STATE OF CONNECTICUT
DEPARTMENT OF SOCIAL SERVICES
OFFICE OF LEGAL COUNSEL, REGULATIONS, AND ADMINISTRATIVE HEARINGS
55 FARMINGTON AVENUE
HARTFORD, CT 06105-3726

[redacted] **2021**
Signature Confirmation

Case ID # [redacted]
Client ID # [redacted]
Request # 175979

NOTICE OF DECISION

PARTY

[redacted]

PROCEDURAL BACKGROUND

Between [redacted] 2021, and [redacted] 2021, the Department of Social Services (the "Department") verbally informed the representative for [redacted] (the "Appellant") that it would denying the Appellant Money Follows the Person ("MFP") services under the Acquired Brain Injury Waiver ("ABI") and the Mental Health Waiver ("MHW"). On [redacted] 2021 the Department issued a notice denying MFP under the ABI and MHW for failure to meet program requirements.

On [redacted] 2021, the Appellant's counsel, [redacted], requested an administrative hearing to contest the Department's decision to deny such benefits.

On [redacted] 2021, the Office of Legal Counsel, Regulations, and Administrative Hearings ("OLCRAH") issued a notice scheduling the administrative hearing for [redacted] 2021.

On [redacted] 2021, in accordance with sections 17b-60, 17-61, and 4-176e to 4-184 inclusive, of the Connecticut General Statutes, OLCRAH held an administrative hearing by telephonic conferencing.

The following individuals participated at the hearing:

[redacted] the Appellant
[redacted] Appellant's Brother
[redacted] Appellant's Counsel
Anna Karabin, DSS ABI program, Central Office
Erin Levitt-Smith, MHW program for the Department
[redacted] Guardian Care Coordinator, [redacted]

[redacted] Clinical Director, [redacted]
[redacted] Connecticut Mental Health [redacted]
[redacted] Connecticut Mental Health [redacted]
[redacted] Advanced Behavioral Health
[redacted] Social Worker, [redacted]
[redacted] Social Worker, [redacted]
Christopher Turner, Hearing Officer

The hearing record was left open for comment from the Appellant's brother. On [redacted] 2021, the record closed after receipt of remarks from the Appellant's brother.

STATEMENT OF THE ISSUE

The issue is whether the Department's decision to deny the Appellant MFP services was correct.

FINDINGS OF FACT

1. The Appellant is a [redacted] woman ([redacted]) who is a Medicaid recipient of Long Term Support Services residing in [redacted] Connecticut, a skilled nursing facility. (Hearing Record)

2. Money Follows the Person ("MFP") is a federal demonstration program that helps Medicaid-eligible individuals currently living in long-term care facilities – such as nursing homes, hospitals, and other qualified institutions – successfully transition back into the community. (Record; Testimony)

3. On [redacted] 2009, and [redacted] 2009, a neuropsychological exam of the Appellant was completed. A diagnosis of chronic hydrocephalus was found as well as bipolar disorder and a history of alcohol abuse/dependency. (Exhibit 3A: Neuropsychological evaluation)

4. On [redacted] 2019, the Appellant was admitted to [redacted], Connecticut, a long-term care facility. (Record; Hearing summary)

5. On [redacted] 2020, the Appellant was discontinued from the ABIW II waiver due to being institutionalized for a period exceeding 90 days. (Hearing summary)

6. On [redacted] 2020, an application for MFP was submitted on behalf of the Appellant. (Hearing summary)

7. On [redacted] 2020, a universal assessment was completed for MFP services by Lyanne Peffley Specialized Care Manager for Connecticut Community Care, Inc. Ms. Peffley evaluated the Appellant's mental and physical status as well as functional abilities. Ms. Peffley determined the Appellant's requirements to be centered around her mental health needs. (Exhibit 1: Universal assessment; Hearing summary)

8. On [redacted] 2021, the Appellant was referred to the MHW for the completion of an eligibility assessment. (Hearing summary)

9. On [redacted] 2021, Heather Blaha, DHMAS specialized Care Manager with the MFP waiver program, completed a psychosocial health assessment of the Appellant. The review found the Appellant has experienced symptoms of delusions, grandiosity, paranoia, tangential thoughts, verbal/physical aggression, resistance to receiving care, and refusal of care. In addition, the Appellant has reported being bitten daily by rats despite no evidence to support her claim, including during the assessment. Moreover, nursing staff and the facility social worker report the Appellant has frequent outbursts that include yelling, posturing, threatening, throwing items and property destruction. Additionally, when the Appellant shows a poor ability to manage her emotions, she becomes difficult to manage and requires 2:1 assistance. In fact, the Appellant has been hospitalized twice because of said behavior. Consequently, Ms. Blaha determined the Appellant requires constant supervision to ensure health and safety which exceeds the level of care provided with the intermittent services of the MHW, and recommended the Appellant live in an ABI residential setting. (Exhibit 2: Universal Assessment; Exhibit 4: MHW screening and disposition form; Hearing summary)

