STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

[redacted].,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. [redacted]
	)	
AGENCY FOR PERSONS WITH DISABILITIES,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

On March 20, 2009, a duly-noticed hearing was held by means of video teleconferencing in [redacted], Florida, before Administrative Law Judge Lisa Shearer Nelson of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Cynthia A. Mikos, Esquire
Allen Dell, P.A.
202 South Rome Avenue
Tampa, Florida 33606

For Respondent: Carrol 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 determined is whether Petitioner's assignment to the Tier Three Waiver for services pursuant to Section 393.0661, Florida Statutes (2008), is appropriate?

PRELIMINARY STATEMENT

On September 2, 2008, the Agency for Persons with Disabilities (Agency or APD) notified Petitioner that, pursuant to the requirements of Section 393.0661, Florida Statutes, Petitioner would be assigned to the Developmental Disabilities Tier Three Medicaid Waiver. On September 15, 2008, Petitioner filed a Petition for Administrative Hearing Involving Material Disputed Facts, requesting a hearing pursuant to Section 120.57(1), Florida Statutes. On December 9, 2008, the Agency forwarded the case to the Division of Administrative Hearings for assignment of an administrative law judge.

On January 8, 2009, the case was noticed for hearing to be conducted March 20, 2009, and proceeded as scheduled. Because through the tier assignment Respondent is seeking to change the provision of services, the parties agreed that Respondent bore the burden of proof in these proceedings. Respondent presented the testimony of [redacted], and Respondent's Exhibits 1 through 3 were admitted into evidence. Petitioner presented the testimony of [redacted]

Respondent's Exhibits 1, 3-9, 11-15, 17-21 and 23-24 were admitted into evidence; Respondent's Exhibit 2 was proffered.

At hearing, Petitioner requested official recognition of the answer brief filed by respondent in Moreland v. Agency for Persons with Disabilities, 1st DCA Case No. 1D08-4353. The Moreland case is an appeal of a final order upholding the Tier Rules, Florida Administrative Code Rules 65G-4.0021 through 65G-4.0025. The Agency objected on the grounds of relevance, and Petitioner's request for official recognition was granted. On April 21, 2009, Respondent's Motion for Reconsideration of the ruling granting official recognition was filed. After considering the motion and the response, and after reviewing the transcript of the proceedings to confirm the original basis for objection, the Motion for Reconsideration was denied. At the request of the parties, the deadline for submitting proposed recommended orders was extended to June 1, 2009, and both submissions were timely filed. Both Proposed Recommended Orders have been carefully considered in the preparation of this Recommended Order. Unless otherwise indicated, all references to Florida Statutes are to the 2008 codification.

FINDINGS OF FACT

1. Petitioner is a [redacted]-year-old developmentally disabled adult who lives in a group home in [redacted]. Prior to his current placement, he resided in institutional settings or other group homes since at least 1980.

2. Petitioner qualifies to receive services from the Developmentally Disabled Home and Community Based Medicaid Waiver by virtue of his diagnosis of mental retardation. Petitioner also carries several other diagnoses, including schizoaffective disorder with depression, psychotic disorder with anxiety, glaucoma, hypercholesterolemia, hypertension, diabetes, and seizure disorder.

3. Petitioner is mobile and able to care for [redacted] activities of daily living with prompts. [redacted] is able to keep his room clean and is well groomed. Petitioner likes to read, watch TV, listen to gospel music and shop at the flea market. However, Petitioner has a history of cyclical outbursts of exploitive, destructive behavior that has required involuntary hospitalization under the Baker Act on four different occasions in the last year. Petitioner has suffered from these outbursts off and on for several years. They have been taken into account when submitting [redacted] support plans for approval of services since at least 1999.

4. In order to be eligible for waiver services, Petitioner must qualify for Medicaid and must meet the level of care criteria for placement in an intermediate care facility for the developmentally disabled. The waiver is a payor of last resort: in other words, it comes into play after all other methods of payment have been exhausted.

5. The amount, duration, and scope of the services Petitioner may receive are described in the Medicaid Developmental Disabilities Waiver Services Coverage Handbook (Handbook). The services are requested on an annual basis by means of a support plan and are reviewed through a prior service authorization process. If the services are determined to be medically necessary, then they are included in a cost plan.

6. 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 must be approved by the Agency before a client may receive services in any given year. It does not, however, include information such as a client's diagnosis, ability to ambulate or other functional limitations.

