STATE OF CONNECTICUT
DEPARTMENT OF SOCIAL SERVICES
OFFICE OF LEGAL COUNSEL, REGULATIONS, AND ADMINISTRATIVE HEARINGS
55 FARMINGTON AVENUE
HARTFORD, CT 06105-3725

[redacted] **2019**
Signature Confirmation

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

NOTICE OF DECISION
PARTY

[redacted]

PROCEDURAL BACKGROUND

On [redacted] 2019, the Department of Mental Health and Addiction Services ("DMHAS") issued a notice of action to [redacted] (the "Appellant") indicating the Appellant's safety cannot be assured by the level of care of Mental Health Waiver ("MHW") services.

On [redacted] 2019, the Appellant requested an administrative hearing because he is aggrieved by DMHAS' denial of MHW services.

On [redacted] 2019, the Office of Legal Counsel, Regulations, and Administrative Hearings ("OLCRAH") issued a notice scheduling the administrative hearing for April 5, 2019.

On [redacted] 2019, 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.

The following individuals were present at the hearing:

[redacted] the Appellant
[redacted] Appellant's Case Manager from United Services
Melinda Lewis, Community Support Clinician, DMHAS
Katie Daly, Supervisor, Advanced Behavioral Health
Cheryl Janes, Manager, DMHAS, Mental Health Waiver
Christopher Turner, Hearing Officer

STATEMENT OF THE ISSUE

The issue to be decided is whether DMHAS properly denied the Appellant's request for MH Waiver services.

FINDINGS OF FACT

1. On [redacted] 2018, the Department received a signed referral from the Appellant's case manager concerning enrollment in the MH Waiver program. (Hearing Record)

2. On [redacted] 2018, the Appellant's name was placed on the MH Waiver program wait list. (Hearing summary)

3. On [redacted] 2019, the Appellant's name was taken from the wait list and a face-to-face assessment scheduled with the Appellant for [redacted] 2019. (Hearing summary)

4. On [redacted] 2019, the Appellant participated in a comprehensive Level of Assistance assessment ("LOA") with Melinda Lewis a Community Support Clinician with DHMAS. The Assessment included an evaluation of the Appellant's physical status, mental status, and functional abilities. The assessment recorded the Appellant concerning support needed and support level required. The scoring ranged from zero to five with zero being unable to assess with five needing maximum or pronounced assistance. The Assessment was completed by means of direct observation, self-reporting and collateral contacts. The Appellant's case manage was also present. (Exhibit 1: Assessment; Hearing summary)

5. The Appellant scored a two on his LOA in regards to bathing. The Appellant requires standby assistance with bathing, at time needing help to get in and out of the tub. (Exhibit 1)

6. The Appellant scored a one on his LOA in regards to dressing. (Exhibit 1)

7. The Appellant scored a one on his LOA concerning toileting. (Exhibit 1)

8. The Appellant scored a two on his LOA regarding mobility. The Appellant has limited range of motion, balance issues due to leg amputation. (Exhibit 1)

9. The Appellant scored a three on his LOA regarding transferring. The Appellant requires standby or hands on assistance for safety. (Exhibit 1)

10. The Appellant scored a one on his LOA regarding eating/feeding. The Appellant is independent with this activity. (Exhibit 1)

11. The Appellant scored a two on his LOA regarding medication administration. The Appellant is able to take his medications if individual dosages are prepared in advance or given daily reminders. (Exhibit 1)

12. The Appellant scored a three on his LOA regarding memory/cognition deficit. The Appellant requires consistent and ongoing reminding with planning, adjusting to new and familiar routines, as well as needing maximum assistance finding solutions to problems. At times, the Appellant gets confused and forgets when his appointments are scheduled. The Appellant reports becoming easily agitated and at times verbally abusive to family and providers when he becomes stressed. The Appellant fired his last caregiver from the Visiting Nurses Association ("VNA") due to the VNA's tardiness. (Exhibit 1; Appellant's testimony)

13. The Appellant scored a one on his LOA regarding safety skills. The Appellant was not evaluated concerning use of street drugs and alcohol usage. (Exhibit 1)

14. The Appellant scored a two on his LOA regarding independent living skills. The Appellant reports being able to maintain his apartment, but it has become physically challenging him to bend down and stand up due to his amputation. The Appellant wishes to receive help with washing dishes. (Exhibit 1; Appellant's testimony)

15. The Appellant scored a four on his LOA regarding interpersonal communication skills. The Appellant reports becoming easily agitated and at times verbally abusive to family and providers when he becomes stressed. The Appellant goes to therapy twice monthly to help with his anger management. (Exhibit 1; Appellant's testimony)

16. The Appellant scored a three on his LOA regarding health awareness. The Appellant reports purchasing his own meds and taking them independently but sometimes forgets to take his insulin. The Appellant relies on medical appointment scheduling by his case manager and family for transportation to his medical appointments. (Exhibit 1; Appellant's testimony)

17. The Appellant scored a five on his LOA regarding coping, stress management, and impulse control skills. The Appellant reports having poor impulse control. The Appellant becomes easily agitated and at times verbally abusive to family and providers as well as neighbors when he is stressed. (Exhibit 1; Appellant's testimony)

18. The Appellant scored a three on his LOA regarding transportation. The Appellant rides his bike when weather permits. The Appellant relies on family and friends to take him to his medical appointments, run errands, and the like. The Appellant does not utilize the Department's medical transportation provider VEYO due to unreliability. (Exhibit 1; Appellant's testimony)