10. Between [redacted] 2021, and [redacted] 2021, the Department verbally informed the Appellant's representative of the denial of the Appellant's MFP application. The Department sent a written notice of action on [redacted] 2021. (Department's summary; Testimony) dysregulated

11. The medical conditions the Appellant has been treated for and currently suffers from, include but are not limited to: Congenital hydrocephalus; Major depressive disorder; Borderline personality disorder; Osteoporosis; GERD; Peripheral vascular disease; Hypertension; Hip fracture; Alcohol and opioid abuse; disclosed anger issues. (Exhibit 3B: Neurocognitive Evaluation; Exhibit 4: MHW Eligibility Screening and Disposition; Hearing summary)

12. Eligibility for the ABI Waiver II program excludes disorders that are congenital, developmental, degenerative, associated with aging, or meet the definition of an intellectual disability. (Department's testimony)

13. The Connecticut Mental Health Waiver is an approved waiver under 1915c of the Social Security Act. The Mental Health Waiver ("MH Waiver") is a Medicaid waiver for persons with serious mental illness who would otherwise require nursing home care;

the MH Waiver is operated by DMHAS, with oversight by the Department, under an application filed with the Center for Medicare and Medicaid Services ("CMS"). (Hearing record; Testimony)

14. 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's counsel requested an administrative hearing on [redacted] 2021 with the decision due [redacted] 2021. However, due to a seven-day extension given to the Appellant's brother to review and comment on the Department's hearing summary and exhibits, this decision was due no later than [redacted] 2021.

CONCLUSIONS OF LAW

1. Connecticut General Statutes (Conn. Gen. Stat.") § 17b-2 provides that the Department of Social Services is designated as the state agency for the administration of (10) the state social services plan for the implementation of the social services block grants and community services block grants pursuant to the Social Security Act the Medicaid program pursuant to Title XIX of the Social Security Act.

   Conn. Gen. Stat. § 17b-260 provides in relevant part that the Commissioner of Social Services is authorized to take advantage of the medical assistance programs provided in Title XIX, entitled "Grants to States for Medical Assistance Programs", contained in the Social Security Amendments of 1965 and may administer the same in accordance with the requirements provided therein.

   Conn. Gen. Stat. § 17b-260a. provides (a) 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. Notwithstanding the addition of any new waiver program serving such individuals, the commissioner shall ensure that services provided pursuant to this subsection are not phased out and that no person receiving such services is institutionalized in order to meet federal cost neutrality requirements for the waiver program established pursuant to this subsection.

   Conn. Gen. Stat. § 17b-602a (a) provides that the Department of Social Services, in consultation with the Department of Mental Health and Addiction Services, may seek approval of an amendment to the state Medicaid plan or a waiver from federal law, whichever is sufficient and most expeditious, to establish and implement a Medicaid-financed home and community-based program to provide community-based services and, if necessary, housing assistance, to adults with severe and persistent psychiatric disabilities being discharged or diverted from nursing home residential care.

   The Department has the authority to administer an acquired brain injury waiver following federal law.

The Department and DMHAS are authorized under Section 17b-602a (a) of the Connecticut General Statutes to cooperate in the implementation of the Connecticut Mental Health Waiver, a Medicaid-financed home and community-based program.

2. Regulations of Connecticut State Agencies ("Regs. Conn. State Agencies") § 17b-260a-1 provides the Acquired Brain Injury (ABI) waiver program is established pursuant to sections 17b-260a(a)and 17b-260a(b) of the Connecticut General Statutes and 42 USC 1396n(c). The ABI waiver program provides, within the limitations described in sections 17b-260a-2 to 17b-260a-18, inclusive, of the Regulations of Connecticut State Agencies, a range of nonmedical, home and community-based services to individuals 18 years of age or older with an ABI who, without such services, would otherwise require placement in a hospital, nursing facility (NF), or Intermediate Care Facility for Individuals with Intellectual Disabilities (ICF/IID). The intention of the ABI waiver program is to enable such individuals, through person-centered planning, to receive home and community-based services necessary to allow such individuals to live in the community and avoid institutionalization.

