

STATE OF FLORIDA
AGENCY FOR PERSONS WITH DISABILITIES

██████ DOAH
██████ RENDITION
Petitioner,
v.

Case NO. 08-5906APD
No. APD-09-5482-FO

AGENCY FOR PERSONS WITH DISABILITIES

Respondent.

_____ /

CORRECTED FINAL ORDER

This corrected Final Order corrects scrivener's errors in the Final Order rendered on May 7, 2009.

This cause is before the Agency for Persons with Disabilities for consideration and final agency action determining the correct Tier Waiver assignment for Petitioner ██████ 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 T. Kent Wetherell, II conducted the hearing on January 7, 2009. After a de novo hearing, the Administrative Law Judge issued a Recommended Order concluding that APD

correctly assigned [REDACTED] to the Tier Three Waiver. No exceptions to the Recommended Order were filed. The Recommended Order is attached and incorporated by reference with the exception of modifications to the Conclusions of Law noted in this Final Order.

FINDINGS OF FACT

The Recommended Order makes the following Findings of Fact (with end notes omitted):

1. Petitioner is 22 years old. [REDACTED] suffers from cerebral palsy and other chronic health problems, including aspiration pneumonia and gag reflux.

2. Petitioner lives at home with [REDACTED] mother. She is [REDACTED] legal guardian and primary caregiver.

3. Petitioner is wheelchair-bound, tube-fed, and on oxygen at all times. [REDACTED] needs assistance with all activities of daily living, although [REDACTED] can crawl around the house and climb onto the couch from the floor.

4. Petitioner receives services under the developmental disability waiver (DD Waiver) program administered by the Agency. [REDACTED] has received services under the program since at least 2002.

5. Petitioner is allocated \$47,675.54 under [REDACTED] current cost-plan, which covers the period of July 1, 2008, through June 30, 2009.

6. Petitioner will be limited to \$35,000 of expenditures if, as proposed by the Agency, [REDACTED] is assigned to the Tier Three Waiver. That expenditure limit is set by the Legislature, not the Agency.

7. Petitioner's current cost-plan includes 156 hours per month of personal care assistance (PCA) services to assist [REDACTED] with [REDACTED] activities of daily living. The cost allocated for the PCA services is \$28,080.

8. The cost-plan also includes 24 quarter-hours per week of companion services for Petitioner and 2,880 quarter-hours per year

of respite services for Petitioner's mother. The costs allocated for these services are approximately \$11,500.

9. In total, Petitioner's cost-plan provides for almost 56 hours per week of services -- 36 hours per week of PCA services, six hours per week of companion services, and almost 14 hours per week of respite services for Petitioner's mother. All of these services are provided by [REDACTED]

10. Petitioner will be able to maintain the same level of PCA services that [REDACTED] currently receives if, as proposed by the Agency, [REDACTED] is assigned to the Tier Three Waiver. However, [REDACTED] will have to prioritize and reduce [REDACTED] other services (e.g., companion and respite services) because, as stated above, the annual expenditure cap for the tier is \$35,000.

11. In making the tier assignment, the Agency reviews all of the services in the client's approved cost-plan because the plan identifies the services that have been determined to be medically necessary for the client. However, it is the "core services" listed in the cost-plan that primarily determine the client's tier assignment.

12. For clients such as Petitioner who live in their own home, core services are the services that are essential for the client to be successful in the home. PCA services are core services; respite and companion services are not core services.

13. The level and number of hours of PCA services that a client receives are significant factors in the tier assignment.

14. According to the "operational detail" utilized by the Agency in making the tier assignments, clients receiving more than 180 hours per month of PCA services at the intense level are assigned to the Tier One Waiver, whereas clients receiving PCA services at the moderate level are assigned to the Tier Three Waiver.

15. Clients who receive PCA services at the intense level have medical conditions that typically require the services to be provided by a licensed nurse. By contrast, PCA services at the moderate level need not be provided by a license [sic] nurse.

16. The PCA services that Petitioner receives under [REDACTED] current cost-plan are at the moderate level, not the intense level.

17. Petitioner has never received PCA services at the intense level. There is no credible evidence that Petitioner's medical conditions require a licensed nurse to provide [REDACTED] PCA services, and the services are currently being provided by the [REDACTED], who are not licensed nurses.

