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June 27, 2022

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TennCare Connect
P.O. Box 305240
Nashville, TN 37230-5240

Re: [REDACTED]
DOB [REDACTED]
Reference No. [REDACTED] (Person ID [REDACTED])

Dear Sir or Madam,

We understand from Mr. Amos Bailey that our request for an **IN-PERSON** hearing will be granted.

We are also again advising you that additional documents were submitted on May 18, 2022 (46 pages including cover letter), as part of a request for fair hearing submitted on May 26, 2022 (127 pages including letter requesting in-person fair hearing) and as part of an amended request for fair hearing submitted on May 27, 2022 (30 pages including amended request for in-person fair hearing).

We are amending our other reasons for requesting eligibility on-going from January 2021 because TennCare's actions violated Section 504 of the Rehabilitation Act of 1973; the Americans with Disabilities Act of 1990; and the Americans with Disabilities Act Amendments Act of 2008.

Since the PAE was submitted, and through substantial communication between Mrs. [REDACTED]'s authorized representative and [REDACTED] TennCare had actual knowledge that Mrs. [REDACTED] lacked legal capacity. Federal regulations, at 45 C.F.R. § 84.3(j)(1)(i) define a handicapped person as any person who "has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. Clearly, someone with a cognitive deficiency serious enough to warrant Conservatorship, which TennCare was aware of, meets this definition.

45 C.F.R. § 84.3(g) defines an applicator for assistance as “one who submits an application, request, or plan required to be approved by a Department official or by a recipient as a condition to becoming a recipient.” TennCare meets the definition of program or activity defined in 45 C.F.R. § 84.3(k)(1)(ii).

TennCare’s obligation to assist individuals with disabilities is acknowledged, in part, at Policy No 200.030, which states: “Assistance is available for all applicants and enrollees. All assistance provided will be in a manner that is accessible to individuals that are LEP and individuals with disabilities. An individual may choose to have someone help him with the application process or renewal.”

TennCare Policy No. 200.010 provides: “TennCare, at all administrative levels, shall not discriminate against any individual for reasons of age, race, color, sex, **disability**, religion, creed, national origin or any other group protected by the applicable federal and state civil rights laws. Individuals with Limited English Proficiency (LEP) and individuals **with disabilities** have equal access to TennCare programs.”

“TennCare is required to make reasonable modifications in its policies, practices and procedures so that qualified individuals with disabilities can take part in TennCare’s programs, services or activities, unless a requested modification would result in a fundamental alteration or undue financial and administrative burden to TennCare.”

Remember, the type of auxiliary aid or services needed by an individual can change during a conversation or service encounter. During brief or simple face-to-face exchanges, very basic aids are usually appropriate. For example, exchanging written notes may be effective when an individual with a hearing disability asks for a copy of a form at a doctor’s office. **Conversations that are more complex or lengthy may require more advanced aids and services.** Consideration should be given to how important the communication is, how many people are involved, the length of the communication anticipated, and the context.

With regard to TennCare’s obligation to assist the disabled, Policy Not. 200.010 expressly provides:

The federal non-discrimination laws listed below prohibit discrimination on the basis of race, color, national origin, age, sex **and disability** in programs or activities that receive or benefit from federal financial assistance. **Discrimination on the basis of disability is prohibited in all programs, services or activities of public entities.** The Americans with Disabilities Act (ADA) coverage does not depend on receipt of federal funds.

- a. **Title VI of the Civil Rights Act of 1964** (“Title VI”): Prohibits discrimination, denial of benefits or being excluded from participation on the basis of race, color or national origin in any program or activity that receives

federal financial assistance from the U.S. Department of Health and Human Services.

- b. **The Americans with Disabilities Act of 1990 and Amendments (“ADA”)**: Prohibits discrimination on the basis of disability by both public and private entities, whether or not they receive federal financial assistance.
- c. **The Age Discrimination Act of 1975 (“ADEA”)**: Prohibits discrimination on the basis of age in programs or activities receiving federal financial assistance.
- d. **Section 504 of the Rehabilitation Act of 1973 (“Section 504”)**: Protects a qualified individual with a disability from discrimination in the provision of any benefit or service provided under any program or activity receiving funds from the Department of Health and Human Services.
- e. **Title IX Education Amendments of 1972 (“Title IX”)**: No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance
- f. **Section 1557 of the Patient Protection and Affordable Care Act (“Section 1557”)**: An individual shall not, on the grounds prohibited under Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, or Section 504 of the Rehabilitation Act of 1973, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance

Policy No. 110.060 expressly recognizes TennCare’s obligation to comply with the ADA and provides:

3. Individual’s Mental Impairment (applicable to non-liquid resources only)

a. General Rule

If the individual has a guardian, conservator, power of attorney or durable power of attorney at the time of application or renewal, the assets of the individual are considered available to the individual. That person is legally appointed to act on behalf of the individual and is expected to make the individual’s assets available for use by or for the care of the individual.

