

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████)
)
Petitioner,)
)
vs.) Case No. 08-5907APD
)
AGENCY FOR PERSONS WITH)
DISABILITIES,)
)
Respondent.)
_____)

RECOMMENDED ORDER

This cause came on for final hearing before Harry L. Hooper, Administrative Law Judge with the Division of Administrative Hearings, on January 23, 2009, ██████████ Florida.

APPEARANCES

For Petitioner: ██████████

For Respondent: Helen Brewer Fouse, Esquire
Office of the Attorney General
501 East Kennedy Boulevard, Suite 1100
Tampa, Florida 33602

STATEMENT OF THE ISSUE

The issue is whether Respondent appropriately assigned ██████████ to Tier 2, based on the criteria set forth in Section 393.0661, Florida Statutes (2008), and Florida Administrative Code Rules 65G-4.0021 through 65G-4.0025.

PRELIMINARY STATEMENT

In 2008, the Florida Legislature enacted a law that required Respondent Agency for Persons with Disabilities (APD or Agency) to assign Medicaid Waiver clients into one of four possible tiers. Persons requiring the most services are to be assigned to Tier 1. Persons requiring the least services are to be assigned to Tier 4. Tier assignments did not exist prior to this legislation.

In a letter dated September 2, 2008, client ██████ was assigned to Tier 2, effective October 15, 2008. Tier 2 provides for an array of defined services and imposes a spending cap of \$55,000 per year. The letter advised ██████ that ██████ could request a hearing if ██████ disagreed with the assignment. The sister and guardian of ██████ responded in a letter dated September 7, 2008, and asserted that ██████ needs could only be addressed if ██████ was assigned a Tier 1 placement.

At the hearing, Petitioner did not offer any evidence. Respondent presented the testimony of one witness and offered eight exhibits into evidence.

After the hearing, Respondent filed its Proposed Findings of Fact and Conclusions of Law on February 2, 2009.

References to statutes are to Florida Statutes (2008) unless otherwise noted.

FINDINGS OF FACT

1. In accordance with Chapter 393, Florida Statutes, APD is charged with operating programs that place emphasis on preventing or reducing the severity of developmental disabilities. The greatest priority of APD is to develop and implement community-based services that will enable individuals with developmental disabilities to achieve their greatest potential for independent and productive living, enable them to live in their own homes or in residences located in their own communities, and permit them to be diverted or removed from unnecessary institutional placements.

2. [REDACTED] is a [REDACTED] who is non-ambulatory, incontinent, non-verbal, blind in one eye, and has limited use of one hand. [REDACTED] is currently living in a residential facility, where [REDACTED] has increased [REDACTED] social involvement and has gained some independence.

3. The Agency assigned Kent Carroll, a management review specialist to evaluate the case of [REDACTED] pursuant to the new legislative requirement to assign clients to appropriate tiers. Mr. Carroll had previously received extensive training in reviewing information and determining into which tier a client should be assigned.

4. In the case of [REDACTED] [REDACTED] made [REDACTED] determination by reviewing documents addressing the needs of [REDACTED] and comparing

them to the requirements outlined in Florida Administrative Code Rules 65G-4.0021 through 65G-4.0025.

5. Mr. Carroll considered the Allocation, Budget and Contract Control System Cost Plan, the Developmental Services Support Planning Information, and the Developmental Services Information Sheets applicable to ██████████

6. Mr. Carroll noted that ██████████ is currently receiving residential habilitation services at the moderate level. In order for ██████████ to be placed in Tier 1 ██████████ would require standard residential habilitation at the extensive 1, or higher, level of support, as provided in Florida Administrative Code Rule 65G-4.0022(2)(c).

7. Determining the placement of a client in a tier, as done by Mr. Carroll, is made by comparing currently documented services to the standards set forth in Florida Administrative Code Rules 65G-4.0021 through 65G-4.0025. Mr. Carroll's determination was correct, based on the material he was charged with reviewing. Should there be a subsequent change in the medical or needs status of ██████████ ██████████ could be moved to Tier 1 or Tier 3 or 4.

CONCLUSIONS OF LAW

8. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. § 120.57(1), Fla. Stat.

9. APD has the burden of proof. Florida Department of Transportation v. J. W. C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

10. APD must prove its case by a preponderance of the evidence. Florida Department of Health and Rehabilitative Services v. Career Services Commission, 289 So. 2d 412 (Fla. 4th DCA 1974).

11. Section 393.0661, Florida Statutes, provides, in part, as follows:

393.0661 Home and community-based services delivery system; comprehensive redesign.--

The Legislature finds that the home and community-based services delivery system for persons with developmental disabilities and the availability of appropriated funds are two of the critical elements in making services available. Therefore, it is the intent of the Legislature that the Agency for Persons with Disabilities shall develop and implement a comprehensive redesign of the system.

(1) The redesign of the home and community-based services system shall include, at a minimum, all actions necessary to achieve an appropriate rate structure, client choice within a specified service package, appropriate assessment strategies, an efficient billing process that contains reconciliation and monitoring components, a redefined role for support coordinators that avoids potential conflicts of interest, and ensures that family/client budgets are linked to levels of need.

(a) The agency shall use an assessment instrument that is reliable and valid. The agency may contract with an external vendor

or may use support coordinators to complete client assessments if it develops sufficient safeguards and training to ensure ongoing inter-rater reliability.

(b) The agency, with the concurrence of the Agency for Health Care Administration, may contract for the determination of medical necessity and establishment of individual budgets.

