

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

██████████ )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 08-6125APD  
 )  
AGENCY FOR PERSONS WITH )  
DISABILITIES, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on March 9, 2009, in ██████████. The hearing was held before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: ██████████ Representative  
██████████  
██████████

For Respondent: Diane R. Esposito, Esquire  
Office of the Attorney General  
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Suite 1100  
Tampa, Florida 33602

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner's assignment to Tier 2 waiver status is appropriate and consistent with the provisions of Section 393.0661, Florida Statutes (2008).

PRELIMINARY STATEMENT

On September 2, 2008, Respondent, Agency for Persons With Disabilities ("APD"), provided Petitioner, [REDACTED], with a Notice of Implementation of Changes in Law for Tier Waiver Assignment, effective October 15, 2008. The notice advised Petitioner that [REDACTED] was being assigned to Tier 2 waiver status with an annual spending limit of \$55,000. Petitioner timely filed a request for formal administrative hearing to contest the assignment by APD. The petition was forwarded to the Division of Administrative Hearings ("DOAH") on December 8, 2008, and assigned to the undersigned Administrative Law Judge.

At the final hearing held on March 9, 2009, Petitioner called three witnesses: [REDACTED] waiver support coordinator; [REDACTED] executive director for [REDACTED] [REDACTED] United Cerebral Palsy; and [REDACTED], Petitioner's mother. Petitioner's Exhibits 1 through 5, 7 through 14, 16, 17, 22, and 23 were admitted into evidence. Official recognition was taken of the documents in Petitioner's Exhibits 18 through 20, which are a part of the Waiver Handbook. Respondent presented the testimony of one witness, Rene Johnson, a Government Operations Consultant II for APD. Respondent's Exhibits 1 through 5 were admitted into evidence.

At the close of the evidentiary portion of the final hearing, the parties advised that a transcript of the final

hearing would be ordered. They were given ten days from the date the transcript was filed at DOAH to submit proposed findings of fact and conclusions of law. On March 20, 2009, Petitioner filed a Proposed Recommended Order, although no transcript had yet been filed at DOAH. The Transcript was filed on April 2, 2009. On that same date, Respondent filed an unopposed motion seeking additional time (until April 13, 2009) to file its proposed recommended order. The motion was granted; however, Respondent filed a second unopposed motion on April 10, 2009, requesting until April 23, 2009, to file its proposed recommended order. That motion was also granted, and Respondent filed a Proposed Recommended Order on April 22, 2009.

Unless otherwise specifically stated, all references to Florida Statutes will be to the 2008 version.

#### FINDINGS OF FACT

1. Petitioner is a 33-year-old [REDACTED] who is wheelchair-bound and with a diagnosis of mental retardation and cerebral palsy. [REDACTED] communicates through facial expressions and grunting noises in various pitches, but does not use words.) Petitioner currently lives in a six-bed group home and has a roommate.

2. Petitioner needs total physical assistance for bathing, toileting, grooming, and dressing (i.e., activities of daily living).

3. Petitioner has a history of seizures and is on medication for the seizures.<sup>1</sup> Other than the seizure medication and a multivitamin, Petitioner does not take any medications.

4. Petitioner does not have any elopement issues.

5. Petitioner's mother and father pick [REDACTED] up on Sundays and take [REDACTED] to their family home for the day. They also bring Petitioner home for holidays and family vacations whenever possible.

6. Petitioner is receiving the following services provided by the Developmental Disabilities Home and Community-Based Medicaid Waiver Program at the annual cost indicated:

Consumable Medical Supplies	\$2,496.00
Standard Residential Habilitation	41,181.00 <sup>2</sup>
Support Coordination	1,571.40
Behavioral Therapy	5,554.78
Adult Day Training (ADT)	12,292.82
Transportation to ADT	2,471.38
Physical Therapy	6,944.26
Occupational Therapy	6,944.26
TOTAL	\$79,455.90

7. Petitioner has been deemed incompetent.

[Findings of Fact 1 through 7, above--  
except for the parenthetical statements--  
were contained in a Pre-Hearing Stipulation  
filed by the parties.]

8. [REDACTED], Petitioner's mother, is a full-time elementary school teacher. She has a genuine love and affection for [REDACTED] and does her best to provide [REDACTED] the care and support [REDACTED] needs. However, due to Petitioner's condition, [REDACTED] cannot provide that care at her home on a full-time basis. Petitioner's father did not testify as to his ability to care for Petitioner, but [REDACTED] suggested that the father was not able to meet Petitioner's needs either.

9. Petitioner resides at a group home [REDACTED] [REDACTED]. Its executive director is [REDACTED]. The group home receives payment from APD and also receives Petitioner's monthly Social Security checks (totaling approximately \$600) for Petitioner's residential care. About \$500 per month from the Social Security money is used for room and board at the group home; the remainder is Petitioner's to spend on [REDACTED] personal needs. The APD portion of payments to the group home covers utilities, staffing, transportation, and other "housing aspects." Also, the group home provides outings for its residents, including dinners, movies, and visits to places of interest.

