

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 ID #: ██████████

NOTICE OF DECISION

PARTY

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PROCEDURAL BACKGROUND

On ██████████ 2019, the Department of Social Services (the “Department”) issued a notice of action (“NOA”) to ██████████ (the Appellant) granting Medicaid, but imposing a penalty period due to an improper transfer of assets.

On ██████████ 2019, ██████████, the attorney representing the Appellant, requested an administrative hearing to appeal the Department’s imposition of a penalty period.

On ██████████, 2019, the Office of Legal Counsel, Regulations, and Administrative Hearings (“OLCRAH”) issued a notice scheduling the administrative hearing for ██████████ 2019.

On ██████████ 2019, because the attorney was unavailable on the originally scheduled date, OLCRAH issued a notice rescheduling the hearing for ██████████ 2019.

On ██████████ 2019, in accordance with sections 17b-60, 17b-61 and 4-176e to 4-189, inclusive, of the Connecticut General Statutes, OLCRAH held an administrative hearing.

The following individuals were present at the hearing:

██████████, Appellant's Spouse (his "Spouse", also ██████████'s "Mother")
██████████, Appellant's daughter and POA ("██████████")
██████████, Appellant's daughter (██████████)
██████████, Esq.
██████████, Paralegal (observing only)
██████████, Department's representative, via telephone
Daniel T. Butler, Esq., Principal Attorney, OLCRAH
James Hinckley, Hearing Officer

STATEMENT OF THE ISSUE

The issue is whether the Department correctly imposed a Medicaid penalty period of ineligibility due to an improper transfer of assets.

FINDINGS OF FACT

1. The Appellant is an 86 year old man and is a resident of a long term care nursing facility, and his spouse lives in the community. (Testimony)
2. Approximately six years ago, the Appellant's Spouse learned that he was diagnosed with dementia. (Spouse's testimony)
3. In ██████████ 2016 the Appellant and his Spouse were joint owners of a bank account (the "Account") and their daughter, ██████████, was a signatory on the Account, but ██████████ never deposited any money that funded the Account. (Ex. A, p. 74: ██████████ statement, Spouse's testimony, ██████████'s testimony)
4. On ██████████, 2016, the Appellant/his Spouse withdrew \$150,000.00 from the Account and gave the money to ██████████ for her to purchase a condominium. (Ex. A, p. 74, Spouse's testimony, ██████████'s testimony)
5. On an undetermined date after ██████████ received the money, she and her Mother made an oral agreement for ██████████ to pay \$500.00 monthly to repay the \$150,000.00. (Spouse's testimony, ██████████'s testimony)
6. On ██████████ 2016, ██████████ made the first \$500.00 payment to her mother; she made 20 more payments for each month after that, the last one on ██████████, 2018. (Spouse's testimony, ██████████'s testimony, Ex. A, pp. 75-95: photocopies of cancelled checks)
7. On ██████████, 2018, the Appellant was hospitalized for approximately one week due to flu and pneumonia, and after that entered a skilled nursing facility for rehabilitation, and after that was discharged home. (Testimony)
8. The Appellant's ██████████ 2018 hospital admission, because it resulted in him

living continuously in an institutional setting for 30 days or more, established that his date of institutionalization ("DOI"), a date important to Medicaid eligibility, was [REDACTED], 2018. (Stipulated)

9. On [REDACTED] 2018, the Appellant became a long term resident of [REDACTED]. (Hearing Record)
10. The Appellant and his Spouse initially paid for the cost of his stay at [REDACTED] using their own funds. (Testimony)
11. Sometime in [REDACTED] 2018, [REDACTED], the Appellant's daughter who is his POA, began investigating whether the Appellant could qualify for Medicaid, and consulted an attorney for advice. ([REDACTED]'s testimony)
12. Following her consultation with the attorney, [REDACTED] advised [REDACTED] that, for Medicaid eligibility reasons, her oral agreement with her Mother to repay the \$150,000.00 would have to be replaced by a signed legal agreement that included higher payments. ([REDACTED]'s testimony, [REDACTED]'s testimony)
13. When [REDACTED] spoke with the attorney about creating a written agreement, she advised him that \$10,000.00 of the \$150,000.00 had been repaid. (Testimony)
14. On [REDACTED] 2018, [REDACTED] signed a Promissory Note agreeing to make monthly payments of \$1,494.00 for 8.5 years to repay the remaining \$140,000.00, with interest at 2% per annum. (Ex. A, p. 96: Promissory Note, Testimony)
15. The payment schedule for the Promissory Note was determined based on the Spouse's life expectancy using actuarial tables. (Hearing Record)
16. The Promissory Note includes no language that prohibits the cancellation of the debt upon the death of the lender. (Ex. A, p. 96)
17. On [REDACTED] 2018, [REDACTED] completed and signed an application form for Medicaid for the Appellant, and the Department received the form on [REDACTED], 2018, which was logged as the application date. (Ex. 1: W-1 LTC Long-term Care Application, Testimony)
18. On [REDACTED] 2018, the Department sent a form to [REDACTED] and to the Appellant's attorney, asking for documentation and verification of certain information. The requested information included the Promissory Note and information about how much was loaned, when the payments started, how much had been repaid and when will the loan be paid off. (Ex. 4: W-1348LTC dated [REDACTED] 2018)
19. On [REDACTED] 2018, the Department received a letter from the attorney, and

