

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████)
)
Petitioner,)
)
vs.) Case No. 08-2095APD
)
AGENCY FOR PERSONS WITH)
DISABILITIES,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to proper notice this cause came on for formal proceeding and hearing before P. Michael Ruff, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, in ██████████ Florida, on November 24, 2008. The appearances were as follows:

APPEARANCES

For Petitioner:

██████████
██████████

For Respondent:

Carrol Y. Cherry, Esquire
Office of the Attorney General
Administrative Law Bureau
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUE

The issue to be resolved in this proceeding concerns whether the Petitioner was properly denied a request for crisis

enrollment in a Home and Community Based Medicaid Services Waiver.

PRELIMINARY STATEMENT

Florida's Medicaid Program, as pertinent to this case, is the Home and Community-Based Medicaid Program. The Agency for Persons with Disabilities (APD, Agency) operates and regulates the program.

When a person requires immediate placement into an intermediate care facility for developmental disabilities, for instance, absent the provision of waiver services, an individual family member or legal guardian may make a request for a crisis determination. If the individual is deemed eligible for the waiver services, but is determined not to be in crisis, then he or she will be placed on a waiting list. If it is determined that the individual is in crisis, the severity of the crisis will be prioritized, based upon the risk faced by that individual, relative to that experienced by other individuals in crisis. This is provided for in the Florida Medicaid Developmental Disabilities Waiver Services Coverage and Limitations Handbook, of October 2003, as updated in June 2007. It is incorporated by reference in Florida Administrative Code Rule 59G-13.001 (hereinafter Handbook). See Appendix F of the Rule at page 5-3.

Before crisis enrollment can be decided or effected, a "crisis identification tool" is required to be executed. The crisis identification tool is an assessment by which the local program office determines whether sufficient information is available to recommend review of the crisis identification application by the Agency's central office. A crisis identification tool also includes any relevant documentation in support of the crisis request. If the individual is determined to be in crisis by the Agency's central office, the person will be listed in order of the severity of the crisis situation. If a number of individuals are experiencing crises of similar severity they are prioritized by the type of crisis they are experiencing, including the consideration of the intensity and scope of services required. The priorities for consideration are as follows:

A. First priority: The individual has no place to live, is homeless and requires emergency placement. Alternatively, while living with family or relatives the person lives in an unsafe environment. There must be evidence that the person is in an unsafe situation or the safety of those with whom he or she is presently living is endangered, if waiver services are not provided immediately.

B. Second Priority: The individual is in present danger because of confirmed abuse or neglect or is exhibiting behavior

that will result in harm to the person or to others which, in turn, creates a life-threatening situation for the disabled person or others, or will result in bodily harm to the person, or others, requiring emergency medical care.

C. Third Priority: The disabled individual's current care-giver is in extreme duress, is no longer able to safely provide care for the individual due to advanced age, illness, or injury and the individual is in immediate need of waiver services in order to remain living with the caregiver or to locate an alternative living arrangement. This could also include situations where abuse or neglect is present.

If an individual is determined to be in crisis, meets the eligibility criteria and there is a waiver vacancy, with funding available, then he or she will be enrolled. If the request does not meet the crisis criteria or the individual is not eligible for services, then a written denial notice is issued. When the Agency recommends denial of crisis enrollment, it sends the applicant a letter containing the reasons for the denial, along with information describing the due process rights and the process for requesting a hearing by the applicant before the Division of Administrative Hearings.

The Petitioner is seeking crisis determination based on the inability of [REDACTED] caregiver to continue. The Respondent Agency central office reviewed the request and it was denied. The

request for a formal proceeding was timely made thereafter and the cause was referred to the Division of Administrative Hearings and the undersigned Administrative Law Judge for hearing.

The cause came on for hearing as noticed. The Respondent presented the testimony of Debra Blizzard, a Crisis Reviewer and Decision-maker, accepted as an expert witness in the area of developmental disabilities. The Respondent offered three exhibits, all of which were admitted into evidence without objection. Upon request by the Respondent, the Handbook, incorporated by reference in the above-mentioned rule, was officially recognized. See Fla. Admin. Code R. 59G-13.080(12). The Petitioner presented the testimony of [REDACTED]

[REDACTED] No exhibits were offered into evidence by the Petitioner.

Upon conclusion of the proceeding the parties were advised of their right to submit proposed recommended orders, which were submitted by both parties and which have been considered in the rendition of this Recommended Order. The Respondent's Motion for Extension of Time for filing proposed recommended orders was granted. The Proposed Recommended Orders were thus timely filed on December 5, 2008.