10. When Petitioner is at [REDACTED] parents' home, [REDACTED] parents do not provide physical therapy or occupational therapy to [REDACTED]. They sometimes place Petitioner in the swimming pool with

flotation devices in an effort to stimulate ■■■, but no formal therapies are done.

11. The therapies Petitioner receives are done at the group home or at ADT. Due to the extreme nature of Petitioner's condition, the therapies are intended to improve range of motion, strength, balance, and transfers. ■■■ has made improvement with ■■■ range of motion and assisting with transfers.

12. Petitioner is wheelchair bound, so ■■■ must be lifted into and out of an automobile for transportation purposes. Although one person can physically lift Petitioner (presuming they have the requisite strength), the group home director says that a two-person lift or "hoyer" lift is needed to move Petitioner from ■■■ wheelchair. ■■■ states that her husband can individually move Petitioner (with some difficulty), but that she is not able to do so alone. When ■■■ picks Petitioner up from the group home, she uses a temporary wheelchair, rather than Petitioner's normal chair.<sup>3</sup>

13. Petitioner has developed the ability to do a "stand pivot transfer" which is a means of assisting ■■■ caregiver when being removed from the wheelchair. This technique basically allows Petitioner to bear ■■■ weight, although minimally, for a moment as ■■■ moves from the wheelchair to ■■■ therapy mat. The

technique is not sufficient to allow [REDACTED] mother to move [REDACTED] from [REDACTED] wheelchair by herself.

14. The total costs for Petitioner's currently approved services is \$79,455.90 (see breakdown in paragraph 6, above). The Tier 2 waiver services for which Petitioner is being reassigned by APD, have a spending cap of \$55,000. Under Tier 2, Petitioner can not receive all of the services [REDACTED] is currently receiving.

15. It is impossible to say which of [REDACTED] current services Petitioner could do without and still remain eligible to continue living at the group home. While [REDACTED] waiver support counselor believes reduction in services may require Petitioner to be institutionalized, she could not specify exactly which services would cause that result. Further, the waiver support counselor does not believe that any of the services being provided to Petitioner are more or less important than any other. The services cannot be prioritized to determine which services should be eliminated first.

16. In deciding which tier a person should be assigned to, APD utilizes a "Rule and Operational Detail" matrix. Within the Tier 1 matrix, Petitioner does not satisfy any of the nine elements of qualification.

17. In the Tier 2 matrix, APD deems Petitioner to have met the first qualification element, which states, "Adults or

children receiving standard Residential Habilitation at the moderate level or higher who do not meet the criteria for Tier 1." That determination is based on APD's prior, unchallenged determination that Petitioner is at the moderate level of support.

18. APD relies upon certain "descriptors" to assist it in identifying the appropriate level of support for recipients residing in a residential facility. The descriptors are divided into five segments: Basic, Minimal, Moderate, Extensive 1 and Extensive 2. Each of the segments contains descriptions of behaviors or abilities in the area of function, behavior, and physical abilities.

19. Under the moderate level of support, Petitioner's condition falls within four of the five descriptors in the Functional Range field (i.e., each descriptor except for the one addressing independent ambulation). Petitioner falls within three of the five descriptors in the Behavioral Range field. (█ does not receive psychotropic medications and has not threatened suicide.)<sup>4</sup> In the Physical Range field, Petitioner falls within three of the four descriptors (i.e., all except for the one requiring daily medication for health needs).

20. Under the Extensive 1 level of support criteria, Petitioner meets four of the six descriptors in the Functional category. The testimony concerning Petitioner's satisfaction of

the other descriptors was not compelling. In the Behavioral area, Petitioner meets only two of the six criteria (i.e., ■ requires consistent formal interventions, and ■ needs physical restraints). As for the Physical realm, the testimony was sufficient to justify Descriptor 2--presence of pressure sores. The testimony as to the other descriptors did not sufficiently establish that the descriptors were met.

21. Petitioner is most accurately described, therefore, by the descriptors in the moderate level of support. Therefore, the placement of Petitioner in the Tier 2 waiver is supported by the evidence.

#### CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes. See J.M. v. Florida Agency for Persons With Disabilities, 938 So. 2d 535 (Fla. 1st DCA 2006).

23. This is a de novo proceeding for the purpose of formulating agency action to determine whether the decision to assign Petitioner to Tier 2 is correct based upon all information currently available. The Findings of Fact "shall be based exclusively on the evidence of record and on matters officially recognized." § 120.57(1)(j) and (k), Fla. Stat.