copies of cancelled checks and a copy of the Promissory Note. The letter stated, in pertinent part, "In 2016, the original loan to ██████████ was \$150,000.00. ██████████ originally agreed (verbally, nothing in writing) to pay \$500.00 per month. Enclosed please find copies of the checks ██████████ paid that total \$10,000.00 towards the loan. In ██████████ of 2018; ██████████ signed a Promissory Note for the remainder \$140,000.00 that is due her mother. Per your request please see the signed Promissory note from ██████████ to her mother." (Ex. 5: ██████████ 2018 letter and copy of Promissory Note)

20. On ██████████ 2018, the eligibility worker sent a request for advice to the Department's Office of Legal Counsel. On ██████████, 2018, the Department's attorney reviewing the request asked the eligibility worker for additional information he needed for the review. (Ex. 8: Email exchange)
21. On ██████████, 2018, the Department sent a form to ██████████ and to the Appellant's attorney requesting more information. The information needed included the total loan amount, whether the loan originated in ██████████ 2016 (the month the first payment was made), and whether there was a mortgage on the condo to secure repayment of the note in the event of default. (Ex. 6: W-1348LTC dated ██████████, 2018, Fact #6)
22. On ██████████ 2018, the Appellant's attorney notified the Department that the loan to their daughter was in ██████████ 2016, and that the total amount of the loan was \$150,000.00, and that there was not a mortgage on the condo. (Ex. 7: ██████████ 2018 letter from Appellant's attorney)
23. The letter from the Appellant's attorney erroneously reported that the loan originated in ██████████ 2016. Bank records confirm that the loan originated in ██████████ 2016, the month the \$150,000.00 withdrawal was made. (Stipulated)
24. On ██████████ 2018, the Office of Legal Counsel advised the eligibility worker of the applicable regulations and its conclusions regarding how the Promissory Note affected the Appellant's Medicaid eligibility. (Ex. 8)
25. On ██████████ 2019, the Department sent the Appellant a preliminary notice of its decision that the remaining \$140,000.00 balance of the loan was considered a transfer of assets in order to be eligible for assistance. (Ex. 9: W-495A Transfer of Assets Preliminary Decision Notice)
26. On ██████████, 2019, the Appellant's attorney submitted a rebuttal letter to the Department. The attorney argued that the Promissory Note met the requirements in UPM 3029.14 B. He included with the rebuttal letter proof that ██████████ was now making monthly payments of \$1,494.00. (Ex. 10: ██████████ 2019 letter)
27. On ██████████, 2019, the Department issued a NOA to the Appellant granting

Medicaid starting [REDACTED] 2018. The NOA stated, in pertinent part, "You are eligible for Medicaid. However, we are imposing a penalty period for improper transfer of assets that affects your coverage. Your penalty period starts [REDACTED] and ends [REDACTED]. During this time, Medicaid will not pay for room and board at a nursing home and the long-term facility will bill you directly for this. Once the penalty period ends, Medicaid will help pay for room and board. Beginning [REDACTED], you are eligible for other Medicaid benefits that you receive while in a nursing home." (Ex. 11: NOA dated [REDACTED], 2019)

