

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

[REDACTED])
Petitioner,)
vs.) Case No. 08-5943APD
AGENCY FOR PERSONS)
WITH DISABILITIES,)
Respondent.)
_____)

RECOMMENDED ORDER

On January 5, 2009, a duly-noticed hearing was held in Jacksonville, Florida. The case was considered by Lisa Shearer Nelson, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner:

[REDACTED]

For Respondent: Carroll Y. Cherry, Esquire
Office of the Attorney General
The Capitol, Plaza Level One
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUE

The issue to be decided is whether Petitioner's assignment to the Tier Four Waiver pursuant to Section 393.0661, Florida Statutes, is appropriate.

PRELIMINARY STATEMENT

On September 2, 2008, the Agency for Persons with Disabilities (the Agency) provided to [REDACTED] a Notice of

Implementation of Changes In Law for Tier Waiver Assignment
Effective October 15, 2008. This Notice indicated that [REDACTED] was
assigned to the Tier Four Waiver, with an annual spending limit
of \$14,792 per year. On September 17, 2008, Petitioner through
[REDACTED] filed a request for an administrative hearing to
challenge the Tier assignment, and on November 26, 2008, the case
was forwarded to the Division of Administrative Hearings for the
assignment of an administrative law judge.

On December 12, 2008, a Notice of Hearing issued, scheduling
the case to be heard January 5, 2009. Prior to hearing,
Respondent filed three Motions: a Motion to Appear by telephone;
a Motion for Official Recognition; and a Motion in Limine. The
first two motions were granted by Order issued December 22, 2008.
After argument at the commencement of the hearing, the Motion in
Limine was denied.

Because assignment to the Tier Four waiver represented a
change in circumstances for Petitioner, it was determined at
hearing that Respondent bore the burden of proof, and presented
its case first. Respondent presented the testimony of two
witnesses and Respondent's Exhibits 1-3 were admitted into
evidence. Petitioner presented six witnesses and Petitioner's
Exhibits 1-2 were admitted into evidence. After the hearing,
on January 13, 2009, Petitioner submitted a letter and several
documents that had not been provided during the course of the
hearing. On January 14, 2009, Respondent filed a Motion to

Strike, asserting that the record of the proceedings was already closed and the documents were not presented at hearing. The Motion to Strike is granted and the materials included with Petitioner's letter have not been considered.

The proceedings were recorded and the Transcript was filed with the Division January 15, 2009. At hearing, Respondent requested and the parties were granted until January 30, 2009, to file proposed recommended orders. Respondent timely filed a Proposed Recommended Order on that date. No similar submission was filed by Petitioner. All references in this Recommended Order to the Florida Statutes are to the 2008 version unless otherwise indicated.

FINDINGS OF FACT

1. [REDACTED] is [REDACTED] with a variety of medical problems, including diagnoses of mental retardation, cerebral palsy, attention deficit hyperactivity disorder (ADHD), seizure disorder, XYY syndrome, and autism. [REDACTED] needs physical assistance with all self-care activities such as bathing, personal hygiene, dressing and eating. [REDACTED] cannot be left alone at any time.

2. [REDACTED] suffers from numerous behavioral problems, and is classified as nonverbal. [REDACTED] exhibits physical aggression, tantrums, self-injury, and pica disorder. [REDACTED]

[REDACTED] have suffered injuries, great stress and anxiety as a result of [REDACTED] actual and threatened physical aggression. In addition to the injuries inflicted on

those around [REDACTED], [REDACTED] has engaged in destructive behaviors in [REDACTED] home that have resulted in five broken toilets over the last two years; holes in the drywall of [REDACTED] home; exposed wires that [REDACTED] pulls out of the wall; torn-out curtain rods; and other, similar destruction. [REDACTED] cannot leave out or display any item that [REDACTED] can reach for fear [REDACTED] will destroy it.

3. Despite these extreme difficulties, it is clear that [REDACTED] is a much loved child for whom [REDACTED] family wants the best care possible. Because of [REDACTED] special needs, [REDACTED] must have constant supervision and a very structured environment. While [REDACTED] is on a waiting list for residential placement, there is currently no available bed for [REDACTED] and [REDACTED] parents appear torn about taking such a step.

4. A "cost plan" is a document that lists all approved waiver services requested by a client and the allocated cost for each waiver service. The cost plan is updated annually after submission of a support plan that outlines the client's current needs and goals. The cost plan must be approved by the Agency prior to a client receiving services for any given year.

