

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

██████████ 2020  
Signature confirmation

Case: ██████████  
Client: ██████████  
Request: 152681

**NOTICE OF DECISION**

**PARTY**

██████████

**PROCEDURAL BACKGROUND**

On ██████████, 2020, the Department of Social Services (the "Department") issued a *Notice of Action* to ██████████ (the "Appellant") terminating her participation in the Connecticut Mental Health Waiver effective ██████████ 2020.

On ██████████ 2020, the Office of Legal Counsel, Regulations, and Administrative Hearings ("OLCRAH") received the Appellant's administrative hearing request.

On ██████████, 2020, the OLCRAH issued a notice scheduling the administrative hearing for ██████████ 2020. The OLCRAH granted the Appellant's request for a postponement of the administrative hearing to ██████████ 2020 to accommodate the availability of her witness.

On ██████████ 2020, the OLCRAH postponed the Appellant's rescheduled ██████████ 2020 hearing due to the global coronavirus pandemic, COVID-19.

On ██████████ 2020, 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 by telephone conferencing.<sup>1</sup> The following individuals participated:

██████████, Appellant

██████████, Appellant's witness

Cheryl Janes, Department of Mental Health and Addiction Services ("DMHAS"), Department's representative

Cindy Drost, DMHAS, Department's representative

Eva Tar, Hearing Officer

---

<sup>1</sup>Executive Order 7E, (Governor Ned Lamont, ██████████/20), in part provides for the suspension of in-person hearing attendance at the Department's administrative hearings.

Prior to the [REDACTED] 2020 close of the hearing record for the submission of the Appellant's evidence, DMHAS submitted new evidence that for good cause had not been provided for the [REDACTED] 2020 administrative hearing.

The undersigned hearing officer extended the close of the hearing record through [REDACTED] 2020 to allow the Appellant the opportunity to provide written comment to the new evidence. The Appellant submitted written comment. On [REDACTED] 2020, the hearing record closed.

### **STATEMENT OF ISSUE**

The issue is whether the Department correctly determined that the Appellant failed to meet the Connecticut Mental Health Waiver's level of care requirement, rendering her ineligible to participate in the Waiver.

### **FINDINGS OF FACT**

1. The Connecticut Mental Health Waiver is an approved waiver under 1915c of the Social Security Act. (Hearing record)
2. As one of the requirements for participation in the Connecticut Mental Health Waiver, an individual must meet its nursing facility level of care criteria by requiring assistance with three or more of the following critical needs: bathing, dressing, toileting, transferring, eating/feeding, meal preparation, and medication administration. (DMHAS Exhibit 1)
3. Applicants with four or more cognitive deficits and behavioral challenges may qualify for the Connecticut Mental Health Waiver by demonstrating two critical needs (i.e., bathing, dressing, toileting, transferring, eating/feeding, meal preparation, and medication administration) in addition to the cognitive deficits and behavioral challenges. (DMHAS Exhibit 1)
4. The Appellant is [REDACTED] years old. (Appellant Exhibit A)
5. On or around [REDACTED] 2018, the Appellant was placed on a waitlist for a level of care assessment for the Connecticut Mental Health Waiver. ([REDACTED] Testimony)(DMHAS Exhibit 2a)
6. In [REDACTED] 2019, the Appellant had right kneecap replacement surgery. (Appellant Exhibit A)
7. On [REDACTED] 2019, a DMHAS clinician assessed the Appellant as requiring supervision with transferring, administration of medication, and bathing, with needs for physical assistance as to meal preparation. (DMHAS Exhibit 2)
8. In [REDACTED] 2019, the Appellant became an enrollee in the Connecticut Mental Health Waiver. ([REDACTED] Testimony)
9. On [REDACTED], 2019, a DMHAS clinician completed an initial psychosocial health assessment of the Appellant. (DMHAS Exhibit 4)

