance and services under programs operated and administered by said department."
- 3. Title 42 Section § 431.10(b)(3) of the Code of Federal Regulations ("CFR") provides that the "single State agency is responsible for determining eligibility for all individuals applying for or receiving benefits" in the Medicaid program.
- 4. Subsection (a) of section § 17b-261 of the Connecticut General Statutes provides that any disposition of property made on behalf of an applicant or recipient by a person authorized to make such disposition pursuant to a power of attorney, or other person so authorized by law shall be attributed to such applicant.
- 5. Subsection (a) of section § 17b-261a of the Connecticut General Statutes provides that any transfer or assignment of assets resulting in the imposition of a penalty period "shall be presumed to be made with the intent, on the part of the transferor or transferee, to enable the transferor to obtain or maintain eligibility for medical assistance. This presumption may be rebutted only by clear and convincing evidence that the transferor's eligibility or potential eligibility for medical assistance was not a basis for the transfer or assignment."
- "The Department's Uniform Policy Manual ("UPM") is the equivalent of a state regulation and, as such, carries the force of law." Bucchere v Rowe; 43 Conn Supp. 175 178 (194) (citing Conn. Gen. Stat. § 17b-10; Richard V. Commissioner of Income Maintenance, 214 Conn. 601, 573 A.2d712 (1990)).

- 7. UPM § 3029.03 provides the Department uses the policy contained in Chapter 3029 of the Uniform Policy Manual to evaluate asset transfers if the transfer occurred on or after February 8, 2006.
- 8. UPM § 3029.05(A) provides there is a period established, subject to the conditions described in chapter 3029, during which institutionalized individuals are not eligible for certain Medicaid services when they or their spouses dispose of assets for less than fair market value on or after the lookback date specified in UPM 3029.05(C). This period is called the penalty period, or period of ineligibility.
- 9. UPM § 3029.05(C) provides the look-back date for transfers of assets is the date that is sixty months before the first date on which both the following conditions exist: 1) the individual is institutionalized; and 2) the individual is either applying for or receiving Medicaid.
- 10. The look-back date for the Applicant is ______, 2013.
- 11. Section § 45a-437 (a)(3) of the Connecticut General Statutes provides for distribution to spouse in intestate succession: If there is no will, or if any part of the property, real or personal, legally or equitably owned by the decedent at the time of his or her death, is not effectively disposed of by the will or codicil of the decedent, the portion of the intestate estate of the decedent, determined after payment of any support allowance from principal pursuant to section 45a-320, which the surviving spouse shall take is: (3) If there are surviving issue of the decedent all of whom are also issue of the surviving spouse, the first one hundred thousand dollars plus one-half of the balance of the intestate estate absolutely.
- 12. The Department correctly calculated the Applicant's share of his spouse's estate proceeds of \$154,605.50 to be \$127,302.75 (100,000 + (54,605.50 / 2) = \$127,302.75).
- 13.UPM § 3029.15(B) provides the Department considers a transferor to have met his or her foreseeable needs if, at the time of the transfer, he or she retained other income and assets to cover basic living expenses and medical costs as they could have reasonably been expected to exist based on the transferor's health and financial situation at the time of the transfer.
- 14. The Department correctly determined that the Applicant did not meet his foreseeable needs because at the time of the transfers based on his health and financial situation the Appellant did not retain enough assets or income to cover his basic living expenses and medical costs.

- 15. The Appellant did not establish with clear and convincing evidence that the Applicant transferred \$127,302.75 for a purpose other than qualifying for assistance.
- 16. The Department was correct to find that the Applicant transferred \$127,302.75 for the purpose of qualifying for Long Term Care Medicaid.
- 17.UPM § 3029.05(F) provides the length of the penalty period is determined by dividing the total uncompensated value of all assets transferred on or after the look-back date by the average monthly cost to a private patient for long-term care services in Connecticut. Uncompensated values of multiple transfers are added together and the transfers are treated as a single transfer.
- 18. UPM § 3029.05 (E)(2) provides that the penalty period begins as of the later of the following dates: the date on which the individual is eligible for Medicaid under Connecticut's State Plan and would otherwise be eligible for Medicaid payment of the LTC services described in 3029.05 B based on an approved application for such care but for the application of the penalty period, and which is not part of any other period of ineligibility caused by a transfer of assets.
- 19. UPM § 3029.05 (F) provides in part that the length of the penalty period consists of the number of whole and/or partial months resulting from the computation described in 3029.05 F. 2. The length of the penalty period is determined by dividing the total uncompensated value of all assets transferred on or after the look-back date described in 3029.05 C by the average monthly cost to a private patient for LTCF services in Connecticut. For applicants, the average monthly cost for LTCF services is based on the figure as of the month of application.
- 20. The average monthly cost of LTCF services in Connecticut as of 2018, the month of the Applicant's application was \$12,604.00.
- 21. The Appellant is subject to a penalty period of 10.1 months after dividing the uncompensated value of the transferred asset by the average monthly cost of LTCF services (\$127,302.75 divided by \$12,604.00).

DISCUSSION

The Department's determination that the Applicant transferred assets to qualify for assistance is upheld. Counsel for the Applicant disputed the imposition of the penalty based on two main arguments. Counsel argued that the transfer was not done with the intent to qualify for Medicaid as outlined in § 17b-261a of the Connecticut General Statutes. Additionally, Counsel argued that at the time of the transfer, the Applicant retained enough assets and income to meet his foreseeable need as outlined in UPM § 3029.15.

