



If so, at what tier level [REDACTED] should be assigned, based on the criteria set forth in Section 393.0661, Florida Statutes (2008)<sup>1</sup>, and Florida Administrative Code Rule 65G-4.0021 through 65G-4.0025. The hearing was recorded but not transcribed.

PRELIMINARY STATEMENT

In a letter dated October 21, 2008, [REDACTED] was advised that [REDACTED] was being assigned to tier three, effective October 15, 2008. Tier three provides for an array of defined services and imposes a spending cap of \$35,000 per year. The letter advised Petitioner that [REDACTED] could request a hearing if [REDACTED] disagreed with the assignment. [REDACTED] the legal guardian of [REDACTED] timely responded and asserted that [REDACTED] needs could only be addressed if [REDACTED] was assigned to a tier one placement. This matter was referred to the DOAH on December 8, 2008, and set for hearing. Upon being transferred to the undersigned Administrative Law Judge, this matter was heard on February 19, 2009.

At the hearing, [REDACTED] relied upon the evidence submitted by Respondent. Respondent presented the testimony of two witnesses: Beverly Behkatar, Agency for Persons with Disabilities, and Kent Carroll, Management Review Specialist for Agency for Persons with Disabilities, who appeared telephonically. Respondent offered five exhibits into evidence. Official recognition was taken of Sections 393.066 and 409.919,

Florida Statutes and Florida Administrative Code Rule  
59G-13.081.

FINDINGS OF FACT

1. [REDACTED] over 21 years old, who is currently living in a residential habilitation facility, and receiving services under the Developmental Disabilities Home and Community-based Services Waiver Program.

2. In the case of [REDACTED] a management review specialist was assigned to evaluate and assign Respondent's clients to an appropriate tier, pursuant to new legislation. The determination, in regard to [REDACTED] was made 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. The allocation, Budget and Contract Control System Cost Plan, the Developmental Services Support Planning Information, and the Developmental Services Information Sheets, applicable to [REDACTED] were considered.

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

4. [REDACTED] is currently receiving residential habilitation services at the minimal level. In order for [REDACTED] to be placed in tier one, the highest tier, [REDACTED] would require standard residential habilitation at the extensive, or highest, level of support, as provided in Florida Administrative Code Rule 65G-4.0022(2)(c).

5. In [REDACTED] tier challenge, [REDACTED] stated that [REDACTED] was requesting residential habilitation services at the extensive level, plus behavioral analyst services to deal with [REDACTED] behavioral issues.

6. A challenge to a tier assignment is not the appropriate mechanism to either challenge the denial or reduction of services based upon medical necessity. The correct way to challenge a denial or reduction of a service based upon medical necessity would be to file an appeal of the denial or reduction of the service and submit an additional cost plan with supporting documentation to Respondent.

7. Determining the placement of a client in a tier is made by comparing currently documented services to the standards set forth in Florida Administrative Code Rules 65G-4.0021 through 65G-4.0025.

8. Based on the evidence, including material submitted for review, Petitioner should be assigned to tier three.

CONCLUSIONS OF LAW

9. The DOAH has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

10. The Legislature has designated Respondent to develop plans for assuring access to all Floridians who have special needs. § 408.301, Fla. Stat.

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

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 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 of in the General Appropriations Act.

(a) Tier one shall be limited to clients who have special needs that cannot be met in tiers 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.

(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 each 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 situation and clients who live in their family home. An increase to the number of services available to clients in this tier shall not take effect prior to July 1, 2009. Total annual expenditures under tier four may not exceed \$14,792 per client each year.

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

#### 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 56G-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 Adaptation;
- (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 clients 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 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.

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

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:

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. Florida Administrative Code Rule 65G-4.0024 provides, as follows:

Tier Three Waiver

The total budget in a cost plan 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 a behavior assistant.

(6) The client is under the age of 22 and authorized to receive the combined services of a behavior analyst and/or 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.

16. Respondent has the initial burden at the hearing, since it has initiated the action to reduce Petitioner's services and/or payments for services being received by the recipient. Fla. Admin. Code R. 65-2.060(1). See also Wiggins

v. Florida Department of Children and Families, 919 So. 2d 619 (Fla. 1st DCA 2006); Florida Department of Transportation v. J. W. C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). Respondent must prove its case by a preponderance of evidence. Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977).

17. Respondent proved by a preponderance of evidence that [REDACTED] is receiving residential habilitation at the minimal level and has never been approved for behavioral analyst services level. Therefore, [REDACTED] does not meet the criteria for tiers one or two. Tier three is the proper level of assignment for [REDACTED]

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 assigning Petitioner [REDACTED] to tier three level of support.

DONE AND ENTERED this 10th day of March, 2009, in Tallahassee, Leon County, Florida.

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Filed with the Clerk of the  
Division of Administrative Hearings  
this 10th day of March, 2009.

ENDNOTE

<sup>1/</sup> All references to Florida Statutes are to Florida Statutes (2008) unless otherwise indicated.

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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.