If the individual’s mental impairment precludes her negotiating the sale of an asset, and she has no guardian or conservator to act on her behalf, exclude the asset as unavailable under certain conditions. It is not necessary that the individual be adjudicated incompetent by a court of law. If, in the Eligibility Specialist’s opinion or that of the responsible party or person in a position to know the facts of the individual’s situation, the individual is mentally impaired, apply the provision of this policy.

b. Individual’s Mental Impairment at Application

i. Temporary Exemption

Exclude the asset as unavailable for up to 3 months from approval date if the individual or the person applying on his behalf agrees to the following:

- Take steps to be appointed guardian or to contact the individual's friends and relatives regarding their willingness to serve as the individual's guardian/conservator;
- See that the individual who agrees to serve takes immediate steps toward appointment; AND
- To provide HCFA with substantial documentation of his action and that of the guardian designee.

If the individual or responsible party is unable to perform the above-cited tasks, he must provide the names and addresses of individuals who might be willing to serve as the individual's guardian. The HCFA Eligibility Specialist accepts the responsibility for contacting the named individuals in an effort to locate someone willing to act as guardian.

Contact each of the individuals by telephone or by mail explaining the situation and requesting their assistance in securing a guardianship for the individual for the purposes of making available assets which the applicant needs to meet his medical needs. Document the case thoroughly.

ii. Long-Term Exemption

An asset may continue to be considered unavailable beyond the initial 3 month period until the next renewal under the following conditions:

A. No guardian is found

If after 3 months, the efforts of the Eligibility Specialist and the person acting on the individual's behalf have failed to locate a potential guardian, document the case record establishing the asset's inaccessibility.

If the individual is otherwise eligible, continue assistance. Extend benefits if all of the following conditions are met:

- The individual requested benefits for that period;
- The same conditions regarding the disputed asset still exist; and
- The individual is otherwise eligible.

B. Potential Guardian is Found

Exclude the asset for an additional 30 days from the date the potential guardian agrees to serve to allow him to file a petition for guardianship with the court. If after 30 days the potential guardian has not initiated

guardianship procedures for any reason, exclude the resource per instruction above under No Guardian is Found section.

If after 30 days, the potential guardian has begun appointment procedures, continue to exclude the asset as unavailable until the next renewal.

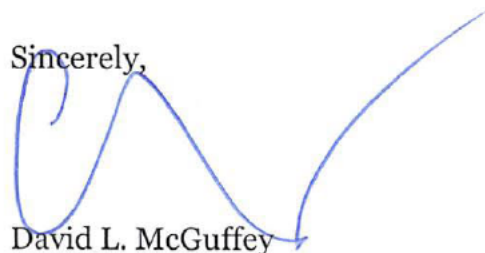
Set an expected change at regular intervals (every 60 to 90 days) to follow up on the situation and to determine the court's instructions regarding the asset.

Note: If it becomes necessary to delay action on an application in order to determine an asset's availability as described in this item, secure the applicant's written permission to hold the application pending beyond the processing time limits.

(Emphasis added)

In this case, TennCare had actual knowledge of Mrs. [REDACTED]'s mental impairment. It had actual knowledge that a Petition to establish a conservatorship was filed while the application was being processed and prior to any denial of eligibility. TennCare had an obligation to follow the ADA and had Policy No. 110.060 to assist Mrs. [REDACTED] prior to appointment of a conservator, TennCare failed to follow its own policy. In doing so it also failed to comply with its obligations under the ADA. It is clear Mrs. [REDACTED]'s "mental impairment preclude[d her negotiating the sale of an asset, and she [had] no guardian or conservator to act on her behalf." It is also clear that until the Chancery Court empowered her Conservator to take action, she still lacked authority to liquidate the insurance policies which are the subject of this litigation. Therefore, Mrs. [REDACTED] contends TennCare violated its own policy and, in doing so it violated the ADA and Section 504 of the Rehabilitation Act, as well as 45 C.F.R. Part 84.

Sincerely,



David L. McGuffey

Cc: Amos Bailey via email at amos.bailey@tn.gov