STATE OF CONNECTICUT

DEPARTMENT OF SOCIAL SERVICES
OFFICE OF THE COMMISSIONER

Roderick L. Bremby
Commissioner

Telephone
(860) 424-5053
Facsimile
(860) 424-5057
TDD/TYY
1-800-842-4524
Email
Commis.dss@ct.gov

H.O. Ex. 1

Declaratory Ruling

Re: Petition for Declaratory Ruling by Tariq Abdulaziz

The Department of Social Services (the "Department") issues this declaratory ruling pursuant to the authority granted to administrative agencies in section 4-176 of the Connecticut General Statutes and sections 17-311-44 to 17-311-46, inclusive, of the Regulations of Connecticut State Agencies.

Procedural History

On December 9, 2014, Tariq Abdulaziz (the "Petitioner") filed a Petition for Declaratory Ruling. *See* Exhibit A, Petition for Declaratory Ruling. The questions set forth in the Petition for Declaratory Ruling are as follows:

1. Whether the regulations proposed by said Agency pursuant to Connecticut General Statutes §4-168, and being §17b-260a and §17b-260b were properly adopted pursuant to the Connecticut Uniform Administrative Procedure Act.

2. Whether the regulations proposed by said Agency, pursuant to Connecticut General Statutes §4-168 and being §17b-99, were properly adopted.

3. Whether 17b-10 can be applied to the ABI Medicaid Waiver Program.

On December 30, 2014, the Department agreed to issue a declaratory ruling by May 29, 2015 in accordance with sections 4-176(e)(3) and 4-176(i) of the Connecticut General Statutes. *See* Exhibit B, Agreement to Issue Declaratory Ruling.

On February 20, 2015, the Petitioner filed two notices of deposition with the Department, in which he sought to depose two of the Department's employees, Lara Stauning and Dorian Long, and requested that they produce certain documents contained in the Schedule A of the notices of deposition. *See* Exhibit C, Notices of Deposition.

On March 4, 2015, the Department issued an Order in which it stated that no discovery, including the taking of a deposition, was permitted in relation to the Petition for Declaratory Ruling. *See* Exhibit D, Order dated March 4, 2015. The Department explained to the Petitioner that the declaratory ruling would be issued without any type of proceeding, per section 4-176(e)(3) of the Connecticut General Statutes, and even if there were a proceeding, the Connecticut Supreme Court has ruled that absent an express statutory or regulatory provision, there is no right to discovery in administrative proceedings. *See Pet v. Dep't of Health Servs.*,

207 Conn. 346, 357, 542 A.2d 672 (1988). Neither statutes nor the Department's regulations grant a party the right to discovery, including the taking of a deposition, in an administrative proceeding or in relation to a petition for a declaratory ruling.

On March 31, 2015, the Petitioner filed what he called an "Amended Petition for Declaratory Ruling." See Exhibit E, Amended Petition for Declaratory Ruling. The following questions were presented, in addition to the original three questions presented on December 9, 2014:

4. Whether the Department of Social Services (DSS), despite the non-adoption of regulations governing the Acquired Brain Injury/Traumatic Brain Injury Waiver Program (ABI Waiver), developed and applied certain published regulations in 1999 (1999 Operation Policy) and certain Social Work Policies.

5. Whether the Department of Social Services (DSS), in developing and applying said 1999 non-adopted regulations, distributed them to Licensing Regulation and Review Committee, the Office of Attorney General or the Secretary of State.

6. Whether the Department of Social Services (DSS) in applying said 1999 non-adopted regulations, impacted providers record keeping requirements and defined who is responsible for determining how services are provided to customers, without ever going through the regulatory adoption process.

7. Whether the Department of Social Services (DSS) in promulgating proposed regulations Connecticut General Statutes §17b-260a-1 to §17b-260a-17, with a Notice of Intent (NOI) published on March 26, 2013, in the Connecticut Law Journal with an effective date of April 1, 2013, despite reference errors as herein referred, failed to include in said NOI any reference to previous and current policies in effect and governing the ABI Waiver Program.

8. Whether the Department of Social Services (DSS) applied policies developed and/or in use by the Department of Social Work since 2009, but failed to publicize them to the general public; distribute them to consumers, providers, Licensing Regulation and Review Committee, the Attorney General or Secretary of State.

Ruling

Question One: Whether the regulations proposed by said Agency pursuant to Connecticut General Statutes §4-168, and being §17b-260a and §17b-260b were properly adopted pursuant to the Connecticut Uniform Administrative Procedure Act.