   Regs. Conn. State Agencies § 17b-260a-2 provides for the ABI program scope. Sections 17b-260a-1 to 17b-260a-18, inclusive, of the Regulations of Connecticut State Agencies set forth the requirements for eligibility and payment of services to eligible individuals participating in the ABI waiver program. These regulations also describe program requirements; services available; service requirements; department, provider, and individual responsibilities; residential setting requirements; and limitations under the ABI waiver program.

   Regs. Conn. State Agencies § 17b-260a-3 provides (1) "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.

   Regs. Conn. State Agencies § 17b-260a-4 provides the ABI waiver program is not an entitlement program. Services, waiver slots, and access to services under the ABI waiver program may be limited based on available funding and program capacity.

   Regs. Conn. State Agencies §17b-260a-9(b) provides the department shall conduct a pre-screen of the applicant following the receipt of the application, and prior to placing the applicant's name on the waiting list, to determine whether the applicant (1) meets the financial and programmatic requirements described in section 17b-260a-5 of the Regulations of Connecticut State Agencies, and (2) requires one of the level-of-care categories described in subsection (d) of this section.

Regs. Conn. State Agencies §17b-260a-9(c) provides that applications shall be pre-screened based upon the information contained in the completed application, as well as information obtained from: the individual; a neuropsychological examination report prepared by a qualified neuropsychologist; and any other clinical personnel who are familiar with the individual's case and history. In order to be considered, the neuropsychological examination report must have been completed no more than two years before the application date, provided, however, that the department retains the discretion to increase this time limitation on a case-by-case basis. The neuropsychological examination report shall be submitted to the department no later than six months following the application date, except that the department may extend this deadline for an additional 90 days if a neuropsychological examination appointment has been scheduled. Failure by the individual to meet this deadline shall result in the denial of the application.

The Department properly completed a prescreening of the Appellant to determine her eligibility for the ABI waiver program.

The Department correctly determined the Appellant does not meet the definition of ABI as outlined in regulation due to her diagnosis of congenital hydrocephalus.

3. Section 1915 (c)(1) of the Social Security Act [Title 42, United States Code ("U.S.C.") § 1396n] provides the Secretary may by waiver provide that a State plan approved under this title may include as "medical assistance" under such plan payment for part or all of the cost of home or community-based services (other than room and board) approved by the Secretary which are provided pursuant to a written plan of care to individuals for whom there has been a determination that but for the provision of such services the individuals would require the level of care provided in a hospital or a nursing facility or intermediate care facility for the mentally retarded the cost of which could be reimbursed under the State plan. For purposes of this subsection, the term "room and board" shall not include an amount established under a method determined by the State to reflect the portion of costs of rent and food attributable to an unrelated personal caregiver who is residing in the same household with an individual who, but for the assistance of such caregiver, would require admission to a hospital, nursing facility, or intermediate care facility for the mentally retarded.

   Section 1915 (c)(2) (B) of the Social Security Act [Title 42, United States Code ("U.S.C.") § 1396n] provides the State will provide, with respect to individuals who (i) are entitled to medical assistance for inpatient hospital services, nursing facility services, or services in an intermediate care facility for the mentally retarded under the State plan, (ii) may require such services, and (iii) may be eligible for such home or community-based care under such waiver, for an evaluation of the need for inpatient hospital services, nursing facility services, or services in an intermediate care facility for the mentally retarded; (C) such individuals who are determined to be likely to require the level of care provided in a hospital, nursing facility, or intermediate care

facility for the mentally retarded are informed of the feasible alternatives, if available under the waiver, at the choice of such individuals, to the provision of inpatient hospital services, nursing facility services, or services in an intermediate care facility for the mentally retarded.

Application for 1915(c) HCBS Waiver: CT.0653.R02.00-Apr 01, 2017, Appendix D-1 (e) describes service Plan Development and provides in part that if a waiver participant's choices are such that waiver program is concerned that it will not be able to assure the waiver participant's health and welfare, this concern is clearly discussed with waiver participant. If the waiver participant's health and welfare can be assured then the waiver participant can remain on the waiver.

The Connecticut Mental Health Waiver is subject to the requirements of Section 1915 (c)(1) of the Social Security Act as well as the plain language of the approved Medicaid waiver.

The Department DMHAS acted correctly to assess the Appellant's abilities to perform critical needs, i.e., ADLs, and to determine whether the Appellant's condition is stable enough for her to return to the community.

