**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 his Community First Choice Option[1] ("Community First Choice") allocation from $37,425.65 to $22,105.44 effective [redacted] 2018.

On [redacted] 2018, [redacted], the Appellant's legal guardian and father, 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 Department 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. The following individuals attended the hearing:

[redacted], Appellant's representative (father)
[redacted], Appellant's witness (stepmother)
[redacted], Appellant'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.

Christine Weston, Community First Choice Unit, Department's representative
Donna Grieder, Connecticut Community Care, Department's witness
Eva Tar, Hearing Officer

The administrative hearing record closed [redacted] 2018.

## STATEMENT OF ISSUE

The issue is whether the Department correctly reduced the Appellant's Community First Choice annual budget to $22,105.44 effective [redacted] 2018.

## FINDINGS OF FACT

1. The Appellant's date of birth is [redacted]. (Department's Exhibit 3)

2. The Appellant has a complex medical history which includes the excision of a brain tumor in [redacted] 1993, intracranial hemorrhage, and resulting coma. (Appellant's Exhibit B)(Appellant's stepmother's testimony)

3. The Appellant has reduced vision in his left eye and partial paralysis on his left side. (Appellant's stepmother's testimony)(Appellant's witness's testimony)

4. The Appellant does not use a wheelchair, walker, cane, or other assistive technology related to mobility. (Appellant's father's testimony)

5. The Appellant has cognitive deficits; he does not retain information. (Appellant's witness's testimony)

6. The Appellant's method of speech is random and not on point; it has more than once resulted in physical confrontations in public initiated by individuals offended by his comments. (Appellant's stepmother's testimony)

7. The Appellant is incapable of assessing physical risk, taking steps to avoid confrontation, or communicating what is going on to his caretakers or family. (Appellant's stepmother's testimony)(Appellant's witness's testimony)

8. The Appellant sometimes refuses to get out of bed in the morning, to the point where he will wet himself and still remain in bed. (Appellant's stepmother's testimony)

9. The Appellant sometimes refuses to get into or out of a car without physical intervention. (Appellant's stepmother's testimony)

10. The Appellant is a Department of Developmental Services ("DDS") waiver participant. (Appellant's Exhibit C)

11. In 2016, the Appellant's DDS Individual Plan's annual budget equaled $23,586.00. (Department's witness's testimony)

12. On [redacted] 2016, the Appellant applied to participate in the Community First Choice, as administered by the Department. (Department's representative's testimony)

13. On [redacted], 2016, the Department calculated an initial services plan of $37,425.65 for the Appellant's annual Community First Choice budget. (Department's representative's testimony)

14. The initial $37,425.65 Community First Choice budget equaled the difference between the Appellant's total assessed needs of $69,816.00, minus the value of DDS-provided services. (Department's representative's testimony)(Department's Exhibit 2)[2]

15. In 2018, the Department changed its methodology as to the calculation of individual Community First Choice budgets. (Department's representative's testimony)

16. On [redacted] 2018, the Department's witness completed an in-person review of the Appellant's level of need for Community First Choice services. (Department's witness's testimony)(Department's Exhibit 2)(Department's Exhibit 3)(Department's Exhibit 4)

17. On [redacted] 2018, the Department's witness assessed the Appellant's ability to independently perform the following five activities of daily living ("ADLs"): bathing, dressing, toileting, transferring, and eating. (Department's Exhibit 3)

18. The Department's witness did not assess the Appellant's ability to independently perform a sixth ADL: grooming. (Department's Exhibit 3)

19. The Appellant requires extensive assistance with the following activities of daily living: bathing, dressing, and toileting. (Department's Exhibit 3)

20. The Appellant requires cueing and supervision with respect to eating; he does not require "fork-to-mouth" hands-on feeding. (Department's Exhibit 3)(Department's witness's testimony)

21. The Appellant has behavioral concerns regarding food intake and is a choking hazard. (Department's Exhibit 3)

22. The Appellant is independent or requires set-up only with respect to transferring from his bed to a chair; he does not require a mechanical lift or physical intervention that

[2] There is a mathematical error regarding this calculation. [$69,816.00 minus $37,425.65 does not equal $23,586.00.]

requires the support of 50 percent or more of his weight at least three times per week to complete the transfer. (Department's witness's testimony)(Department's Exhibit 3)

23. The Department determined that the Appellant required 26.25 hours per week of personal care assistance budgeted by Community First Choice as follows: 8.75 hours per week per each ADL that he was assessed as requiring extensive assistance to complete. (Department's witness's testimony)

24. The Department did not include in the Appellant's amended Community First Choice budget any hours associated with tasks that required cueing, supervision, or safety. (Department's representative's testimony)(Department's Exhibit 4)

25. The Department did not include in the Appellant's amended Community First Choice budget any hours associated with instrumental activities of daily living ("IADLs"). (Department's representative's testimony)

26. In [redacted] 2018, the Medicaid rate equaled $16.32 per hour for personal care assistant services. (Department's representative's testimony)

27. On [redacted] 2018, the Department issued the Appellant a *Notice of Action/Service Budget Reduction* stating that his previously authorized Community First Choice budget was being reduced to $22,105.44 effective [redacted] 2018, based on his assessed level of need. (Department's Exhibit 2)

28. The Appellant's amended Community First Choice annual budget of $22,105.44 was calculated as follows: $16.32 (hourly rate) multiplied by 26.25 (hours per week); multiplied by 4.3 (weeks per month); multiplied by 12 (months per year).