28. On [REDACTED] 2019, the Appellant's attorney's office submitted a letter to the Department that was a follow-up to a [REDACTED], 2019 phone conversation his Paralegal had with the eligibility worker. The letter noted that the Department never issued a formal response to the attorney's [REDACTED] 2019 letter of response to its preliminary decision, and requested a review of the attorney's rebuttal by the worker's supervisor or the legal department. The letter also noted that the eligibility worker agreed during the phone conversation to return the Appellant's application to pending status until such time as the Department completes its review and issues a final decision on the proposed penalty. (Ex. 12: [REDACTED] 2019 letter from Paralegal)
29. On [REDACTED] 2019, the Department rescreened the Appellant's Medicaid application with the original application date. (Hearing Summary)
30. On [REDACTED] 2019, the Department made a referral to its Resources unit to complete an asset / income investigation. (Hearing Summary)
31. On [REDACTED] 2019, a lead investigator in the Resources unit notified the eligibility worker of her determination that the fair market value of the Promissory Note was \$140,000.00 as of [REDACTED] 2018. (Ex. 13: [REDACTED] 2019 email)
32. On [REDACTED] 2019, the Department issued a notice to the Appellant that it did not agree with his rebuttal of its decision to set up a penalty period because of the transfer of the \$140,000.00 remaining balance on the loan. (Ex. 14: W-495B Transfer of Assets Notice of Response to Rebuttal)
33. On [REDACTED], 2019, the Department issued a notice to the Appellant that it would set up a penalty period beginning [REDACTED] 2018 and ending [REDACTED], 2019 because of its final decision that the \$140,000.00 remaining balance of the loan was transferred to become eligible for Medicaid. (Ex. 15: W-495C Transfer of Assets Final Decision Notice)
34. On [REDACTED], 2019, the Department issued a NOA notifying the Appellant of the same eligibility results as the [REDACTED], 2019 NOA (The Appellant was eligible for Medicaid beginning [REDACTED] 2018 but had a penalty period from

██████████ 2018 until ██████████ 2019). (Ex. 16: NOA dated ██████████, 2019, Fact #27)

35. As of the date of the Appellant's application for Medicaid in ██████████ 2018, the average private-pay cost of care in a nursing home in Connecticut was \$12,851.00 per month. (Ex. 17, p. 2: Long Term Services and Supports Amounts table)
36. The Department determined that the penalty period for the Appellant was 10.89 months because \$140,000.00 divided by the \$12,851.00 average cost of care equals 10.89 months. (Ex. 17, p. 1: Asset Transaction Worksheet and notes)
37. The issuance of this decision is timely under Connecticut General Statutes 17b-61(a), which requires that a decision be issued within 90 days of the request for an administrative hearing. The Appellant requested an administrative hearing on ██████████ ██████████, 2019. The hearing was originally scheduled for ██████████ 2019, but was rescheduled at the request of the Appellant, adding 23 days to the time. Therefore, this decision is due not later than ██████████, 2019.

CONCLUSIONS OF LAW

1. The Department is the state agency that administers the Medicaid program pursuant to Title XIX of the Social Security Act. The Department may make such regulations as are necessary to administer the medical assistance program. Conn. Gen. Stat. § 17b-2; Conn. Gen. Stat. § 17b-262
2. 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, 177 (1994) (citing Conn. Gen. Stat. 17-3f(c) [now 17b-10]; *Richard v. Commissioner of Income Maintenance*, 214 Conn. 601, 573 A.2d 712(1990)).
3. 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. UPM § 3029.03
4. 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 look-back date specified in UPM 3029.05(C). This period is called the penalty period or period of ineligibility. UPM § 3029.05(A)
5. The look-back date for transfers of assets is a 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. UPM § 3029.05(C)

6. **The look-back date for the Appellant is [REDACTED] 2013.**
7. **[REDACTED], 2016, the date the Appellant and his Spouse transferred \$150,000.00 to [REDACTED], was during the look-back period.**
8. **[REDACTED] 2018, the date [REDACTED] signed a Promissory Note agreeing to repay the \$140,000.00 remaining unpaid balance of the money, was during the look-back period.**
9. Section 52-550 of the Connecticut General Statutes ("Conn. Gen. Stat.") provides, in pertinent part, as follows:
 - (a) No civil action may be maintained in the following cases unless the agreement, or a memorandum of the agreement, is made in writing and signed by the party, or the agent of the party, to be charged... (6) upon any agreement for a loan in an amount which exceeds fifty thousand dollars. Conn. Gen. Stat. § 52-550(a)
10. **[REDACTED]'s oral agreement with her Mother to repay the \$150,000.00 was not a legally enforceable agreement under Connecticut's Statute of frauds because the loan amount exceeded fifty thousand dollars and the parties did not sign a written agreement.**
11. UPM § 3029.14 provides, in pertinent part, as follows:
 - A. If an individual or his or her spouse uses his or her funds to purchase a mortgage note, loan, installment contract or similar financial instrument, the Department may consider such a transaction a transfer of assets for less than fair market value.
 - B. The purchase of a bona fide mortgage note, loan, installment contract or similar financial instrument is not considered a transfer of assets for less than fair market value if the mortgage note, loan, installment contract or similar financial instrument:
 1. has a repayment term that is actuarially sound (as determined in accordance with actuarial publications of the Office of the Chief Actuary of the Social Security Administration); and