4. Title 42 of the Code of Federal Regulations ("C.F.R.") § 441.301(b) provides, in relevant part, if the agency furnishes home and community-based services, as defined in § 440.180 of this subchapter, under a waiver granted under this subpart, the waiver request must – (1) Provide that the services are furnished – (i) Under a written person-centered service plan (also called a plan of care) that is based on a person-centered approach and is subject to approval by the Medicaid agency.

   42 C.F.R. § 441.301 (b) (6) provides contents of the request for a waiver be limited to one or more of the following target groups or any subgroup thereof that the State may define : (i) Aged or disabled, or both; (ii) Individuals with Intellectual or Developmental Disabilities, or both (iii) Mentally ill.

   The Department correctly determined the Appellant meets the waiver target group criteria.

5. 42 C.F.R. § 441.301 (c) provides in relevant part a waiver request under this subpart must include the following – (1) Person-centered planning process. The individual will lead the person-centered planning process where possible. The individual's representative should have a participatory role, as needed, and as defined by the individual, unless State law confers decision-making authority to the legal representative. All references to individuals include the role of the individual's representative. In addition to being led by the individual receiving services and supports, the person-centered planning process: (i) Includes people chosen by the individual. (ii) Provides necessary information and support to ensure that the individual directs the process to the maximum extent possible and is enabled to make informed

choices and decisions. (vii) Offers informed choices to the individual regarding the services and supports they receive and from whom.

42 C.F.R. § 441.301 (c) (2) provides for the Person-Centered Service Plan. The person-centered service plan must reflect the services and supports that are important for the individual to meet the needs identified through an assessment of functional need, as well as what is important to the individual with regard to preferences for the delivery of such services and supports. Commensurate with the level of need of the individual, and the scope of services and supports available under the State's 1915(c) HCBS waiver, the written plan must: (i) Reflect that the setting in which the individual resides is chosen by the individual. The State must ensure that the setting chosen by the individual is integrated in, and supports full access of individuals receiving Medicaid HCBS to the greater community, including opportunities to seek employment and work in competitive integrated settings, engage in community life, control personal resources, and receive services in the community to the same degree of access as individuals not receiving Medicaid HCBS. (ii) Reflect the individual's strengths and preferences. (iii) Reflect clinical and support needs as identified through an assessment of functional need. (vi) Reflect risk factors and measures in place to minimize them, including individualized backup plans and strategies when needed. (xii) Prevent the provision of unnecessary or inappropriate services and supports.

The Department's determination that C.F.R. 441.301 (c) (2) (xii) prevents the provision of unnecessary or inappropriate services and supports is backed by the Department's conclusion that the Appellant's health and safety in the community could not be assured by the level of care of MHW services. The Appellant's needs are best met in an intermediate mental health care facility at this time.

DISCUSSION

The Appellant's brother noted his sister has previously been able to live a "somewhat contented life" in the community. He believes her needs were at a higher level than the caregivers provided by ABI were directed to assist with. He believes that the level of supervision offered to his sister led her to feel "incarcerated" with a feeling of hopelessness for her future. This resulted in his sister having an elevated level of frustration that caused her inappropriate and anger-induced behavior. His concerns, though well placed, do not outweigh the Department's findings and that of the medical professionals. Although the Appellant's brother noted [redacted] assessment completed on [redacted] 2020, touched on the possible discharge to the community, the Appellant's current psychological medical condition, as evidenced by her recent hospitalizations and the medical documentation provided for the hearing record supports the Appellant's need for the assistance offered in an institutional setting and outweighs the results of [redacted] evaluation.

Before the Appellant's admission to [redacted], the Appellant was receiving ABI Waiver II services starting in [redacted] 2015. The Appellant's past receipt of ABI II services, however lengthy, was due to Departmental error according to Anna Karabin, DSS ABI program, and is not a factor in this decision as the past receipt of assistance is no guarantee of current or future eligibility.

Regulation is clear that an ABI Waiver II program applicant must meet the medical definition criteria as outlined in the policy. In the present case, the Appellant does not. With regards to the Appellant's MHW application, the Appellant's health and safety in the community cannot be assured. As a result, absent any recent medical evidence to the contrary, the Department's decision to deny MFP services for the Appellant is upheld.

DECISION

The Appellant's appeal is denied.

Christopher Turner
Hearing Officer

Cc: hearings.commops@ct.gov
Anna Karabin, DSS Central Office
Erin Smith, Department of Mental Health
[redacted]

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, law, and 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 06105-3730.

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, if 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.