FINDINGS OF FACT

1. The Petitioner is [REDACTED] who is legally blind. [REDACTED] has been diagnosed with moderate mental retardation, with an intelligence quotient of 46, coupled with mild deficits in adaptive skills. [REDACTED] is eligible for services under the Developmental Disabilities Home and Community-Based Services Medicaid Waiver Program (Medwaiver).

2. The Petitioner currently resides at home with [REDACTED] [REDACTED] [REDACTED] work during the day and there is no one now to care for [REDACTED] at home during each day. [REDACTED] has been caring for [REDACTED] during the day up until recent times. However, [REDACTED] recently suffered a stroke and is now wheelchair bound and can no longer care for the Petitioner. The family home is not wheelchair accessible so the Petitioner's [REDACTED] is unable to access the home in case of an emergency.

3. The Petitioner is seeking transportation and an adult training service through the Medwaiver, so that [REDACTED] can receive adult day training and other programs at the blind services facility in [REDACTED], Florida, approximately 30 miles from the family home where the Petitioner resides.

4. The Petitioner can perform a few small tasks of [REDACTED] activities of daily living, including toileting [REDACTED], but is unable to prepare [REDACTED] own meals.

5. In January 2008, the Petitioner applied for or requested a crisis determination. The Respondent Agency denied that request by letter of February 15, 2008, noting that the Petitioner's case did not meet the criteria for a crisis determination, as provided in Florida Administrative Code Rules 65G-1.046 and 65G-1.047. The Respondent has instead listed the Petitioner on its waiting list.

6. Ms. Debra Blizzard was accepted as an expert in developmental disabilities. She is employed as a crisis reviewer in the central office of the Respondent Agency. She established that the request was denied because the Petitioner's situation and circumstances, while certainly a matter of concern since [REDACTED] can no longer be [REDACTED] caregiver during the day, does not rise to the level of severity so as to be considered a crisis situation or emergency.

7. In this regard, the Petitioner's [REDACTED] testimony establishes that there are substantial difficulties providing the Petitioner's care and supervision during the day, since both [REDACTED] work at full-time jobs outside the home. While it is understood that the loss of the Petitioner's [REDACTED] as a daily caregiver has posed substantial difficulties, it was not definitely established what efforts and arrangements [REDACTED] have attempted in trying to establish an alternative care-giving arrangement. It may be

that some sort of substitute caregiver arrangement can be implemented for the Petitioner's daily care. [REDACTED] inability to do that was not clearly established (although admittedly it is a substantial difficulty). Other avenues might be explored before it can be determined that the removal of the [REDACTED] from the care-giving regimen gives rise to a crisis determination.

8. Appendix F of the Handbook addresses eligibility and enrollment in services. The Handbook provides that an individual, such as the Petitioner, determined to be eligible for waiver services shall consult with the Respondent to determine if a vacancy and funding are available to serve the individual. (The Handbook, Appendix F, at paragraph 1.C.(20)). The Handbook also provides that if no vacancy or funding is available the Respondent "will assess whether an assessment for crisis, using the crisis identification tool (page three of this appendix) is needed." This paragraph of the Handbook requires the completion of the crisis identification tool when it appears that the individual requires "immediate placement into an intermediate care facility for developmental disabilities (ICF/dd), absent the provision of waiver services or if the individual, family, or legal guardian makes a request for a crisis determination." The Handbook also states that the Respondent shall place the individual on the waiting list for

services if his or her situation does not appear to require immediate ICF/dd placement or no request for a crisis determination has been made.

9. The Handbook provides that the waiting list comprises two tiers. Paragraph 1.C explains that placement on a waiting list is not entitlement to waiver services: the "final determination of the applicant eligibility for the waiver shall be made at the time the vacancy and funding are available and prior to enrolling the individual on a waiver." This paragraph concludes by identifying the two tiers of the waiting list as those individuals determined to be in crisis, and those individuals determined not to be in crisis.

10. The Handbook then describes the use of the crisis identification tool. It explains that if a vacancy and funding exist, the Respondent may immediately enroll an individual determined to be in crisis, or, if a vacancy and funding do not exist, the Respondent will place the individual on a crisis waiting list. The Handbook identifies the priorities of the crisis waiting list. The Petitioner contends in this case that [REDACTED] meets the criteria for the third priority [as described in the above preliminary statement.]