Sections 17b-260a and 17b-260b are statutes, not regulations. It will be assumed that the Petitioner is asking whether sections 17b-260a-1 to 17b-260a-17, inclusive, of the Regulations of Connecticut State Agencies (the "ABI Waiver Regulations") were properly adopted pursuant to the Connecticut Uniform Administrative Procedure Act ("UAPA").

The Petitioner asserts that the ABI Waiver Regulations were not properly adopted for the following reasons: A) the Department did not comply with the requirement of Connecticut General Statute §17b-10(b) to publish notice of intent to adopt the ABI Waiver Regulations within twenty day after adopting the policy; B) the Department did not comply with the requirement of Connecticut General Statutes §4-168(a) to publish notice of intent at least thirty days prior to adopting the ABI Waiver Regulations; C) the ABI Waiver Regulations have not been properly noticed because of a typographical error citing to §17b-260b, rather than §17b-260a, in the Connecticut Law Journal; and D) the Department did not submit the ABI Waiver Regulations to the Legislative Regulation Review Committee ("LRRC") within one hundred eighty (180) days of the notice's publication in the Connecticut Law Journal

The ABI Waiver Regulations have been properly adopted as follows:

A) The Department is operating under the ABI Waiver Regulations as a policy, in accordance with section 17b-10(b) of the Connecticut General Statutes. *See* Exhibit F, §17b-10(b) of the Connecticut General Statutes, in effect until June 30, 2013.

Section 17b-10(b) of the Connecticut General Statutes enables the Department to operate under a policy while the Department is in the process of adopting the policy as a regulation. *Id.* Until June 30, 2013, it provided that the Department

> shall adopt as a regulation in accordance with the provisions of chapter 54, any new policy necessary to conform to a requirement of an approved federal waiver application initiated in accordance with section 17b-8... but the department may operate under such policy while it is in the process of adopting the policy as a regulation, provided the Department of Social Services prints notice of intent to adopt the regulation in the Connecticut Law Journal within twenty days after adopting the policy. Such policy shall be valid until the time final regulations are effective. *Id.*[1]

The ABI Waiver Regulations were promulgated as new policies necessary to conform to the requirement of an approved federal waiver. The statute in effect at the time was clear that, as long as the Department printed notice of its intent to adopt the policy as a regulation in the Connecticut Law Journal within twenty days after adopting the policy, the Department could operate under such policy until the final regulations become effective. *Id.*

In fact, the Department gave more notice than it was required to give. The Notice of Intent to Adopt Regulations ("NOI") was published in the Connecticut Law Journal on March 26, 2013, five days before the policy went into effect on April 1, 2013. *See* Exhibit G, Notice of Intent to Adopt Regulations. The Department, therefore, complied fully with section 17b-10(b)

[1] This section is virtually identical to the current version of section 17b-10(b) of the Connecticut General Statutes. The only difference is that that the Department is now required to post the policy on the eRegulations System prior to adopting the policy, rather than printing notice in the Connecticut Law Journal within twenty days after adopting the policy.

of the Connecticut General Statutes, which requires that notice be published no later than 20 days after adopting the policy.

B) Again, because the ABI Waiver Regulations were a new policy "necessary to conform to a requirement" of the approved ABI Waiver, the Department issued an NOI in accordance with section 17b-10(b) of the Connecticut General Statutes in effect at the time. *See* Exhibit F. As described in the previous response, the Department complied with the notice requirement in section 17b-10(b) of the Connecticut General Statutes.

C) The ABI Regulations have been properly noticed, even though there is a typographical error in the NOI that was published in the Connecticut Law Journal on March 26, 2013. The NOI cites to section 17b-260b, rather than to section 17b-260a of the Connecticut General Statutes as the statutory authority for the proposed regulations. *See* Exhibit G. Nevertheless, there is no question that the NOI is announcing the Department's intent to adopt regulations for the ABI waiver program. There are multiple references to the ABI waiver program in the opening paragraph of the NOI and in the Statement of Purpose. *Id.* Even with the incorrect statutory citation, therefore, there can be no confusion about the NOI's purpose. The Department provided sufficient notice to the public of its intention to adopt regulations concerning the ABI waiver program, and that the implementation date for the policy was April 1, 2013. *Id.* The typographical error, therefore, does not invalidate the policy under which the Department is operating.

D) The Department acknowledges that it did not submit the ABI Waiver Regulations to the LRRC within 180 days after publication of the NOI, nor did it notify the LRRC of the reasons for its noncompliance and the date by which it would submit the proposed regulations. *See* Exhibit F. The Department's failure to comply with this provision, however, is not a basis upon which to invalidate the policy under which the Department is operating.