24. Title 42, Section 440.180, Code of Federal Regulations, defines home or community-based services as "services, not otherwise furnished under the State's Medicaid plan, that are furnished under a waiver granted under the provisions of part 441, subpart G of this chapter." The Federal Social Security Act allows states to offer an array of home and community-based services to developmentally-disabled individuals in order to avoid the need for these individuals to reside in an institution. 42 C.F.R. § 441.300. Florida's plan for providing services to the developmentally-disabled is found in Chapter 393, Florida Statutes, and in Florida Administrative Code Rule Chapter 59G-13.

25. Because the goal of the Medicaid Waiver Program is to avoid institutionalization of developmentally-disabled individuals insofar as possible, waiver participants must meet institutional level-of-care requirements, and the waiver services provided must be necessary to allow recipients to remain at home or in a home-like setting. See Fla. Admin. Code R. 59G-13.080(1).

26. As the party seeking to decrease the level of the services, Respondent has the burden of proving Petitioner should be assigned to Tier 2. See Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981);

Balino v. Department of Health & Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977).

27. The respondent must meet its burden by a preponderance of the evidence. A preponderance of the evidence means the greater weight of the evidence. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

28. APD is attempting to place Petitioner in Tier 2 due to [REDACTED] level of support status being "moderate" as defined by the level of support descriptors. Petitioner maintains that [REDACTED] is in the Extensive 1 level of support category.

29. The "Residential Habilitation in a Licensed Facility Level of Supports Descriptors" for moderate level are set forth below. The descriptors which Petitioner meets, based upon the evidence presented in this case, are followed by an asterisk:

Functional Range:

- 1- [R]equires physical assistance in all self care activities.\*
- 2- [R]equires mealtime intervention or devices, or receives all nutrition through a gastromostomy or jejunostomy tube.\*
- 3- [I]s incontinent of bladder and bowel.\*
- 4- [I]s not ambulatory, needs moderate assistance using a manual wheelchair, but able to use a powered wheelchair.
- 5- [R]equires physical assistance of one person to change or transfer positions.\*
- 6- [H]as limited position options or is unable to sit in an upright position for an extended period of time.\*

Behavioral Range:

- 1- [E]xhibits behaviors that require frequent planned formal and informal interventions.\*
- 2- [H]as been prescribed a psychotropic medication to affect behavioral concerns.
- 3- [E]xhibits aggressive behaviors towards self or others that results in bruising, swelling, tissue damage, abrasions or cuts requiring medical attention.\*
- 4- [W]ears protective equipment to prevent self-injury.\*

Physical Range:

- 1- [H]as seizures that interfere with daily activities.\*
- 2- [H]ealth needs require daily medication and management, including enemas, for bowel elimination.
- 3- [I]s nutritionally at risk and requires a special diet.\*
- 4- [H]as experienced a pressure sore requiring medical attention in the past six months.\*

30. Petitioner meets the majority of the descriptors set forth in the moderate level of support. Conversely, Petitioner meets less than half (8 of 17) of the descriptors for extensive level of support.

31. The Waiver Handbook, pages 2 through 66, describes Residential Habilitation services as:

Residential habilitation provides supervision and specific training activities that assist the recipient to acquire, maintain or improve skills related to activities of daily living. The service focuses on personal hygiene skills such as bathing and oral hygiene; homemaking skills such as food preparation, vacuuming and

laundry, and on social and adaptive skills that enable the recipient to reside in the community. This training is provided in accordance with a formal implementation plan developed with direction from the recipient and reflects the recipient's goal(s) from their current support plan.

32. Residential habilitation, while not completely meeting Petitioner's needs, appears to be the correct environment for [REDACTED] at this time. Petitioner receives care and assistance at the group home generally commensurate with [REDACTED] needs.

33. APD has met its burden of proof that Petitioner should be assigned to Tier 2 due to [REDACTED] status within the moderate level of support. To the extent Petitioner's needs can be met at the group home under the Tier 2 financial limits, residential habilitation placement is proper for [REDACTED].

34. Respondent did not address at final hearing, or file a proposed recommended order with an explanation of, what would happen to Petitioner if the group home [REDACTED] is currently in was no longer available to [REDACTED] as a result of the change in tier status.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that Respondent, Agency for Persons With Disabilities, enter a final order finding that Petitioner, [REDACTED]

is appropriately assigned to the Tier 2 waiver, as ■ is within the moderate level of support.

DONE AND ENTERED this 30th day of April, 2009, in Tallahassee, Leon County, Florida.

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R. BRUCE MCKIBBEN  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 30th day of April, 2009.

ENDNOTES

<sup>1/</sup> Although Petitioner has had a history of seizures, the last known seizure was about a year ago.

<sup>2/</sup> Petitioner also pays approximately \$600 per month directly to the group home above and beyond this amount.

<sup>3/</sup> Petitioner's normal wheelchair, in which ■ spends the majority of ■ time each day, apparently will not fit in ■'s vehicle.

<sup>4/</sup> Petitioner's waiver support coordinator testified that Petitioner does not currently wear protective equipment, but has done so in the recent past and may require such equipment in the future.

COPIES FURNISHED:

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[REDACTED]

[REDACTED]

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.