11. The language of the third priority clearly imposes certain requirements preliminary to the application of the ensuing 13 criteria. The Rule that sets forth the preliminary

requirements for crisis enrollment states that: "The caregiver is in extreme duress, the caregiver is no longer safely able to provide care for the individual . . . and the individual is in immediate need of waiver services in order to remain living with the caregiver or to locate an alternative living arrangement." Fla. Admin. Code R. 65G-1.047(6). The language specifies that the 13 criteria are applied to an individual meeting these preliminary criteria in order to determine if such an individual is in crisis.

12. The Petitioner has not established that [REDACTED] meets the preliminary requirements. The Petitioner's [REDACTED] testified concerning the problem created by the Petitioner's [REDACTED] being unavailable to provide care and oversight for the Petitioner during the day, coupled with [REDACTED] inability to care for the Petitioner during the day, due to their employment. [REDACTED] testimony, ironically, shows that the Petitioner's parents have provided [REDACTED] care in a competent manner. They have adjusted well to the burden involved in care for [REDACTED] and, although a significant problem has occurred in the provision of [REDACTED] care during the day, the evidence does not reflect, in a preponderant way, that all possible avenues of alternative care and oversight arrangements have been exhausted. The Petitioner has not thus proven that the second of the preliminary requirements has been

satisfied in that they have demonstrated their ability to safely care for ██████████ in the home in something akin to the present arrangement. They also have demonstrated that the arrangement previously made, through the ██████████ as a caregiver, has failed, but the evidence offered by the Petitioner does not establish that all arrangements in the local community whereby care or assistance during the day could be provided have been investigated, considered and shown to be inadequate.

13. Further, the last of the preliminary requirements referenced above has not been satisfied by the Petitioner, as it must in all cases arising under the above-referenced "third priority." That is to say, nothing in this record shows that the Petitioner requires waiver services immediately in order to be able to continue to live with ██████████ or to be able to locate an alternative living arrangement. Even had ██████ satisfied the preliminary requirements, the Petitioner did not prove eligibility for crisis consideration under the third priority by using the 13 criteria referenced above.

14. In this connection, the Petitioner's health and safety were not shown to be at dire risk without immediate provision of waiver services. The Petitioner's ██████████ have been able to provide a loving and competent care and home for the Petitioner. Nothing in the record suggests that, even considering their present difficulty, that they will be unable to do so in the

future in terms of their own mental and physical condition and the age, size and capabilities of [REDACTED]. There has, for instance, been no showing that law enforcement or regulatory personnel, such as protective services, have become involved with the Petitioner, [REDACTED] care or [REDACTED] family, by necessity or otherwise.

15. Finally, Ms. Blizzard established that even in consideration of the Petitioner's family's present difficulty in the provision of [REDACTED] care, that most of the families who apply for crisis enrollment are working families. Thus, that fact alone does not establish compliance with the above requirements in order to establish the existence of a crisis for purpose of the above-referenced rules. Further, as established by Ms. Blizzard in her testimony, if the Petitioner has any further change in life circumstances and needs to be reconsidered, a new request may be submitted at any time.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2008). See also J.M. v. Florida Agency for Persons With Disabilities, 938 So. 2d 535 (Fla. 1st DCA 2006).

17. This is a de novo proceeding designed to formulate final agency action. See Hamilton County Board of County

587 So. 2d 1378 (Fla. 1st DCA 1991), and § 120.57(1)(k), Fla. Stat. (2008).

18. The Petitioner, as the applicant for crisis enrollment in this proceeding, has the burden to prove entitlement to that status by a preponderance of evidence. See Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977); Florida Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); and § 120.57(1)(j), Fla. Stat. (2008).

19. The Petitioner has not preponderantly established entitlement to the status of crisis enrollment or enrollee for waiver services. Pursuant to the Handbook cited and referenced above, incorporated by referenced in Florida Administrative Code Rule 59G-13.001, if an individual is deemed eligible for waiver, but is not determined to be in crisis, then that individual will be placed on a waiting list for services. If it is determined that the individual is in crisis, the severity of the crisis will be assessed by the risk experienced by the individual, relative to that experienced by other individuals in crisis. If a number of individuals are experiencing crises of similar severity, they will be prioritized by the type of crisis they are experiencing, including consideration of the intensity and

scope of services required. Priorities for consideration are as follows:

First Priority: The individual does not have a place to live and is homeless, requires emergency placement, or while living with family or relatives is in an unsafe environment. There must be evidence that the individual's safety (or the safety of those with whom he or she is presently living) is in immediate peril if waiver services are not provided immediately.