2. provides for payments to be made in equal amounts during the term of the loan, with no deferral and no balloon payments; and
 3. prohibits the cancellation of the balance upon the death of the lender.
- C. A mortgage note, loan, installment contract or similar financial instrument is considered bona fide only if:
1. a repayment agreement is in place at the time the funds are dispersed [sic]...
- D. An individual or spouse who purchases a mortgage note, loan, installment contract or similar financial instrument that does not meet the criteria described in 3029.14 B and C is considered to have made a transfer of assets for less than fair market value.
- E. The uncompensated value involving the purchase of a mortgage note, loan, installment contract or similar financial instrument that does not meet the criteria described in 3029.14 B and C is considered the outstanding balance due as of the date of the institutionalized individual's application for Medicaid benefits.
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- 12. The Promissory Note signed by [REDACTED] is not a bona fide financial instrument pursuant to UPM § 3029.14 C. 1. A repayment agreement was not in place at the time the funds were disbursed. The funds were disbursed in [REDACTED] 2016. The informal oral agreement reached subsequently was not a legally enforceable agreement. The Promissory Note was signed in [REDACTED] 2018, more than two years after the funds were disbursed.**
- 13. Pursuant to the provisions in UPM § 3029.14 D, the Department considers the Appellant and his Spouse to have made a transfer of assets for less than fair market value because the note does not meet the criteria described in 3029.14 B and C.**
- 14. The Department correctly determined that the amount subject to a penalty as an improper transfer of assets is \$140,000.00. The unpaid balance and value of the note when it was signed on [REDACTED] 2018 was \$140,000.00. The balance was the same on the [REDACTED], 2018 date of the Appellant's application for Medicaid.**

15. With respect to the provisions for taking into account certain transfers of assets in 42 U.S. Code § 1396p(c), “the term “assets” includes funds used to purchase a promissory note, loan, or mortgage *unless such note, loan, or mortgage—(iii) prohibits the cancellation of the balance upon the death of the lender.* (emphasis added) 42 USC § 1396p(c)(1)(I)
16. **The provision in UPM § 3029.14 B. 3. that requires a financial instrument to expressly prohibit the cancellation of the balance in order to not be considered a transfer of assets mirrors the provision in USC § 1396p(c)(1)(I).**
17. **The Promissory Note’s silence on whether the debt can be cancelled is not the same as prohibiting the cancellation of the balance upon the death of the lender.**
18. **Even if the Promissory note met the first hurdle of qualifying as a bona fide financial instrument pursuant to UPM § 3029.14(C), the note would still be considered an asset with respect to the transfer of assets provisions because it does not expressly prohibit the cancellation of the balance upon the death of the lender.**
19. Conn. Gen. Stat. § 17b-261a(a) provides as follows:

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 the 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 was not a basis for the transfer or assignment.
20. “An otherwise eligible institutionalized individual is not ineligible for Medicaid payment of LTC services if the individual, or his or her spouse, provides clear and convincing evidence that the transfer was made exclusively for a purpose other than qualifying for assistance.” UPM § 3029.10 E.
21. UPM § 3029.15 provides, in pertinent part, as follows:

An institutionalized individual or the individual’s spouse is considered to have transferred an asset exclusively for a purpose other than qualifying for assistance under circumstances which include, but are not limited to, the following:

....

B. 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.

...

