

STATE OF FLORIDA  
AGENCY FOR PERSONS WITH DISABILITIES

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DOAH Case NO.: 08-5903APD  
RENDITION No. : APD-██████-FO

Petitioner,

v.

AGENCY FOR PERSONS WITH DISABILITIES

Respondent.

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**FINAL ORDER**

This cause is before the Agency for Persons with Disabilities for consideration and final agency action determining the correct Tier Waiver assignment for Petitioner, J. H., pursuant to Section 393.0661, Florida Statutes (2008), and Rules 65G-4.0021 through 65G-4.0025, Florida Administrative Code. The 2007 Legislature created the four tier waiver system and directed the Agency to assign all clients receiving services through the developmental disability waiver to one of four tiers. See Chapter 2007-64, Laws of Florida.

██████ disagreed with the Agency's proposed assignment of ██████ to the Tier Three Waiver and timely requested a hearing. The Agency for Persons with Disabilities referred this cause to the Division of Administrative Hearings for an administrative hearing. Administrative Law Judge Jeff B. Clark conducted the hearing on March 11, 2009. After a de novo hearing, the Administrative Law Judge issued a Recommended Order recommending that APD assign ██████ to the Tier Three Waiver. No exceptions to the Recommended Order were filed. The Recommended Order is attached and incorporated by reference.

## FINDINGS OF FACT

The Administrative Procedures Act does not permit an agency to reject or modify the findings of fact in a Recommended Order unless the agency first determines from a review of the complete record that the specific finding was not based on competent, substantial evidence and states so in particularity in the Final Order. Section 120.57(1)(l), Florida Statutes (2008). However, the agency is not bound by the labels affixed to the findings of fact and conclusions of law. If a conclusion of law is improperly labeled as a finding of fact, the label should be disregarded and the item treated as if it were a conclusion of law. Battaglia Properties, LTD., v. Florida Land and Water Adjudicatory Commission, 629 So.2d 161 (Fla. 5 DCA 1993), citing Kinney v. Department of State, 501 So.2d 129 (Fla. 5 DCA 1987).

In paragraph 14. of the Recommended Order the Administrative Law Judge makes the following finding:

Petitioner meets the mandated criteria for Tier 3. ■ lives at home, not a residential facility. Living in a residential facility is a requirement for Tiers 1 and 2. ■ is not receiving nursing services and receives less than 180 hours per month of personal care assistance. ■ approved cost plan did not exceed \$55,000. Nursing services, 180 hours or more in personal care assistance and an approved cost plan in excess of \$55,000 are thresholds for Tiers 1 and 2. While Petitioner receives less than the threshold 180 hours per month, ■ receives a “moderate” level of personal care assistance. (emphasis added)

The emphasized “findings of fact” are properly labeled as “conclusions of law.” Additionally, since the Administrative Law Judge concludes that Petitioner should be assigned to Tier 3, they are not really relevant. Consequently, they should be and are hereby stricken from the Final Order.

Otherwise, the Findings of Fact contained in the Recommended Order are approved and adopted.

### **CONCLUSIONS OF LAW**

The Conclusions of Law in the Recommended Order are approved and adopted.

Accordingly, upon review of the complete record in this case, including the Recommended Order, the submissions and arguments of the parties, and being otherwise fully advised in the premises, ■■■ is hereby placed in Tier 3. ■■■ shall contact his Waiver Support Coordinator to submit a revised cost plan to the Area Office consistent with this Order.

**DONE AND ORDERED** in Tallahassee, Leon County, Florida, this 11th day of August, 2009.

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Mac McCoy, Operations Officer  
Agency for Persons with Disabilities

## RIGHT TO APPEAL

A party who is adversely affected by this final order is entitled to judicial review. To initiate judicial review, the party seeking it must file one copy of a "Notice of Appeal" with the Agency Clerk. The party seeking judicial review must also file another copy of the "Notice of Appeal," accompanied by the filing fee required by law, with the First District Court of Appeal in Tallahassee, Florida, or with the District Court of Appeal in the district where the party resides. Review proceedings shall be conducted in accordance with Florida Rules of Appellate Procedure. The Notices must be filed within thirty (30) days of the rendition of this final order.<sup>1</sup>

Information about some sources of possible legal assistance maybe found at:  
<http://apd.myflorida.com/customers/legal/resource-listing.htm>

Copies furnished to:

M. Catherine Lannon, Esquire  
Office of the Attorney General  
Administrative Law Section  
The Capitol, PL 1  
Tallahassee, FL 32399-1050

Robert Dietz, Esquire  
Office of the Attorney General  
501 East Kennedy Blvd, Suite 1100  
Tampa, FL 33602-5242

■.  
(Address of record)

Claudia Llado  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Final Order Closing File was provided to the above-named individuals at the listed addresses, by U.S. Mail, facsimile, or electronically, this 11th day of August, 2009.

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Percy W. Mallison, Jr., Agency Clerk  
Agency for Persons with Disabilities

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<sup>1</sup> The date of the "rendition" of this Final Order is the date that is stamped on its first page. The Notices of Appeal must be received on or before the thirtieth day after that date.