Much of the administrative hearing revolved around the tragic passing of the Applicant's spouse and how the circumstances of her death affected the Applicant's actions in reference to his disclaimer of the funds he was entitled to as her surviving spouse. The Appellant testified that the Applicant referred to the settlement money as "bloody money" and that he did not want to have any part of the proceeds from the lawsuit. While he may have felt very strongly about the origin of the funds, the record shows that he did participate and consent to the filing of the wrongful death claim. The Department argues that because the Applicant chose to pursue the claim rather than refusing to participate in the pursuit of funds, he used the disclaimer as an estate planning tool to funnel the funds to family members and preserve the assets for his heirs addressed in the language cited in Forsyth v Rowe, 226 Conn. 818(1993) "our conclusion reflects" the legislative concern that the medicaid program not be used as an estate planning tool. The medicaid program would be at fiscal risk if individuals were permitted to preserve assets for their heirs while receiving medicaid benefits from the state."

The Applicant had limited income and assets and had been relying on forms of public assistance through Medicaid, the SNAP program, HUD, and the Medicare Savings Program to meet his daily needs for several years. The Appellant's testimony that he was unaware of public assistance benefits or the requirements of the Medicaid program prior to the Applicant's institutionalization, is not credible and not supported by the hearing record.

The Applicant was advanced in age, at the time of the transfer, and his medical records reflect a worsening medical state. While his family had always been attentive to his needs the record reflects that at the time of the transfer the Applicant's needs were increasing to the point of overwhelming his family and nursing home placement was imminent. The Applicant's attorney argued that the Applicant's circumstances were similar to Socci v. Bremby; CV15-6028687, 2016 Conn.Super. LEXIS 2575(J.D. of New Britain, J. Shortall, Oct. 3, 2016). The court found that though Ms. Socci was ninety one years old there was no evidence in the record of any medical diagnosis that might portend the need for institutional long term care. The court found that "there is in the record a letter from her treating physician stating that 'there was no warning nor could patient have foreseen that she was to have a (cerebrovascular accident)'." In this case, medical records do not reflect that the Applicant had a singular catastrophic medical event, as Socci did, that placed him in the nursing home, but rather a history of cognitive and physical decline.

Long term nursing home placement was foreseeable at the time of the transfers based on the Applicant's age and worsening medical condition as reported in the medical records by the Applicant's doctor. The medical records reflect that his sons were concerned with his condition. The Applicant's income and assets were not sufficient to meet those foreseeable needs. The Applicant applied for

Medicaid to cover the cost of his stay at the nursing facility back to 2018, very soon after his admission date of 2018. There is no evidence in the record that the Applicant had any form of long term care coverage as claimed in the Appellant's Post Hearing Brief.

The Appellant's attorney argued that the Applicant's situation is similar to Matter of Collins v. Zucker 144A.D.3d 1441(N.Y.App.Div 3d Dept., 2018). Appellant's attorney argued that, like in Collins, the Applicant did suffer from chronic medical conditions and had experienced falls but he was able to remain at home with assistance. The court found in Collins "the fact for future need for nursing home care may be foreseeable for a person of advanced age with chronic medical conditions is not dispositive of the question of whether a transfer by such person is based solely on speculation and other evidence indicates otherwise". The evidence in Collins did indicate that the transfer was not made with the intent to qualify for assistance. In Collins, the Applicant had transferred the funds over two years prior to applying for Medicaid coverage and had retained over \$200,000 in assets which she used to pay for her care. In this case, the Applicant requested Medicaid coverage six months after the transfer and at the time of the transfer he retained less than \$3000 in liquid assets. Collins was also able to establish that the purpose of the transfers was to assist the grandson, a veteran with young children and a service related disability, in purchasing and repairing a house. Here, the Applicant did not establish with clear and convincing evidence a purpose for the transfer other than qualifying for assistance. He simply argued he did not want the funds that he had actively pursued.

While both the Department and the Appellant's attorney cited case laws applicable to this type of transfer and circumstances surrounding the Medicaid application, such as <u>Rathbun v Commissioner of Social Services</u>, I found that the statutes and regulations provided clear guidance on the merits of this case and I relied more heavily on those statutes and regulations than on any of the cases reviewed for this decision

There is no clear and convincing evidence that the transfers were made for a purpose other than qualifying for assistance therefore the Department's action to assign a penalty is upheld.

DECISION

The Appellant's appeal is **DENIED**

Marci Ostroski Marci Ostroski Hearing Officer

cc: Musa Mohamud, Operations Manager, Hartford
Judy Williams, Operations Manager, Hartford
Jessica Carroll, Operations Manager, Hartford
Peter Bucknall, Operations Manager, Waterbury
Jamel Hilliard, Operations Manager, Waterbury
Kimberly Divirgilio, Eligibility Services Worker, Waterbury
Daniel Butler, Esq., Department of Social Services Principal Attorney

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 <u>specific</u> grounds for the request: for example, indicate <u>what</u> error of fact or law, <u>what</u> new evidence, or <u>what</u> 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 06105-3725.

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, 55 Elm Street, 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.