22. The Appellant has not provided clear and convincing evidence to rebut the presumption that the assets were transferred with the intent to enable him to qualify for medical assistance. When the assets were initially disbursed in 2016, the Appellant already had a years-old diagnosis of dementia. Given the Appellant's age and state of health, he did not retain assets sufficient to meet his reasonably foreseeable medical needs. When the Promissory Note was signed in 2018, it was drawn up by the attorney assisting the Appellant with the Medicaid application process, and the application was filed days after the Promissory Note was signed. The assets were not transferred exclusively for a purpose other than qualifying for assistance.

23. The penalty period begins as of the later of the following dates: 1. The first day of the month during which assets are transferred for less than fair market value, if this month is not part of any other period of ineligibility caused by a transfer of assets; or 2. 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 UPM § 3029.05 (E)

24. The Appellant's penalty period begins [REDACTED] 2018, the date on which he would otherwise be eligible for Medicaid payment for long term care services.

38. UPM § 3029.05 provides for the length of the penalty period and nature of the penalty as follows:

F. Length of the Penalty Period

1. 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.
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.

- a. For applicants, the average monthly cost for LTCF services is based on the figure as of the month of application.
 - b. For recipients, the average monthly cost for LTCF services is based on the figure as of:
 - (1) the month of institutionalization; or
 - (2) the month of the transfer, if the transfer involves the home, or the proceeds from a home equity loan, reverse mortgage or similar instrument improperly transferred by the spouse while the institutionalized individual is receiving Medicaid, or if a transfer is made by an institutionalized individual while receiving Medicaid...
4. Once the Department imposes a penalty period, the penalty runs without interruption, regardless of any changes to the individual's institutional status.

G. Medicaid Eligibility During the Penalty Period

1. During the penalty period, the following Medicaid services are not covered:
 - a. LTCF services; and
 - b. services provided by a medical institution which are equivalent to those provided in a long-term care facility; and
 - c. home and community-based services under a Medicaid waiver.
2. Payment is made for all other Medicaid services during a penalty period if the individual is otherwise eligible for Medicaid.

25. The average monthly cost to a private patient for LTCF services was \$12,851.00 as of the month of the Appellant's application.

26. The Appellant's transfer of \$140,000.00 results in a transfer of asset penalty of 10.89 months (\$140,000.00 divided by \$12,851.00).

27. The Department correctly imposed a 10.89 month Medicaid penalty

period of ineligibility because the Appellant made a \$140,000.00 uncompensated transfer of assets during the look-back period.

DISCUSSION

Counsel asked the hearing officer to rule on the validity of the provisions in UPM § 3029.14 which he claimed were in violation of federal statute. It is not within the authority and jurisdiction of an administrative hearing officer to rule on the validity of the Department's operating regulations.

Hypothetically, if the provisions in UPM § 3029.14 C. were invalid, the issue would have to be evaluated differently. The language in 3029 C does not come directly from the federal statute, and one basis for the Department's action was that the Promissory Note did not qualify as a bona fide agreement pursuant to 3029.14 C. It should be noted that the Department provided a letter from CMS to the State Medicaid Director and other testimony supporting the language in 3029.14 C, but none of that information was included in the above findings because I am not ruling on this issue.

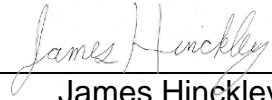
The hearing officer *did* rely on UPM § 3029.14 C. for this decision. But even if 3029.14 C were set aside, the Department has other support for its action.

The Promissory Note contains no language about whether the debt can be cancelled. Even if counsel's concerns about the validity of certain provisions in the UPM have merit, the requirement for the note to contain language prohibiting cancellation of the debt is not only in UPM § 3029.14 B. 3., but also in USC 1396p(c)(1)(I). Counsel's argument that the note satisfies the requirement because it contains no language making it "self-cancelling" was not persuasive. The language of the statute and regulation are clear that the note must contain an express provision that prohibits cancellation.

Lastly, counsel put on some testimony trying to establish the state of knowledge of the Appellant's Spouse and daughters regarding the Appellant's state of health at the time ██████ received the money, presumably to argue that the money was not transferred for the purpose of qualifying for Medicaid. For reasons explained in the above findings and conclusions, the testimony was inadequate to rebut the presumption that the money was transferred for the purpose of qualifying for Medicaid.

DECISION

The Appellant's appeal is **Denied.**

A handwritten signature in cursive script that reads "James Hinckley".

James Hinckley
Hearing Officer

cc: [REDACTED], Esq.
Tricia Morelli
Janet Giunti
Daniel T. Butler, Esq.

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 06105-3725.

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.