19. [redacted] 2019, the Department issued a notice of action to the Appellant informing him that the Department denied his request/application for MH Waiver benefits because the Appellant's safety and the safety of the provider(s) cannot be assured by the level of care of MHW services. (Notice of Action; Record; Hearing record)

20. The Department of Social Services is Connecticut's Single State Agency for Medicaid and operates several Medicaid Home and Community-Based Services waiver programs authorized under Section 1915(c) of the Social Security Act that provide Community-Based services to target populations of individuals who would otherwise require institutionalization. (Hearing Record)

21. 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)

22. DMHAS, as the operating agency for the MH Waiver, recruits and establishes agreements with service provider agencies that perform the services that are part of the Waiver. (Hearing Record)

23. The CMS Waiver Application Pages 21-23, Appendix B, B-1(b), provides for additional criteria and states in relevant part "Waiver participant must meet all of the requirements of Section 1 and one of the requirements of Section 2. Further, Appendix B, B-1 (b) 2 stipulates the Appellant have a "level of risk to self or others that a Community Support Clinician has determined can be managed safely in the community." (Exhibit 4: Pages 21-23)

24. The Appellant [redacted] who is a HUSKY C Medicaid recipient. (Hearing Record)

25. The Appellant has been diagnosed with serious mental illness, major depressive disorder persistent in nature and disclosed anger issues. (Exhibit 3: MHW Eligibility Screening and Disposition)

26. The Appellant suffers from insomnia, diabetes. The Appellant had his right leg amputated due to his diabetes. (Exhibit 1; Appellant's testimony)

27. The Appellant pled guilty to assault on a female in 1995. (Appellant's testimony)

28. The Appellant is not currently involved in the criminal justice system. The Appellant completed his parole requirements 10 years ago. (Appellant's testimony)

29. The Appellant has been 10 years sober. (Appellant's testimony)

30. The Appellant did not display or show anger during his assessment. (Ms. Lewis' testimony; [redacted] testimony)

31. There are no current complaints either verbal or written concerning the Appellant's behavior toward service providers male or female. (Ms. Lewis' testimony; [redacted] testimony)

32. The Appellant is more comfortable with male white only providers as he struggles with feelings of racism. The Appellant and his case manager agree the restriction to white only workers/providers is appropriate due to the Appellant's anger issues. (Appellant's testimony; [redacted] testimony)

33. It is difficult to obtain and contract with white only male staffing due to geographic concerns. There are a limited number of DMHAS contracted agencies, and an inadequate number of white male staff working for those agencies who are available to provide RA services to MH Waiver-eligible individuals. This restriction results in inconsistent services provided to the Appellant and as a result endangers the Appellant's health and safety in the community. (Kathy Daly's testimony; Ms. Janes' testimony)

34. A Recovery Plan employing Recovery Assistant ("RA") services is drawn up after the approval of waiver services. The typical service provider DHMAS uses are recent female high school graduates. (Testimony, Hearing Record)

35. The Appellant request's assistance with medication management, transportation, meal preparation, and transferring. (Appellant's testimony)

36. 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 [redacted] 2019, and the hearing was held on [redacted] 2019. This decision is due no later than [redacted] 2019 and therefore timely.

CONCLUSIONS OF LAW

1. Connecticut General Statutes § 17b-2 provides that the Department of Social Services is designated as the state agency for the administration of (6) the Medicaid program pursuant to Title XIX of the Social Security Act.

2. § 1915(c)(1) of the Social Security Act provides in relevant part "The Medicaid Home and Community-Based Services (HCBS) waiver program is authorized in §1915(c) of the Social Security Act. The program permits a State to furnish an array of home and community-based services that assist Medicaid beneficiaries to live in the community and avoid institutionalization. The State has broad discretion to design its waiver program to address the needs of the waiver's target population. Waiver services complement and/or supplement the services that are available to

participants through the Medicaid State plan and other federal, state, and local public programs as well as the supports that families and communities provide.

3. Title 42 of the Code of Federal Regulations ("CFR") § 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 plan of care) that is based on a person-centered approach and is subject to approval by the Medicaid agency.

   Title 42 of the CFR § 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. (2) 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 back-up plans and strategies when needed. (*xii) Prevent the provision of unnecessary or inappropriate services and supports.*

   The Department's determination that CFR 441.301 (c) (2) (xii) prevents the provision of unnecessary or inappropriate services and supports is supported by the Department's determination that the Appellant's health and safety could not be assured by the level of care of MHW services due to the restrictive nature of male white only care providers needed by the Appellant.

DISCUSSION

DMHAS's decision to limit staff to white, male-only providers was based on information about the Appellant's current anger issues and his 1995 conviction of sexual assault on a female. While it is true the Appellant completed his probation ten years ago and has not been arrested since, the Appellant and his case manager agree with DHMAS' decision to restrict service providers to white only males. Consequently, DHMAS' contention the Appellant will be subject to inconsistent services due to a lack of credentialed providers resulting in a risk to self or others is credible and supported by regulation.

DECISION

The Appellant's appeal is denied.

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Christopher Turner
Hearing Officer

Cc: Cheryl Janes, DMHAS
Laurie Filippini, DSS

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 06105-3725.

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, 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, 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.