10. On [REDACTED], 2019, a DMHAS clinician assessed the Appellant as independent in bathing, dressing, transferring, toileting, feeding/eating, and administration of medication, with the Appellant needing help with meal preparation and some ambulation. (DMHAS Exhibit 3)
11. On [REDACTED] 2019, a DMHAS clinician and an [REDACTED] supervisor met with the Appellant in part to discuss her improvement subsequent to the [REDACTED] 2019 evaluation. (DMHAS Exhibit 5)
12. Since [REDACTED] 2019, with support from [REDACTED] employees, the Appellant has been able to clear approximately two- to two-and-a-half rooms of her five-room townhouse. (Appellant Testimony)([REDACTED] Testimony)
13. On [REDACTED] 2020, the Department issued a *Notice of Action* to the Appellant terminating her participation in the Connecticut Mental Health Waiver effective [REDACTED] 2020. (Hearing request)
14. On [REDACTED], 2020, a DMHAS clinician assessed the Appellant as independent in bathing, dressing, transferring, toileting, feeding/eating, meal preparation, and administration of medications. The clinician indicated that the Appellant may need standby assistance outside of the home. (DMHAS Exhibit 7)
15. In [REDACTED], the Appellant has been treated for the following conditions by her mental health providers: depression with anxiety, PTSD [post-traumatic stress disorder], hypertension, calculus ureter, and kidney stone. (Appellant Exhibit A)
16. The Appellant takes her medications in pill or capsule form. (Appellant Testimony)(Appellant Exhibit A)
17. The Connecticut Mental Health Waiver contracts [REDACTED] to provide services to its participants. [REDACTED] Testimony)
18. [REDACTED] employees “coach [the Appellant] in her goals,” encourage her to declutter her home, help her fill out forms, and remind her to be on time for appointments. ([REDACTED] Testimony)
19. The Appellant also has the [REDACTED] employees hand her bins of her possessions so she can sort through them. (Appellant testimony)
20. The Appellant does not require assistance of another individual to complete the following activities of daily living (“ADLs”): bathing, dressing, toileting, walking, transferring, and eating. (Appellant Testimony)
21. The Appellant does not use a wheelchair or walker. (Appellant Testimony)
22. The Appellant’s surgeon who performed the knee surgery has recommended that the Appellant walk in order “to keep mobility and improve physically after having major surgery.” (Appellant Email)

23. The Appellant is able to walk to an [REDACTED] (grocery store) and do some yardwork. (DMHAS Exhibit 8)(Appellant Email)
24. [REDACTED]. does not provide “meal prep” to the Appellant. [REDACTED] (Testimony)
25. The Appellant is able to make quick, pre-made, or “instant meals.” (Appellant Testimony)(Appellant Email)
26. The Appellant is able to heat frozen dinners and provide takeout for an elderly individual in the community, a service for which she received payment. (DMHAS Exhibit 8)(Appellant Email)
27. The COVID-19 pandemic’s effect on the operation of the State of Connecticut’s services to the public is an extenuating circumstance beyond the commissioner’s control.
28. Connecticut General Statutes § 17b-61 (a), as amended on passage by Section 309 of *Public Act No. 19-117 (January Session)*, provides:  
The Commissioner of Social Services or the commissioner's designated hearing officer shall ordinarily render a final decision not later than ninety days after the date the commissioner receives a request for a fair hearing pursuant to section 17b-60, ... , provided the time for rendering a final decision shall be extended whenever the aggrieved person requests or agrees to an extension, *or when the commissioner documents an administrative or other extenuating circumstance beyond the commissioner's control.* Such decision shall be based upon all the evidence introduced before the commissioner or the commissioner's designated hearing officer and all pertinent provisions of law, regulations and departmental policy, and shall supersede the decision made without a hearing. ... Failure by the commissioner or the commissioner's designated hearing officer to render a final decision within the time limits set forth in this subsection shall not of itself be deemed an approval of the aggrieved person's requested relief on the merits.  
Conn. Gen. Stat. § 17b-61 (a) (emphasis added).

Executive Order 7M, (Governor Ned Lamont, [REDACTED]/20), in part authorizes “each department head, commissioner, agency head, and board and commission of this State to extend, as they deem reasonably necessary to respond to the COVID-19 pandemic or its effects, any statutory or regulatory time requirements, decision-making requirements, hearings, or other time limitations or deadlines, procedure or legal process pertaining to matters under their respective jurisdiction, functions or powers for a period not to exceed 90 days....”

ORDER, (Commissioner Deidre S. Gifford, [REDACTED]20) provides in part: “Section 17b-61(a)’s timeframe for the commissioner or commissioner’s designated hearing officer to render a final decision is extended from 90 to ‘not later than 120 days’ after the date the commissioner receives a request for a fair hearing pursuant to Section 17b-60....”

On [REDACTED] 2020, the OLCRAH received the Appellant’s hearing request. This hearing decision would have become due with the extended deadlines on [REDACTED]

2020. However, the OLCRAH granted the Appellant's request for a postponement of the initially scheduled hearing date of [REDACTED] 2020 through the second scheduled hearing date of [REDACTED] 2020.

The 38-day postponement of the initially scheduled hearing date accordingly extended the deadline for this final decision. This final decision would have become due by [REDACTED] 2020. This final decision is timely.

### **CONCLUSIONS OF LAW**

1. Section 17b-2 of the Connecticut General Statutes in part authorizes the Commissioner of the Department of Social Services to administer the Medicaid program pursuant to Title XIX of the Social Security Act.