5. Prior to the implementation of the tier process giving rise to this case, [REDACTED] was provided services by means of the Developmental Disabilities Home and Community-Based Medicaid Waiver (DD Waiver). Under the DD Waiver, [REDACTED]'s cost plan authorized [REDACTED] to receive Level One, Behavioral Therapy services for ten hours each month; a behavioral assessment; 30 days of

respite care services; personal care assistance for 49 hours weekly; consumable medical supplies (1 case each of diapers and wipes each month); and support coordination services.

6. In 2007, the Legislature amended Section 393.0661, Florida Statutes, related to home and community-based services available under the Medicaid Waiver program. These amendments directed the Agency to develop a comprehensive re-design of the system, and to implement a four-tier waiver system for the delivery of services, whereby clients would be assigned a particular tier (Tier One representing the most services to Tier Four representing the least).

7. The amendments to Section 393.0661 provide certain criteria for placement and established annual spending caps for the four tiers as follows: Tier One has no spending cap; Tier Two clients may not exceed \$55,000 per year; Tier Three clients may not exceed \$35,000 per year; and Tier Four clients are limited to \$14,792 each year.

8. The Agency adopted Florida Administrative Code Rules 65G-4.0021, 65G-4.0022, 65G-4.0023, 65G-4.0024 and 65G-4.0025 (the Tier Rules) to implement the four-tier system. When proposed, these rules were the subject of a rules challenge in which it was ultimately found that the rules were not invalid exercises of delegated legislative authority. Moreland v. Agency for Persons with Disabilities, 08-2199RP (DOAH Final Order August 6, 2008). The rules became effective October 20, 2008.

9. In determining which tier assignment is appropriate for clients receiving services, an initial assignment was made by use of computer software that took into account the services being received and the dollar amount of those services. Based on this calculation, [REDACTED] was originally assigned to Tier Three.

10. The Agency's area office staff then reviewed the initial tier assignments to determine whether they were consistent with the criteria set forth in Section 393.0661(3) (a)-(d), Florida Statutes, and the Tier Rules. If the area office staff determined that the assignment needed to be changed, then a recommendation was submitted to the central office in Tallahassee, which would either approve or deny the proposed change. At that point, the client would be notified of his or her tier assignment.

11. Initially, children residing in the family home and receiving personal care assistance were in most instances assigned to Tier Three. However, personal care assistance is now provided as a service under the Medicaid State Plan as opposed to being provided as a Medicaid Waiver Service. Therefore, the cost of those services would be subtracted from the authorized services under the Medicaid Waiver.

12. Patti Smith reviewed [REDACTED]'s initial tier assignment and completed an operational detail checklist which outlined the criteria in the Tier Rules. She determined that the Tier Four Waiver was the appropriate waiver for [REDACTED] because [REDACTED] is under

the age of 22, resides in the family home, and therefore does not meet the criteria for the other three tiers.

13. Ms. Smith could only consider those services that had been approved in [REDACTED] cost plan. She also considered the availability of supports and services from other sources, including the personal care assistance services now funded under the Medicaid State Plan, and the speech therapy, physical therapy and occupational therapy [REDACTED] receives from the public school system.

14. The cost of the services [REDACTED] was approved to receive prior to the tier assignment, not including personal care assistance, was \$15,511.35. The difference between what was previously approved and what is allowed under Tier Four is \$719.35 per year.

15. After review of [REDACTED]'s initial tier assignment and the criteria mandated under Section 393.001 and the Tier Rules, Ms. Smith recommended that [REDACTED] be assigned to Tier Four. This assignment was approved and [REDACTED]'s family notified accordingly.

16. Sometime after [REDACTED]'s family was notified that [REDACTED] was assigned to Tier Four, they were also notified that [REDACTED] was not recertified for Medicaid services. The appropriate paperwork for recertification was submitted in November 2008 and, at the time the hearing in this case took place, services were being provided pending a decision on the recertification.

17. Based upon all of the information available at this time, and consistent with the testimony of [REDACTED]'s support coordinator regarding [REDACTED] current needs, [REDACTED] is eligible for placement in Tier Four.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with Sections 120.569 and 120.57(1), Florida Statutes.

19. In administrative hearings, the burden of proof is on the party asserting the affirmative of an issue. Wilson v. Department of Administration, Division of Retirement, 538 So. 2d 139, 141-2 (Fla. 4th DCA 1989); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977). The Agency bears the burden of proof in this de novo proceeding to demonstrate by a preponderance of the evidence that [REDACTED] is appropriately placed in the Tier Four waiver. § 120.57(1)(j), Fla. Stat.

