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

[redacted] 2018
Signature confirmation

Case: [redacted]
Client: [redacted]
Request: [redacted]

NOTICE OF DECISION

PARTY

[redacted]

PROCEDURAL BACKGROUND

On [redacted] 2018, the Department of Social Services (the "Department") issued [redacted] (the "Appellant") a *Notice of Action/Service Budget Reduction* stating that it was reducing her Community First Choice Option[1] ("Community First Choice") budget from $59,694.33 to $0.00 effective [redacted] 2018.

On [redacted] 2018, the Appellant filed an administrative hearing request with the Office of Legal Counsel, Regulations, and Administrative Hearings ("OLCRAH").

On [redacted], 2018, the OLCRAH issued a notice scheduling the administrative hearing for [redacted], 2018. The Appellant requested a postponement of the administrative hearing; the OLCRAH granted the request.

On [redacted], 2018, 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 at the Appellant's home. The following individuals attended the hearing:

[redacted], Appellant
[redacted], Appellant's witness (mother)
Dane Lustila, Community First Choice Unit, Department's representative
Christina Mueller, Western Connecticut Agency on Aging, Department's witness
Carla Gilbode, Western Connecticut Agency on Aging, Department's witness

[1] The Community First Choice Option (or "Community First Choice") is an optional amendment to a State plan to provide home- and community-based attendant services and supports, as authorized pursuant to Section 2401 of the Patient Protection and Affordable Care Act, P.L. 111-148.

Eva Tar, Hearing Officer

By mutual agreement at the [redacted] 2018 administrative hearing, the close of the hearing record was extended through [redacted] 2018 for the submission of additional evidence by the Department, with a comment period of one week past the close of evidence.

On [redacted], 2018, the Department's representative requested an extension to the close of the hearing record through [redacted], 2018 for good cause; the hearing officer granted the Department's request, extending the comment period through [redacted] 2018. On [redacted], 2018, the comment period further was extended through [redacted], 2018, as requested by the Appellant.

The administrative hearing record closed [redacted] 2018.

STATEMENT OF ISSUE

The issue is whether the Department correctly reduced the Appellant's Community First Choice budget to $0.00 effective [redacted], 2018.

FINDINGS OF FACT

1. The Appellant is [redacted] years old. (Appellant's testimony)(Department's Exhibit 3)

2. The Appellant and her mother live together. (Appellant's testimony)

3. The Appellant's mother is the Appellant's full-time personal care assistant. (Appellant's testimony)(Appellant's witness's testimony)

4. The Appellant has a second, part-time personal care assistant. (Appellant's testimony)

5. The Appellant has the following diagnoses: neuropathy, seizure disorder/epilepsy, asthma, chronic bronchitis, diabetes mellitus (Type 1), Stage 3 kidney disease, gastroparesis, hypertension, anxiety, and depression. (Appellant's testimony)(Department's Exhibit 3)

6. The Appellant is not undergoing dialysis treatments. (Appellant's testimony)

7. The Appellant's seizures generally happen in her sleep; she will wake up with a foggy feeling or find herself on the floor. (Appellant's testimony)

8. The Appellant is blind in her left eye. (Appellant's testimony)

9. The Appellant does not demonstrate a speech or communication deficit. (Department's Exhibit 3)

10. The Appellant has difficulty turning when standing, has dizziness, and an unsteady gait. (Department's Exhibit 3)(Appellant's testimony)

11. The Appellant can't stand for too great a period of time; she can stand for at most 10 minutes. (Appellant's testimony)

12. The Appellant falls several times per week. (Appellant's testimony)

13. The Appellant regularly uses a wheelchair; she occasionally uses a cane. (Appellant's testimony)

14. Prior to [redacted] 2018, the Appellant's Community First Choice annual budget equaled in excess of $59,000.00.[2] (Department's Exhibit 2)

15. The Department's witness completed an in-person review of the Appellant's level of need for Community First Choice services, assessing the Appellant's ability to perform the following activities of daily living ("ADLs"): bathing, dressing, toileting, transferring, and eating. (Department's witness's testimony)(Department's Exhibit 2)(Department's Exhibit 3)

16. The Appellant is independent in toileting, transferring, and eating; she has open-door supervision for bathing; and she needs limited assistance for dressing. (Appellant's testimony)(Department's Exhibit 2)

17. The Appellant's personal care assistants cook and plate the Appellant's meals, prepare the Appellant's bathroom to make sure the floor is clear, portion out her medication, and provide companionship. (Appellant's testimony)

18. With respect to Community First Choice, a "need factor" is defined as: 1. Rehabilitative Services (physical therapy, occupational therapy, speech therapy): the individual has restorative potential; 2. Behavioral Need: requires daily supervision to prevent harm; 3. Medication supports: requires assistance for administration of physician-ordered medications. Includes supports beyond set up. (Department's Exhibit 4)

19. The Appellant's personal care assistants do not provide physical therapy, occupational therapy, or speech therapy to the Appellant.