29. The Appellant's DDS budget for the budget year of [redacted] 2017 through [redacted] 2018 equals $26,685.00. (Appellant's Exhibit C)

## 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. 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.

4. 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).

5. ACTIVITIES OF DAILY LIVING.—The term 'activities of daily living' includes tasks such as eating, toileting, grooming,[3] dressing, bathing, and transferring. 42 United States Code ("U.S.C.") 1396n (k)(6)(A), as amended by P.L. 111-148.

   INSTRUMENTAL ACTIVITIES OF DAILY LIVING.—The term 'instrumental activities of daily living' includes (but is not limited to) meal planning and preparation, managing finances, shopping for food, clothing, and other essential items, performing essential household chores, communicating by phone or other media, and traveling around and participating in the community. 42 U.S.C. § 1396n (k)(6)(F), as amended by P.L. 111-148.

   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,[4] dressing, bathing, and transferring.

   *Instrumental activities of daily living (IADLs)* means activities related to living independently in the community, including but not limited to, meal planning and preparation, managing finances, shopping for food, clothing, and other essential items, performing essential household chores, communicating by phone or other media, and traveling around and participating in the community.

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,

[3] Emphasis added.
[4] Emphasis added.

(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 Department correctly determined that 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, 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.

8. **Assessment of functional need.** States must conduct a face-to-face assessment of the individual's needs, strengths, preferences, and goals for the services and supports provided under Community First Choice in accordance with the following:
   (a) States may use one or more processes and techniques to obtain information, including telemedicine, or other information technology medium, in lieu of a face-to-face assessment if the following conditions apply:
      (1) The health care professional(s) performing the assessment meet the provider qualifications defined by the State, including any additional qualifications or training requirements for the operation of required information technology;
      (2) The individual receives appropriate support during the assessment, including the use of any necessary on-site support-staff; and
      (3) The individual is provided the opportunity for an in-person assessment in lieu of one performed via telemedicine.

(b) Assessment information supports the determination that an individual requires Community First Choice and also supports the development of the person-centered service plan and, if applicable, service budget.
(c) The assessment of functional need must be conducted at least every 12 months, as needed when the individual's support needs or circumstances change significantly necessitating revisions to the person-centered service plan, and at the request of the individual.
(d) Other requirements as determined by the Secretary. 42 C.F.R. § 441.535.

9. The Department incorrectly failed to assess the Appellant's ability to independently perform the following ADL: grooming.

10. The Department's [redacted] 2018 in-person review of the Appellant's functional need for Community First Choice services was incomplete, as it was not a comprehensive assessment of the Appellant's ability to independently perform the six functions specifically identified as ADLs, as codified at 42 U.S.C. § 1396n (k)(6)(A) and 42 C.F.R. § 441.505.

11. **Included services.** If a State elects to provide Community First Choice, the State must provide all of the following services:
(1) Assistance with ADLs, IADLs, and health-related tasks through hands-on assistance, supervision, and/or cueing.
(2) Acquisition, maintenance, and enhancement of skills necessary for the individual to accomplish ADLs, IADLs, and health-related tasks.
(3) Backup systems or mechanisms to ensure continuity of services and supports, as defined in §441.505 of this subpart.
(4) Voluntary training on how to select, manage and dismiss attendants. 42 C.F.R. § 441.520 (a).

12. The Department's [redacted] 2018 amended Community First Choice budget was incomplete as it did not assess the Appellant's need for assistance with IADLs, health-related tasks, supervision, and cueing.

13. The Department's [redacted] 2018 amended Community First Choice budget was incomplete as it did not assess the Appellant's need for the acquisition, maintenance, and enhancement of skills necessary for the Appellant to accomplish his ADLs, IADLs, and health-related tasks.

14. The Department did not prove that the DDS was already providing all necessary services related to the Appellant's need for assistance with ADLs (related to cueing and supervision), IADLs, and health related tasks.

15. **Excluded services.** Community First Choice may not include the following:
(a) Room and board costs for the individual, except for allowable transition services described in §441.520(b)(1) of this subpart.

(b) Special education and related services provided under the Individuals with Disabilities Education Act that are related to education only, and vocational rehabilitation services provided under the Rehabilitation Act of 1973.
(c) Assistive devices and assistive technology services, other than those defined in §441.520(a)(3) of this subpart, or those that meet the requirements at §441.520(b)(2) of this subpart.
(d) Medical supplies and medical equipment, other than those that meet the requirements at §441.520(b)(2) of this subpart.
(e) Home modifications, other than those that meet the requirements at §441.520(b) of this subpart. 42 C.F.R. § 441.525.