18. Petitioner's mother testified that Petitioner needs more services than [REDACTED] current cost-plan provides because [REDACTED] is no longer in school. She and Petitioner's waiver support coordinator, [REDACTED] also testified that it is unfair to base Petitioner's tier assignment on the amount of PCA services provided for in the cost-plan because Petitioner needs more PCA services than the Agency's rules have allowed [REDACTED] to have.

19. With respect to the first point, Petitioner's PCA service provider [REDACTED], acknowledged that Petitioner's current cost-plan takes into account the fact that [REDACTED] is no longer in school. The plan includes more hours of services than did the prior year's plan that was in effect when Petitioner was in school.

20. With respect to the second point, Petitioner's mother and [REDACTED] both testified that the services provided under the current cost-plan are adequately meeting Petitioner's need for PCA services even though they would like for Petitioner to receive more services.

21. If, as Petitioner's mother contends, additional services are medically necessary for Petitioner to avoid institutionalization, she can have [REDACTED] seek a modification to the cost-plan through the prior service authorization review process at the Agency. That, in turn, may lead to a change to Petitioner's tier assignment in the future.

CONCLUSIONS OF LAW

The Recommended Order makes the following conclusions of law:

22. DOA H has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569, 120.57(1), and 393.125, Florida Statutes. See also J.M. v. Agency for Persons with Disabilities, 938 So. 2d 535 (Fla. 1st DCA 2006).

23. This proceeding, like any other proceeding under Section 120.57(1), Florida Statutes, is de novo. See § 120.57(1)(k), Fla. Stat. The purpose of the proceeding is to formulate final agency action regarding Petitioner's tier assignment,

not to review the proposed assignment made by the Agency. See generally McDonald v. Dept. of Banking & Finance, 346 So. 2d 569 (Fla. 1st DCA 1977).

24. In 2007, the Legislature substantially amended Section 393.0661, Florida Statutes, and directed the Agency to develop and implement a “comprehensive redesign” of the home and community-based services delivery system. See Ch. 2007-64, Laws of Fla. A central element of the redesign was the requirement that the Agency assign all clients receiving services through the DD Waiver to one of four “tiers.” See § 393.0661(3), Fla. Stat.

25. The tier system is part of a broader legislative effort to reduce the costs of the home and community-based services program. See, e.g., § 393.0661(7) and (8), Fla. Stat. (authorizing the Agency for Health Care Administration and the Agency to make additional adjustments to the home and community-based services program “to comply with the availability of moneys and any limitations or directions provided for in the General Appropriations Act” and requiring those agencies to develop and implement a plan for the adjustments if the cost of services is expected to exceed the amount appropriated).

26. The rules adopted by the Agency to implement the tier system are codified in Florida Administrative Code Rules 65G-4.0021 through 65G-4.0025. See generally Moreland v. Agency for Persons with Disabilities, Case No. 08-2199RP (DOAH Aug. 6, 2008) (rejecting a challenge to the validity of the tier rules), appeal pending, Case No. 1D08-4353.

27. The Tier One and Tier Two Waivers are “limited to” clients meeting specific criteria. See § 393.0661(3)(a) and (b), Fla. Stat.; Fla. Admin. Code R. 65G-4.0022 and 65G-4.0023.

28. The Tier Three Waiver includes clients who are eligible for services under the DD Waiver and who do not meet the criteria for the Tier One or Tier Two Waivers. See § 393.0661(3)(c), Fla. Stat.; Fla. Admin. Code R. 65G-4.0024.

29. The Tier Four Waiver is the family and supported living waiver. See § 393.0661(3)(d); Fla. Admin. Code R. 65G-4.0025. This waiver is subject to different terms and conditions than the DD Waiver, and is not implicated in this case.

30. The Legislature imposed annual expenditure limits of \$55,000 for clients in the Tier Two Waiver and \$35,000 for clients in

the Tier Three Waiver. See § 393.0661(3)(b) and (c), Fla. Stat. There is no expenditure limit for clients in the Tier One Waiver. See § 393.0661(3)(a), Fla. Stat.