The Connecticut Supreme Court has provided guidance concerning whether the time frame in a statute is mandatory in which case the failure to comply with it invalidates an agency's action:

> The test to be applied in determining whether a statute is mandatory or directory is whether the prescribed mode of action is the essence of the thing to be accomplished, or in other words, whether it relates to a matter of substance or a matter of convenience.... If it is a matter of substance, the statutory provision is mandatory. If, however, the legislative provision is designed to secure order, system and dispatch in the proceedings, it is generally held to be directory, especially where the requirement is stated in affirmative terms unaccompanied by negative words.... Such a statutory provision is one which prescribes what shall be done but does not invalidate action upon a failure to comply." (Citations omitted; internal quotation marks omitted.) *Jones v. Mansfield Training School*, 220 Conn. 721, 727, 601 A.2d 507 (1992). A reliable guide in determining whether a statutory provision is directory or mandatory is whether the provision is accompanied by language that expressly invalidates any action taken after noncompliance with the

provision. *Leo Fedus & Sons Construction Co. v. Zoning Board of Appeals*, 225 Conn. 432, 440, 623 A.2d 1007 (1993).

Katz v. Comm'r of Revenue Servs., 234 Conn. 614, 617, 662 A.2d 762, 764 (1995). There is nothing in section 17b-10 of the Connecticut General Statutes indicating that, if the Department failed to comply with the 180-day period, its regulation would become invalid. Accordingly, although the legislature may have intended for these matters to proceed expeditiously, there is nothing in the statute to indicate that it intended the draconian remedy of invalidating the operational policy, which has the effect of a regulation.

For all of the reasons set forth above, the ABI Waiver Regulations have been properly noticed and are in effect while the Department is in the process of final adoption.

Question Two: Whether the regulations proposed by said Agency, pursuant to Connecticut General Statutes §4-168 and being §17b-99, were properly adopted.

Section 17b-99 is a statute, not a regulation. It will be assumed that the Petitioner is asking whether proposed sections 17b-99(d)-1 to 17b-99(d)-6, inclusive, were properly adopted.

There are currently no regulations in effect for section 17b-99 of the Connecticut General Statutes. Although the Department has presented a proposed regulation to implement this section to the LRRC, the LRRC rejected it without prejudice, despite the Legislative Commissioner's Office's recommendation for approval. Accordingly, a declaratory ruling cannot be issued on the validity of a regulation that has not yet been adopted.

Contrary to the Petitioner's claim, the Department does not rely on regulations to extrapolate findings of overpayments against providers. Rather, section 17b-99(d) (3) of the Connecticut General Statutes authorizes the Department to extrapolate findings of overpayment under certain circumstances. The Department acts in accordance with the statute when it extrapolates overpayments. *See* Conn. Gen. Stat. §17b-99.

Question Three: Whether 17b-10 can be applied to the ABI Medicaid Waiver Program.

Yes, section 17b-10(b) of the Connecticut General Statutes is applicable to the promulgation of regulations under the ABI Waiver Program. As stated above, section 17b-10(b) of the Connecticut General Statutes provides that the Department shall adopt as a regulation, in accordance with the provisions of chapter 54, any new policy necessary to conform to a requirement of an approved federal waiver application initiated in accordance with section 17b-8. *See* Exhibit F.

The ABI Waiver Program operates under an approved federal waiver which was initiated in accordance with section 17b-8 of the Connecticut General Statutes. The ABI Waiver Regulations were promulgated as new policies necessary to conform to the requirements of that waiver. Section 17b-10(b) of the Connecticut General Statutes, therefore, is applicable to regulations promulgated pursuant to the ABI Waiver.

Questions Four – Eight:

The Department has determined that questions four through eight do not constitute questions that meet the standard for questions that are properly answered through issuance of a declaratory ruling.

Section 4-176(a) of the Connecticut General Statutes provides that any person may petition a state agency for a declaratory ruling "as to the validity of any regulation, or the applicability to specified circumstances of a provision of the general statutes, a regulation, or a final decision on a matter within the jurisdiction of the agency." *See* Conn. Gen. Stat. §4-176(a). These are the "ground rules" or standards that a petitioner must meet for bringing a petition for a declaratory ruling before a state agency. *Peruta v. Comm'r of Pub. Safety*, 128 Conn. App. 777, 785, *cert. denied*, 302 Conn. 919 (2011).