16. ADLs related to cueing and supervision, IADLs, and health-related tasks are not listed within "excluded services" as contemplated by 42 C.F.R. § 441.525.

17. **Service budget requirements**.
(a) For the self-directed model with a service budget, a service budget must be developed and approved by the State based on the assessment of functional need and person-centered service plan and must include all of the following requirements:
(1) The specific dollar amount an individual may use for Community First Choice services and supports.
(2) The procedures for informing an individual of the amount of the service budget before the person-centered service plan is finalized.
(3) The procedures for how an individual may adjust the budget including the following:
(i) The procedures for an individual to freely adjust amounts allocated to specific services and supports within the approved service budget.
(ii) The circumstances, if any, that may require prior approval by the State before a budget adjustment is made.
(4) The circumstances, if any, that may require a change in the person-centered service plan.
(5) The procedures that govern the determination of transition costs and other permissible services and supports as defined at §441.520(b).
(6) The procedures for an individual to request a fair hearing under Subpart E of this title if an individual's request for a budget adjustment is denied or the amount of the budget is reduced.
(b) The budget methodology set forth by the State to determine an individual's service budget amount must:
(1) Be objective and evidence-based utilizing valid, reliable cost data.
(2) Be applied consistently to individuals.
(3) Be included in the State plan.
(4) Include a calculation of the expected cost of Community First Choice services and supports, if those services and supports are not self-directed.
(5) Have a process in place that describes the following:
(i) Any limits the State places on Community First Choice services and supports, and the basis for the limits.

(ii) Any adjustments that are allowed and the basis for the adjustments.

(c) The State must have procedures in place that will provide safeguards to individuals when the budgeted service amount is insufficient to meet the individual's needs.

(d) The State must have a method of notifying individuals of the amount of any limit that applies to an individual's Community First Choice services and supports. Notice must be communicated in an accessible format, communicated in plain language, and needed auxiliary aids and services should be provided.

(e) The budget may not restrict access to other medically necessary care and services furnished under the State plan and approved by the State but which are not included in the budget.

(f) The State must have a procedure to adjust a budget when a reassessment indicates a change in an individual's medical condition, functional status, or living situation. 42 C.F.R. § 441.560.

18. The Department incorrectly reduced the Appellant's Community First Choice annual budget to $22,105.44 effective [redacted] 2018, as the assessment was incomplete.

19. The Department incorrectly reduced the Appellant's Community First Choice annual budget to $22,105.44 effective [redacted] 2018, as the reduction was not supported by relevant federal regulations.

## DISCUSSION

The Department argues that Community First Choice may only budget for a participant's personal care assistant hours associated with ADLs requiring significant hands-on, fork-to-mouth, support of more than 50 percent of the individual's weight, types of physical intervention, comparable to services provided to patients in skilled nursing facilities. The Department opines that the Community First Choice cannot pay for a personal care assistant to help an individual with: 1) ADLs requiring intervention due to behavioral issues; 2) ADLs requiring only supervision or cueing; and 3) IADLs.

In the alternative, the Department argues that the Appellant's participation in a DDS waiver prohibited the Department from budgeting for personal care assistant hours associated with cueing, supervision, and safety, as those services *should be provided* by the DDS. The Department provided no probative evidence that the Appellant's Community First Choice annual budget was reduced by $15,320.21 to eliminate the duplication of identical services already provided by the DDS to the Appellant.

The Department's arguments are unpersuasive, as they are not supported by a plain reading of 42 C.F.R. § 441.520 (a).

Regardless, it should be noted that the Department's [redacted] 2018 *Universal Assessment Outcome Form* only reviewed five of the six activities specifically identified as ADLs at 42 U.S.C. 1396n (k)(6)(A) and 42 C.F.R. § 441.505. This form also contains no

assessment of the Appellant's ability to perform IADLs. Therefore, this form is not a comprehensive assessment.

The Department's [redacted] 2018 action to reduce the Appellant's Community First Choice budget to $22,105.44 effective [redacted] 2018 is not supported by the evidence in the hearing record or the federal regulations associated with Community First Choice.

## DECISION

The Appellant's appeal is GRANTED.

## ORDER

1. The Department immediately will rescind in writing its [redacted] 2018 *Notice of Action/Service Budget Reduction*.

2. Within 30 calendar days of this decision, or [redacted] 2018, documentation of compliance with this order is due to the undersigned.

Eva Tar – electronic signature
Eva Tar
Hearing Officer

Cc: [redacted]
Christine Weston, DSS-Central Office
Sallie Kolreg, DSS-Central Office
Lisa Bonetti, DSS-Central Office
Laurie Filippini, DSS-Central Office
Pam Adams, DSS-Central Office
Dawn Lambert, 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.