31. The factors to be considered in determining the appropriate tier assignment are:

(a) The client's level of need in functional, medical, and behavioral areas, as determined through Agency evaluation of client characteristics, the Agency approved assessment process, and support planning information;

(b) The client's service needs as determined through the Agency's prior service authorization process to be medically necessary;

(c) The client's age and the current living setting; and

(d) The availability of supports and services from other sources, including natural and community supports.

Fla. Admin. Code R. 65G-4.0021(1) (all emphasis supplied).

32. Thus, even though this is a de novo proceeding, the focus is on Petitioner's needs as established by [REDACTED] current cost-plan. Issues concerning Petitioner's need for additional services are beyond the scope of this proceeding; those issues must be addressed in the first instance through the prior service authorization review process at the Agency. See Fla. Admin. Code R. 65G-4.0021(5).

33. The Agency is the party seeking to change the status quo and is the party asserting the affirmative on the issue of the appropriate tier assignment for Petitioner. Therefore, in accordance with well-settled administrative law, the Agency has the burden of proof. / See, e.g., Amico v. Div. of Retirement, 352 So. 2d 556 (Fla. 1st DCA 1977); Balino v. Dept. of Health & Rehabilitative Servs., 348 So. 2d 349 (Fla. 1st DCA 1977); Dept. of Health & Rehabilitative Servs. v. Career Service Comm'n, 289 So. 2d 412 (Fla. 4th DCA 1974).

34. Balino is strikingly similar to this case. Like the "comprehensive redesign" of the DD Waiver program that gave rise to this case, Balino arose out of a "massive state-wide reclassification of skilled care nursing home patients" in order to comply with new requirements established by the federal government. See Balino, 348 So. 2d at 350.

35. The specific issue decided in Balino was which party -- the agency or the nursing home patient -- had the burden of proof in the reclassification proceeding. *Id.* at 349. The court rejected

the agency's argument that the patient had the burden of proof, concluding that the agency had the burden because it was the party asserting the affirmative on the issue of the reclassification. Id. The court also made the following observation that is equally applicable to proceedings under Section 393.0661, Florida Statutes, such as this case:

Considering the superior resources available to the agency, it is hardly consistent with fundamental concepts of fairness to impose upon those who have been found incapable of caring for themselves the burden of the preponderance of the evidence at such reclassification hearings.
Id. at 351-52.

36. The applicable standard of proof is a preponderance of the evidence. See § 120.57(1)(j), Fla. Stat.

37. The Agency met its burden of proof, as discussed below.

38. Florida Administrative Code Rule 65G-4.0024 provides in pertinent part:

A client must meet at least one of the following criteria for assignment to the Tier Three Waiver:

* * *

(3) The client is 21 or older and is authorized to receive Personal Care Assistance service at the moderate level of support as defined in the DD Handbook.

39. Petitioner meets this criterion. ■ is 22 years old and ■ receives PCA services at the moderate level.

40. Petitioner contends that ■ should be assigned to the Tier One Waiver or the Tier Two Waiver so that ■ will be able to continue to receive services at the level provided for in ■ current cost-plan.

41. The Tier Two Waiver is limited to clients living in a licensed residential facility or in supported living. See Fla. Admin. Code R. 65G-4.0023. Petitioner is not eligible for this waiver because ■ lives at home.

42. For clients not living in a licensed residential facility, the Tier One Waiver is limited to clients who meet one of the following criteria:

(a) The client's needs for medical or adaptive services cannot be met [in the other tiers] and are essential for avoiding institutionalization, or

(b) The client possesses behavioral problems that are exceptional in intensity, duration, or frequency with resulting service needs that cannot be met [in the other tiers], and the client presents a substantial risk of harm to themselves or others.

Fla. Admin. Code R. 65G-4.0022(1).

43. Petitioner does not meet either of these criteria.

44. With respect to paragraph (a), the more persuasive evidence demonstrates that Petitioner's established need for PCA services can be met in the Tier Three Waiver and that the other services that Petitioner will have to prioritize and reduce as a result of the \$35,000 expenditure limit for that tier are not "essential to avoid institutionalization."