20. The Appellant is not receiving therapy for anxiety and depression; she is looking for a therapist. (Appellant's testimony)

21. The Appellant does not exhibit wandering, verbal abuse, physical abuse, socially inappropriate or disruptive behavior, inappropriate public sexual behavior or public

[2] The [redacted], 2018 Revised CFC Individual Budget identifies $59,286.10 in CFC services ($58,256.98 plus $1,029.12); the [redacted], 2018 *Notice of Action* notes the CFC budget as equaling $59,694.33. (Department's Exhibit 2)

disrobing, does not resist care, does not do self-injurious behavior, or property destruction. (Department's Exhibit 3)

22. The Appellant does not have a behavioral issue that requires daily supervision to prevent harm. (Department's Exhibit 3)

23. The Appellant has used injectable insulin since she was five years old; she self-administers the insulin. (Appellant's testimony)

24. The Appellant has difficulty reading prescription labels; on occasion, she takes the incorrect dosages. (Appellant's testimony)

25. The Appellant's personal care assistants do not provide medication assistance to the Appellant that is beyond set-up. (Appellant's testimony)(Appellant's witness's testimony)

26. The Appellant does not have a "need factor," as defined by Community First Choice.

27. With respect to Community First Choice, an individual requires institutional level of care under the following conditions: the individual requires "substantial assistance" for personal care. "Substantial assistance" is: 1. Supervision or cueing with three or more ADLs plus need factor; 2. Hands-on care for three or more ADLs; 3. Hands-on care for two or more ADLs plus need factor; 4. A cognitive impairment which requires daily supervision to prevent harm. (Department's Exhibit 4)

28. The Appellant scored a "5" on a Mini-Cog Test; a score of 4 or 5 means that clinically important cognitive impairment is unlikely. (Department's Exhibit 2)

29. The Appellant shows no deficits in short term memory, procedural memory, and situational memory. (Department's Exhibit 3)

30. The Appellant does not require "substantial assistance" for personal care. She does not require hands-on care for three or more ADLs and does not have a cognitive impairment which requires daily supervision to prevent harm.

31. On [redacted], 2018, the Department issued the Appellant a *Notice of Action/Service Budget Reduction* stating that her previously authorized Community First Choice budget was being reduced to $0.00 effective [redacted] 2018, based on her assessed level of need. (Department's Exhibit 2)

32. On [redacted], 2018, the Appellant filed a request for an administrative hearing. (Hearing record)

33. Deborah E. Fox, R.N., (the "nurse") is employed by the Department. (Department's Exhibit 6)

34. On [redacted] 2018, the nurse reviewed the Appellant's Community First Choice case. (Department's Exhibit 6)

35. The nurse did not overturn the Department's [redacted], 2018 *Notice of Action/Service Budget Reduction*. (Department's Exhibit 6)

CONCLUSIONS OF LAW

1. Section 17b-2 of the Connecticut General Statutes authorizes the Commissioner of the Department of Social Services to administer the Medicaid program.

2. Section 17b-263c (b)(2)(H) of the Connecticut General Statutes provides in part that the commissioner may implement policies and procedures necessary to pursue optional initiatives or policies authorized pursuant to the Patient Protection and Affordable Care Act, P.L. 111-148, and the Health Care and Education Reconciliation Act of 2010, including, but not limited, to: the establishment of a "Community First Choice Option."

3. The Department has the statutory authority to implement policies and procedures regarding establishing the criteria, such as level of care requirements, individuals must meet in order to participate in Community First Option.

4. Title 42 of the Code of Federal Regulations ("C.F.R."), section 441.500 (a) provides that this subpart implements section 1915(k) of the Act, referred to as the Community First Choice Option (hereafter Community First Choice), to provide home and community-based attendant services and supports through a State plan.

5. Community First Choice is designated to make available home and community-based attendant services and supports to eligible individuals, as needed, to assist in accomplishing activities of daily living (ADLs), instrumental activities of daily living (IADLs), and health-related tasks through hands-on assistance, supervision, or cueing. 42 C.F.R. § 441.500 (b).

   42 C.F.R. § 441.505 in part provides the following definitions:
   Activities of daily living (ADLs) means basic personal everyday activities including, but not limited to, tasks such as eating, toileting, grooming, dressing, bathing, and transferring.

6. Community First Choice services and supports under this section, an individual must meet the following requirements:
   (a) Be eligible for medical assistance under the State plan;
   (b) As determined annually—
      (1) Be in an eligibility group under the State plan that includes nursing facility services; or
      (2) If in an eligibility group under the State plan that does not include such nursing facility services, have an income that is at or below 150 percent of the Federal

poverty level (FPL). In determining whether the 150 percent of the FPL requirement is met, States must apply the same methodologies as would apply under their Medicaid State plan, including the same income disregards in accordance with section 1902(r)(2) of the Act; and,

(c) Receive a determination, at least annually, that in the absence of the home and community-based attendant services and supports provided under this subpart, the individual would otherwise require the level of care furnished in a hospital, a nursing facility, an intermediate care facility for individuals with intellectual disabilities, an institution providing psychiatric services for individuals under age 21, or an institution for mental diseases for individuals age 65 or over, if the cost could be reimbursed under the State plan. The State administering agency may permanently waive the annual recertification requirement for an individual if:
   (1) It is determined that there is no reasonable expectation of improvement or significant change in the individual's condition because of the severity of a chronic condition or the degree of impairment of functional capacity;
   (2) The State administering agency, or designee, retains documentation of the reason for waiving the annual recertification requirement.