In Peruta, the Appellate Court reviewed the trial court's granting of the Department of Public Safety's motion to dismiss the plaintiff's action for declaratory judgment for lack of subject matter jurisdiction. The plaintiff in that case emailed nine questions to the Department of Public Safety, and later delivered a document with the same questions.[2] The Department of Public Safety's legal affairs unit sent the plaintiff a letter stating that it was "unable to provide answers to his questions" and suggested that he seek the advice of an attorney. The plaintiff then filed the declaratory judgment action.

The Superior Court had granted the Department of Public Safety's motion to dismiss, finding that the Plaintiff had failed to exhaust his administrative remedies by not first requesting a declaratory ruling from the Department of Public Safety. *Id.* at 779. It ruled that the email the Plaintiff sent to the Department of Public Safety with nine questions regarding the carrying of a firearm was not a valid petition for a declaratory ruling. *Id.*

---

[2] In his e-mail, the plaintiff asked the following questions: (1) "What state statute(s), regulation(s), policies or case law(s) mandates concealment of a firearm while being carried by an individual in possession of a valid license to carry same?"; (2) "What state statute(s), regulation(s), policies or case law(s) prevents the wearing of an exposed firearm while being carried by an individual in possession of a valid license to carry same?"; (3) "What state statute(s), regulation(s), policies or case law(s) establish the standards for concealment of a firearm while being carried by an individual in possession of a valid license to carry same?"; (4) "What state statute(s), regulation(s), policies or case law(s) esfablishes the simple act of carrying of a holstered firearm, by an individual in possession of a valid permit/license to carry same, into a restaurant as an element of a crime?" (5) "What state statute(s), regulation(s), policies or case law(s) establishes the simple act of carrying of a holstered firearm, by an individual in possession of a valid permit/license to carry same, into an establishment that serves alcoholic beverages, (such as a bar or restaurant), as an element of a crime?"; (6) "Is there any existing criminal case law where the simple act of carrying of a concealed holstered firearm, (by an individual in possession of a valid permit/license to carry same), into a restaurant meets the necessary elements contained in [General Statutes §] 53a–181—Breach of peace in the second degree?"; (7) "Is there any existing criminal case law on the simple act of carrying of an exposed, holstered firearm, (by an individual in possession of a valid permit/license to carry same), into a restaurant meets the necessary elements contained in [§] 53a–181—Breach of the peace in the second degree?"; (8) "What state statute(s), regulation(s), policies, case law(s) or situations grant or provide the authority to a local police officer or department to seize and/or confiscate a pistol permit from the holder of same?"; (9) "What state statute(s), regulation(s), policies, case law(s) or situations grant or provide the authority to a local police officer to determine 'MATURE JUDGMENT' as the phrase pertains to carrying a firearm by a person permitted or licensed to do so?"

The Appellate Court affirmed the trial court's decision, ruling that the Plaintiff's email was not a petition for a declaratory ruling -- it needed to "set forth specific circumstances and seek to have the department apply a regulation, statute or final decision on a matter in its jurisdiction to those specific circumstances," and it failed to do that. *Id.* at 785-786.

The Court stated:

> [T]hrough a series of nine questions, the plaintiff asked the department to *identify* and to provide the source of legal authority preventing, in whole or in part, a valid permit holder from carrying a firearm in the state, openly or exposed, and from doing so in a 'restaurant' or 'an establishment that services alcoholic beverages....' The plaintiff did not seek to have the department apply or examine a regulation or statute with respect to a specified set of circumstances."

Id. at 785-86 (emphasis in original).

Similar to the questions at issue in Peruta, questions four through eight posed by the Petitioner in his Amended Petition for Declaratory Ruling simply ask for information. They do not question the validity of a regulation nor do they seek to have the Department apply or examine a regulation or statute with respect to a specified set of circumstances. Accordingly, the Department is deciding not to issue a declaratory ruling on questions four through eight because these questions do not constitute a petition for a declaratory ruling. *See* Conn. Gen. Stat. 4-176(e)(5).

STATE OF CONNECTICUT
DEPARTMENT OF SOCIAL SERVICES

Roderick L. Bremby
Commissioner of Social Services

May 28, 2015

Certificate of Mailing Form

Declaratory Ruling – Tariq Abdulaziz

I certify that a copy of the above referenced Declaratory Ruling was sent to the following person(s) on:

May 29, 2015.

[ ] Hand Delivered
[X] Mailed
[ ] Other (specify)

Petitioner:

Tariq Abdulaziz
23 Kate Way
Windsor Locks, CT 06096

Petitioner's Attorney:

I. David Marder
76 South Frontage Road
Vernon, CT 06066

Joseph A. Smiga

5/29/15
Date