45. With respect to paragraph (b), there is no credible evidence that Petitioner has any exceptional behavioral problems that present a substantial risk of harm to [REDACTED] or others.

The Administrative Procedures Act grants an agency authority to modify the Conclusions of Law in a Recommended Order as they relate to laws or rules over which it has substantive jurisdiction. See §120.57(l), Florida Statutes (2008). An Agency has recognized expertise in the interpretation and application of its operable statute and implementing rules. This is the reason that courts give great deference to an Agency's interpretation of those statutes and rules.

Floridian Community Bank, Inc. v. State, Office of Financial Regulation, Div. of Financial Services, 989 So.2d 1231 (Fla. 4th DCA 2008)

The resolution of this cause turns upon the interpretation and implementation of Section 393.0661, Florida Statutes (2008) and other provisions of Chapter 393, Developmental Disabilities. It also relies upon the interpretation and application of Florida Administrative Code Rules 65G-4.0021 through 65G-

4.0025 and other rules governing the administration of the Florida's developmental disabilities waiver. The Agency has substantive jurisdiction over both the prior service authorization process and the tier level assignment process. See sections 393.0651 and 393.0661, Florida Statutes (2008), and Rules 65G-4.0021 through 65G-4.0025, Florida Administrative Code.

Conclusion of Law 32 is not incorrect. But amplification of it is necessary to clarify that the tier level assignment process and the prior service authorization process are separate procedures, each of which results in final agency action as contemplated in Chapter 120.

Consequently, the Recommended Order's Conclusions of Law are modified by this Final Order. Section 393.0661 and the tier rules refer to client "needs" and "service needs." Rule 65G-4.0021(1)(a)-(d) lists certain information on which a tier assignment will be based. That information includes "(t)he client's service needs as determined through the Agency's prior service authorization process to be medically necessary." 65G-4.0021(1)(b).

In the waiver service authorization process, in operation when the Legislature adopted Chapter 2007-64, a client's service needs are determined, not through the tier assignment process, but rather through the agency's prior service authorization process. This process, conducted in accordance with the provisions of Section 393.0651, Florida Statutes, results in a final agency determination that, as provided in Sub-section 393.125, is subject to challenge under Sections 120.569 and 120.57. Where a client disagrees with the determination of his or her service needs, the client has the right to challenge

that determination by timely filing a request for an administrative hearing as permitted by section 393.125. Once the client's service needs have been approved by final agency action, however, those are the clients service needs as referred to in Section 393.0661.

Only those finally determined service needs may be considered in making a tier assignment in accordance Section 393.0661 and Florida Administrative Code Rules 65G-4.0021 through 65G-4.0025. Section 393.0661 does not require or contemplate a determination of client "service needs" or "needs" separate from the needs determination process in effect when the Legislature adopted Chapter 2007-64.

A client assigned to a specific tier based on his or her current and approved service needs is still eligible to be reassigned to a different tier. This can happen if the Agency determines, in the course of its annual review of the approved support plan, that the client's service needs have changed. It can also happen whenever a client "has a significant change in circumstance or condition that impacts on the client's health, safety, or welfare or when a change in the client's plan of care is required to avoid institutionalization." See Fla. Admin. Code R. 65G-4.0021(4).

Conclusion of Law 24 also requires slight modification. That Conclusion states that Chapter 2007-64, Laws of Florida created the tiers as part of the "comprehensive redesign" of the home and community-based services delivery system referred to in the first paragraph of section 393.0661, Florida Statutes (2008). The Legislature's statement of intent for the Agency (then the

Department of Children and Families) to develop and implement a comprehensive redesign of the system was first adopted in Ch. 2002-400, section 39, Laws of Florida.

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, [REDACTED] is placed in Tier Three. [REDACTED] shall contact [REDACTED] Waiver Support Coordinator to submit a revised cost plan to the Area Office consistent with this decision.

DONE AND ORDERED in Tallahassee, Leon County, Florida, this _____ day of _____, 2009.

James DeBeaugrine, Director
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.¹

¹ 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.

Copies furnished to:



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Final Order was provided to the above-named individuals at the listed addresses, by U.S. Mail or electronic mail, this _____ day of May, 2009.

Percy

Tallahassee,

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