(d) For purposes of meeting the criterion under paragraph (b) of this section, individuals who qualify for medical assistance under the special home and community-based waiver eligibility group defined at section 1902(a)(10)(A)(ii)(VI) of the Act must meet all section 1915(c) requirements and receive at least one home and community-based waiver service per month.

(e) Individuals receiving services through Community First Choice will not be precluded from receiving other home and community-based long-term care services and supports through other Medicaid State plan, waiver, grant, or demonstration authorities. 42 C.F.R. § 441.510.

7. The Appellant's lack of intellectual disability prohibits her from being institutionalized in an intermediate care facility for individuals with intellectual disabilities.

8. The Appellant's age prohibits her from being institutionalized in an institution providing psychiatric services for individuals under age 21 and from being institutionalized in an institution for mental diseases for individuals age 65 and older.

9. As an eligibility requirement of Community First Choice, the Appellant is subject to an annual review for the purpose of determining whether, in the absence of the home- and community-based attendant services and supports provided through participation in Community First Choice, the Appellant would otherwise require the level of care furnished in a hospital or a nursing facility.

10. The Appellant's current symptoms and mobility deficits are not so severe as to require her to be institutionalized in a hospital or a nursing facility, in the absence of services provided through participation in Community First Choice.

11. For purposes of the administration of the medical assistance programs by the Department of Social Services, "medically necessary" and "medical necessity" mean

those health services required to prevent, identify, diagnose, treat, rehabilitate or ameliorate an individual's medical condition, including mental illness, or its effects, in order to attain or maintain the individual's achievable health and independent functioning provided such services are: (1) Consistent with generally-accepted standards of medical practice that are defined as standards that are based on (A) credible scientific evidence published in peer-reviewed medical literature that is generally recognized by the relevant medical community, (B) recommendations of a physician-specialty society, (C) the views of physicians practicing in relevant clinical areas, and (D) any other relevant factors; (2) Clinically appropriate in terms of type, frequency, timing, site, extent and duration and considered effective for the individual's illness, injury or disease; (3) Not primarily for the convenience of the individual, the individual's health care provider or other health care providers; (4) Not more costly than an alternative service or sequence of services at least as likely to produce equivalent therapeutic or diagnostic results as to the diagnosis or treatment of the individual's illness, injury or disease; and (5) Based on an assessment of the individual and his or her medical condition. Conn. Gen. Stat. §17b-259b (a).

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).

12. The home care services provided to the Appellant through Community First Choice are not health services required to prevent, identify, diagnose, treat, rehabilitate, or ameliorate the Appellant's medical conditions or their symptoms.

13. Services provided through Community First Choice are not medically necessary to prevent the Appellant from being institutionalized in a hospital or a nursing facility.

14. The Department correctly reduced the Appellant's Community First Choice budget to $0.00 effective [redacted] 2018.

DISCUSSION

The purpose of the Community First Choice is to prevent or delay institutionalization of individuals residing in the community. Eligible participants must demonstrate, at least annually, that in the absence of the home and community-based attendant services and supports provided through Community First Choice, the participants otherwise medically would require in-patient hospitalization or the level of care furnished by a nursing facility.

In Connecticut, Community First Choice participants must have a medical condition or combination of conditions that causes them to require "extensive assistance" with personal care as related to the following activities of daily living (ADLs): bathing, dressing, toilet use, transferring, and eating. Participants who require less than extensive assistance with personal care—such as having multiple ADLs that require

"supervision or cueing" vs. "hands on" care—must demonstrate at least one "need factor."

The Appellant is independent with four of the five ADLs. At most, she requires "limited assistance" with one ADL (dressing) due to impaired balance. She has open-door supervision for bathing, i.e. "supervision or cueing." She is able to use a toilet without intervention, is able to transfer herself from her bed to a chair, and uses utensils to eat her food.

As defined by Community First Choice, as the Appellant is absent a "need factor." She is not undergoing rehabilitative services (physical therapy, occupational therapy, speech therapy) for restorative potential; she does not demonstrate a *behavioral* need that requires daily supervision to prevent harm; and she does not require assistance for administration of physician-ordered medications in excess of having the medications set up for her to self-administer.

At this time, the Appellant's Community First Choice benefits of 63 hours per week of care distributed between two personal care assistants are not medically necessary. The Department's [redacted] 2018 discontinuance of the Appellant's Community First Choice benefits is affirmed.

DECISION

The Appellant's appeal is DENIED.

Eva Tar – electronic signature
Eva Tar
Hearing Officer

Cc: Dane Lustila, DSS-Central Office
Shirlee Stoute, DSS-Central Office
Paul Chase, DSS-Central Office
Lisa Bonetti, DSS-Central Office
Laurie Filippini, DSS-Central Office
Pam Adams, DSS-Central Office

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 Legal Counsel, Regulations, and Administrative Hearings, 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, 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 his 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.