Second Priority: Presently, the individual is either in danger because of confirmed abuse or neglect, or is exhibiting behaviors that result in harm to the persons or others or, in turn, create a life threatening situation for that person or others or will result in bodily harm to that person or others that may require emergency medical care in the absence of waiver services.

Third Priority: The individual's current caregiver is in extreme duress, is no longer safely able to provide care for the individual due to advanced age, illness or injury and the individual is in immediate need of waiver services in order to remain living with the caregiver or to locate an alternative living arrangement. This includes situations where abuse or neglect is present.

20. If a crisis request does not meet the crisis criteria, or the individual is not eligible for services, a written denial is issued by the Agency. This gives rise to the applicant's due process rights and the process for requesting a formal proceeding concerning that Agency decision before the Division of Administrative Hearings is inaugurated. The Petitioner

applied for such crisis consideration under the third priority, referenced above, concerning crisis assessment.

21. Appendix F of the Handbook referenced in the above-adopting rule, addresses eligibility and enrollment in services. The Handbook provides that one situated as the Petitioner, determined to be eligible for waiver services, shall consult with the Agency to determine if a vacancy and funding are available to serve that individual. If no vacancy or funding is available, the Respondent will assess whether an assessment for crisis using the crisis identification tool, provided for at page three of Appendix F of the Handbook, is needed. The crisis identification tool must be completed if it appears an individual requires immediate placement into an intermediate care facility, absent the provision of waiver services, or if the individual's family or legal guardian makes a request for a crisis determination.

22. The Handbook requires that the Respondent place the individual on a waiting list for services if his or her situation does not appear to require immediate intermediate care placement, or if no request for crisis determination is made. See paragraph 1.C.(2)(ii)(I and II) of the Handbook. The Handbook further provides that the waiting list comprises two tiers. This paragraph, referenced above, explains that the placement on a waiting list does not constitute entitlement to

waiver services; the "final determination of the applicant eligibility for the waiver shall be made at the time the vacancy and funding are available and prior to enrolling the individual on a waiver." This paragraph concludes by identifying the two tiers of the waiting list as those individuals determined to be in crisis and those individuals not determined to be in crisis. Id. at paragraph two. The Handbook identifies priorities of the crisis waiting list. The Petitioner contends that in this case ■ meets the criteria for the third priority, as described above.

23. The language of the third priority clearly imposes certain requirements preliminary to the application of the ensuing 13 criteria of the rule. The Rule that sets forth the preliminary requirement for crisis enrollment states that: "the caregiver is in extreme duress, the caregiver is no longer safely able to provide care for the individual . . . and the individual is in immediate need of waiver services in order to remain living with the caregiver or to locate an alternative living arrangement." Fla. Admin. Code R. 65G-1.047(6). The language of the rule requires that the preliminary criteria be met before application of the reference 13 criteria in the determination of whether such an individual is in crisis.

24. In view of the above Findings of Fact, the Petitioner has not established by preponderant evidence that the Petitioner

meets these preliminary requirements of priority three. Notwithstanding the fact that the Petitioner's [REDACTED] testimony establishes that a difficult situation has arisen with the loss of availability of the Petitioner's [REDACTED] as a caregiver during the day, the fact remains that the Petitioner's [REDACTED] have heretofore shown great resourcefulness in the provision of care for [REDACTED] faced with the fact that both must work outside the home during the day.

25. The testimony, while establishing their current hardship, does not show that all possible feasible and reasonable alternatives available to provide care and supervision for [REDACTED] during the working day have been examined and found unavailable or unfeasible. Thus, for this reason, preponderant evidence of compliance with the third priority referenced above and therefore with the basic showing needed to establish the crisis status referenced herein, has not been presented. The Petitioner has thus not established that [REDACTED] is entitled to crisis enrollment for waiver services. The Petitioner thus should be placed on the referenced waiting list, in the manner described, and should be permitted to re-apply for crisis enrollment at such time as the Petitioner believes justifying circumstances exist at anytime in the future.

RECOMMENDATION

Having considered the foregoing Findings of Fact,
Conclusions of Law, the evidence of record, the candor and
demeanor of the witnesses, and the pleadings and arguments of
the parties, it is, therefore,

RECOMMENDED that a final order be entered denying the
Petitioner's request for crisis enrollment.

DONE AND ENTERED this 26th day of January, 2009, in
Tallahassee, Leon County, Florida.

S

P.
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Filed with Clerk of the
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[REDACTED]

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.