20. Section 393.0661, Florida Statutes, defines the tiers for service delivery related to developmental disabilities and the process to be used as follows:

(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 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 or 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 per year.

(c) Tier three shall include, but is not limited to, clients requiring residential placements, clients in independent or supported living situations, and clients who live in their family home. Total annual expenditures under tier three may not exceed \$35,000 per client per year.

(d) Tier four is the family and supported living waiver. Tier four shall include, but is not limited to, clients in independent or supported living situations and clients who live in their family home. Total annual expenditures under tier four may not exceed \$14,792 per client per year.

21. Florida Administrative Code Rule 65G-4.0021 provides in pertinent part:

(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 current living setting; and

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

* * *

(3) For all Tiers client [sic] 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 circumstances 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 circumstances 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.

22. Tier One is limited to those client's whose needs cannot be met in any of the other tiers, and whose services are essential for avoiding institutionalization, or where 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. While there has been some evidence presented regarding harm to [REDACTED] and to [REDACTED] family members by virtue of [REDACTED] behavioral problems, no one has argued that [REDACTED] qualifies for inclusion in Tier One.

23. Tier Two is limited to clients whose service needs include placement in a licensed residential facility and authorization for greater than five hours of residential habilitation services each day, or where the client is in supported living and is authorized to receive more than six

hours each day of in-home support services. Fla. Admin. Code R. 65G-4.0023. Petitioner does not meet these criteria and no argument has been made for placement in Tier Two.

24. Florida Administrative Code Rule 65G-4.0024 governs placement in Tier Three and provides as follows:

The total budget in a cost plan year for each Tier Three Waiver client shall not exceed \$35,000. A client must meet at least one of the following criteria for assignment to the Tier Three Waiver:

- (1) The client resides in a licensed residential facility and is not eligible for the Tier One Waiver or the Tier Two Waiver; or
- (2) The client is 21 or older, resides in their own home and receives In-Home Support Services and is not eligible for the Tier One Waiver or the Tier Two Waiver; or
- (3) The client is 21 or older and is authorized to receive Personal Care Assistance services at the moderate level of support as defined in the DD Handbook.
- (4) The client is 21 or older and is authorized to receive Skilled or Private Duty Nursing Services and is not eligible for the Tier One Waiver or the Tier Two Waiver; or
- (5) The client is 22 or older and is authorized to receive services of a behavior analyst and/or behavior assistant.
- (6) The client is under the age of 22 and authorized to receive the combined services of a behavior analyst and/or a behavior assistant for more than 60 hours per month and is not eligible for the Tier One Waiver or the Tier Two Waiver.
- (7) The client is 21 or older and is authorized to receive at least one of the following services:

- (a) Occupational therapy; or
- (b) Physical therapy; or
- (c) Speech therapy; or
- (d) Respiratory therapy.

25. Because [REDACTED] is 11 years old, [REDACTED] would only be eligible for Tier Three if [REDACTED] qualified on paragraph (1) or (6). [REDACTED] is not now residing in a residential facility, although is on a waiting list to do so. While [REDACTED] is authorized to receive behavioral services, [REDACTED] receives ten hours per month, well short of the 60 hours per month required to be eligible for services under Tier Three.

26. At this time, [REDACTED] is appropriately placed in Tier Four. While there was significant concern expressed about how [REDACTED]'s needs may change as [REDACTED] reaches adolescence, [REDACTED] current Tier assignment can only take into account [REDACTED] needs at this time, and the supports presently available to [REDACTED]. Should [REDACTED] needs change, or the services available to [REDACTED] change, the appropriateness of [REDACTED] Tier assignment would be addressed pursuant to Rule 65G-4.0021. However, for the time being, [REDACTED] should be placed in the Tier Four waiver.

RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

RECOMMENDED:

That a final order be entered placing Petitioner in the Tier Four Waiver.

DONE AND ENTERED this 23rd day of February, 2009, in
Tallahassee, Leon County, Florida.

S

LISA SHEARER NELSON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of February, 2009.

COPIES FURNISHED:

[REDACTED]

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

Cathy Bedell, Esquire
Agency for Persons with Disabilities
Fair Hearing Coordinator
4030 Esplanade Way, Suite 380
Tallahassee, Florida 32399-0950

M. Catherine Lannon, Esquire
Office of the Attorney General
Administrative Law Section
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

John Newton, General Counsel
Agency for Persons with Disabilities
4030 Esplanade Way, Suite 380
Tallahassee, Florida 32399-0950

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.