Section 17b-602a (a) of the Connecticut General Statutes permits the Department and DMHAS "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 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.**

**DMHAS acted correctly to assess the Appellant's abilities to perform critical needs, i.e., ADLs, to determine whether the Appellant's condition had improved from its initial [REDACTED] 2019 assessment to the point where the Appellant was no longer at risk for institutionalization at a hospital or skilled nursing facility.**

2. Section 1915 (c)(1) of the Social Security Act [Title 42, United States Code ("U.S.C.") § 1396n] provides in part:

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 with respect to 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...."

42 U.S.C. § 1396n (emphasis added).

**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.**

**As the Appellant does not require assistance to complete at least two of her ADLs (with four or more cognitive deficits and behavioral challenges) OR at least three of her ADLs (with less than four or more cognitive deficits and behavioral**

**challenges), she does not meet the Connecticut Mental Health Waiver’s level of care requirement.**

3. Section 17b-259b (a) of the Connecticut General Statutes defines “medically necessary” and “medical necessity” as follows:

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 (a).

**The Appellant did not establish with probative evidence that her medical conditions are generating symptoms of such severity that it would be medically necessary—as “medically necessary” is defined at Conn. Gen. Stat. § 17b-259b (a)—for her to receive institutionalization at a hospital or a skilled nursing facility.**

**The services provided to the Appellant by [REDACTED] employees are primarily for the convenience of the Appellant.**

4. “The department’s uniform policy manual is the equivalent of a state regulation and, as such, carries the force of law.” *Bucchere v. Rowe*, 43 Conn. Supp. 175, 178 (1994) (citing Conn. Gen. Stat. § 17b-10; [Richard v. Commissioner of Income Maintenance, 214 Conn. 601, 573 A.2d 712 \(1990\)](#)).

Section 2540.92 A. of the Department’s Uniform Policy Manual (“UPM”) states that for individuals receiving home and community based services paid for by the Medicaid program, the coverage group is described as follows:

This group includes individuals who:

1. would be eligible for MAABD [Medicaid for the Aged, Blind, and Disabled] if residing in a long term care facility (LTCF); and
2. qualify to receive home and community-based services under a waiver approved by the Centers for Medicare and Medicaid Services; and
3. *without such services, require care in an LTCF.*

UPM § 2540.92 A (emphasis added).

**The Appellant has not established that *but for* the services provided to her by [REDACTED] of coaching her in her goals, encouraging her to declutter her home, helping her fill out forms, reminding her of appointments, and helping her sort through her bins of possessions, she would require institutionalization in a hospital or skilled nursing facility.**

**The Appellant has not met the criteria set in UPM § 2540.92 for receiving home- and community-based services paid for by the Medicaid program.**

**The Department correctly terminated the Appellant's participation in the Connecticut Mental Health Waiver.**

### **DISCUSSION**

The Connecticut Mental Health Waiver is an approved home and community based services waiver authorized under section 1915 (c) of the Social Security Act. This Medicaid waiver provides home- and community-based services to eligible adults with severe mental illness who would otherwise require institutionalization at a hospital or skilled nursing facility.

At her initial [REDACTED] 2019 level of care assessment, the clinician evaluating the Appellant found that the Appellant required "standby assistance" with several ADLs. The assessment was performed in proximity to the Appellant's [REDACTED] 2019 right kneecap surgery. It is reasonable to conclude that at the time of the initial assessment, the Appellant reasonably did require standby assistance with bathing, transferring, "meal prep," and administering her medications.

The Appellant submitted a [REDACTED] 2020 email from a licensed clinical social worker who recommended that the Appellant continue to receive case management and in-home aid services; the social worker opined that the Appellant's symptoms "often impede her ability to engage in daily self care activities." The social worker's assessment as to the Appellant's ability to engage in self care activities was inconsistent with the [REDACTED] 2020 testimony of the Appellant and the testimony of her [REDACTED] witness as well as other substantive evidence in the hearing record. The hearing officer assigned this document lesser weight.

Since [REDACTED] 2019, the Appellant has improved to the point where: 1) she performs her ADLs independently; 2) she walks to a grocery store (walking being an activity recommended by her surgeon); 3) she has helped an elderly individual in the community by heating up his frozen meals, getting takeout, and shopping for his cleaning supplies; 4) and she has cleared approximately two rooms of her five room town house of excess boxes and clutter.

The Appellant uses [REDACTED] services several hours per week to coach her in her goals, help her declutter her home, help her fill out forms, and remind her to be on time for appointments. While these services are helpful and convenient to the Appellant, they are not ones that in their absence would require the Appellant immediately to be hospitalized or placed in a skilled nursing facility.

The Appellant is not eligible to participate in the Connecticut Mental Health Waiver.

**DECISION**

The Appellant's appeal is DENIED.

*Eva Tar - electronic signature*  
Eva Tar  
Hearing Officer

Cc: Cheryl Janes, DMHAS  
Cindy Drost, DMHAS  
Community Options, 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 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.