(2) A provider of services rendered to persons with developmental disabilities pursuant to a federally approved waiver shall be reimbursed according to a rate methodology based upon an analysis of the expenditure history and prospective costs of providers participating in the waiver program, or under any other methodology developed by the Agency for Health Care Administration, in consultation with the Agency for Persons with Disabilities, and approved by the Federal Government in accordance with the waiver.

(3) The Agency for Health Care Administration, in consultation with the agency, shall seek federal approval and implement a four-tiered waiver system to serve clients with developmental disabilities in the developmental disabilities and family and supported living waivers. The agency shall assign all clients receiving services through the developmental disabilities waiver to a tier based on a valid assessment instrument, client characteristics, and other appropriate assessment methods. All services covered under the current developmental disabilities waiver shall be available to all clients in all tiers where appropriate, except as otherwise provided in this subsection or in the General Appropriations Act.

(a) Tier one shall be limited to clients who have service needs that cannot be met in tier two, three, or four for intensive medical or adaptive needs and that are

essential for avoiding institutionalization, or who possess behavioral problems that are exceptional in intensity, duration, or frequency and present a substantial risk of harm to themselves or others.

(b) Tier two shall be limited to clients whose service needs include a licensed residential facility and who are authorized to receive a moderate level of support for standard residential habilitation services or a minimal level of support for behavior focus residential habilitation services or clients in supported living who receive greater than 6 hours a day of in-home support services. Total annual expenditures under tier two may not exceed \$55,000 per client each year.

* * *

12. Florida Administrative Code Rule 65G-4.0021 provides as follows:

65G-4.0021 Tier Waivers.

(1) The Agency for Persons with Disabilities will assign clients of home and community-based waiver services for persons with developmental disabilities to one of the four Tier Waivers created by Section 393.0661, F.S. (2007). The Agency will determine the Tier Waiver for which the client is eligible and assign the client to that waiver based on the developmental disabilities waiver criteria and limitations contained in the following provisions: Sections 409.906(13) and 393.0661, F.S.; and Rule 59G-13.080, F.A.C.:

(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.

(2) The services described by the Developmental Disabilities Waiver Services Coverage and Limitations Handbook, July 2007 (hereinafter referred to as the "DD Handbook"), adopted by Rule 59G-13.080, F.A.C. and incorporated herein by reference, are available to clients of the Developmental Disabilities Waiver (hereinafter called "the Tier One Waiver"), the Developmental Disabilities Tier Two Waiver (hereinafter called "the Tier Two Waiver"), and Developmental Disabilities Tier Three Waiver (hereinafter called "the Tier Three Waiver"). The following services described in the DD Handbook are available to clients assigned to the Tier Four Waiver (presently known as The Family and Supported Living Waiver):

- (a) Adult Day Training;
- (b) Behavior Analysis;
- (c) Behavior Assistance;
- (d) Consumable Medical Supplies;
- (e) Durable Medical Equipment;
- (f) Environmental Accessibility Adaptations;
- (g) In-Home Support Service;
- (h) Personal Emergency Response System;
- (i) Respite Care;
- (j) Support Coordination;
- (k) Supported Employment;
- (l) Supported Living Coaching; and
- (m) Transportation.

(3) For all Tiers client must utilize all available State Plan Medicaid services including, but not limited to, personal care assistance, therapies, and medical services, that duplicate the waiver services proposed for the client. A client shall not be

provided waiver services that duplicate available State Plan Medicaid Services including, but not limited to, personal care assistance, therapies, and medical services.

(4) The Agency will review a client's tier eligibility when 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. The information identifying and documenting a significant change in circumstance or condition that necessitates additional or different services must be submitted by the client's Waiver Support Coordinator to the appropriate Agency Area office for determination.

13. Florida Administrative Code Rule 65G-4.0022 provides as follows:

65G-4.0022 Tier One Waiver.

(1) The Tier One Waiver is limited to clients that the Agency has determined meet at least one of the following criteria:

(a) The client's needs for medical or adaptive services cannot be met in Tiers Two, Three, and Four 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 Tiers Two, Three, and Four, and the client presents a substantial risk of harm to themselves or others.

(2) Clients living in a licensed residential facility receiving any of the following services shall be assigned to the Tier One Waiver:

(a) Intensive behavioral residential habilitation services;

- (b) Behavior focus residential habilitation services at the moderate or above level of support; or
- (c) Standard residential habilitation at the extensive 1, or higher, level of support; or
- (d) Special medical home care.

(3) Nursing service needs that can be met through the Tier Two, Tier Three, or Tier Four Waivers are not "services" or "service needs" that support assignment to the Tier One Waiver.

14. Florida Administrative Code Rule 65G-4.0023 provides as follows:

65G-4.0023 Tier Two Waiver.

The total budget in a cost plan year for each Tier Two Waiver client shall not exceed \$55,000. The Tier Two Waiver is limited to clients who meet the following criteria:

- (1) The client's service needs include placement in a licensed residential facility and authorization for greater than five hours per day of residential habilitation services; or
- (2) The client is in supported living and is authorized to receive more than six hours a day of in-home support services.

15. APD proved by a preponderance of the evidence that [REDACTED] is receiving residential habilitation at the moderate level. Thus [REDACTED] is properly assigned as a Tier 2 client.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law,
it is

RECOMMENDED that the Agency for Persons with Disabilities
enter a final order affirming the assignment of [REDACTED] to Tier 2.

DONE AND ENTERED this 11th day of February, 2009, in
Tallahassee, Leon County, Florida.

S

HARRY L. HOOPER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of February, 2009.

COPIES FURNISHED:

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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.