7. For the period of July 1, 2008, through June 30, 2009, Petitioner's approved services included in his cost plan were as follows: 1) waiver support services, in the amount of $1,571.40; 2) adult day training in the amount of $6,681.60; 3) trans-portation to and from adult day training, in the amount of $5,833.40; 4) residential habilitation services at the minimal level, in the amount of $27,443.52; 5) medication review, in the amount of $66.78; 6) behavioral analysis services in the amount of $8,332.80; and 7) adult dental care in the amount of $500.00 The total of the services approved as medically necessary for Petitioner in the 2008-2009 year is $50,429.50.

8. Waiver support coordination services are described in the Handbook as services such as advocating, identifying, developing, coordinating and accessing supports and services on behalf of the waiver recipient. These services cannot be reduced.

9. Adult day training services are training services to support the participation of recipients in daily, meaningful, valued routines of the community, which for adults may include work-like settings. Services are usually furnished for a minimum of six hours per day on a regular basis. Petitioner's adult day training program is provided through ARC of [redacted] where he makes boxes and earns a small salary.

10. Transportation services are described in the Handbook as the provision of transportation to and from the recipient's home and his or her community-based waiver services. Petitioner's transportation services are used to take him to and from [redacted] adult training program.

11. Residential habilitation services are described in the Handbook as supervision and specific training activities that assist the recipient to acquire, maintain, or improve skills related to activities of daily living, focusing on personal hygiene skills, homemaking skills, and social and adaptive skills that enable the recipient to live in the community. Respondent's residential habilitation services are considered to

be at a minimal level. In other words, according to the Handbook, the minimal level of residential habilitation requires the provider to maintain a staffing level at a group home of four hours per day of direct care staff time devoted to training, intervening for or supervising Petitioner.

12. Petitioner's behavior problems could possibly qualify [redacted] for a higher level of residential habilitation, but as of the date of the hearing, no request for additional residential habilitation services had been requested for [redacted]

13. Medication review is an annual review of Petitioner's medications by a pharmacist. This service cannot be eliminated, as it is a required service.

14. Behavioral analysis services are those services provided to assist a person to learn new behaviors that are directly related to existing challenging behaviors. Additional behavioral services were requested and approved for Petitioner after [redacted] was Baker Acted in June 2008, both in terms of a one-time emergency allocation and the inclusion of additional, ongoing services. The behaviors leading up to the involuntary hospitalizations were taken into consideration when the amount for behavioral services was allocated. No additional services were requested after Petitioner's hospitalizations in early 2009.

15. Dental services under the Medicaid Waiver are dental services not otherwise covered by the Medicaid Dental Services

Program. Services were authorized because Petitioner has chronic infections of his teeth.

16. In 2007, the Legislature amended Section 393.0661, Florida Statutes (the Tier Statute), related to the services available under the Medicaid Waiver programs. The amendments to Section 393.0661 provide certain criteria for placement and established four "tiers" with established annual spending caps for each tier: Tier One has no spending limit; Tier Two has a spending cap of $55,000 per year; Tier Three has spending cap of $35,000 per year; and Tier Four is limited to $14,792 per year.

17. 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 Tier Statute. The validity of the rules was challenged in Moreland v. Agency for Persons with Disabilities, 08-2199RP (DOAH August 6, 2008), in which it was determined that the rules were not invalid exercises of legislatively delegated authority. An appeal of the Moreland order is presently pending in the First District Court of Appeal docketed as First District Case No. 1D08-4353. In the meantime, the Tier Rules became effective October 20, 2008.

18. Florida Administrative Code Rule 65G-4.0021 identifies the factors that must be considered by the Agency in assigning individual clients to tiers. The Agency must consider the client's level of need in functional, medical, and behavioral

areas, as determined through the Agency's evaluation of client characteristics, the Agency's approved assessment process, and support planning information; the client's service needs as determined through the Agency's prior service authorization process to be medically necessary; the client's age and current living setting; and the availability of supports and services from other sources.

19. The initial determination of the appropriate tier for a client was determined by use of a computer program, although exactly what data was used to formulate the initial placement was unclear, beyond the fact that the cost of approved services reflected in the 2008-2009 cost plan was used. Once that initial determination was made, it was sent to the local Agency office to determine if the computer-generated assignment was correct. The computer-generated assignment for Petitioner was to Tier Three.

20. The computer-generated assignment was "validated" by reviewing the cost plan and a checklist referred to as the "operational detail checklist." The original version of this operational detail checklist was three pages long. It was condensed (but contains the same information) to a one-page checklist that included certain criteria taken from the Tier Rules. The operational detail checklist includes references to certain "core" services that are referenced in the tier rules.

"Core" or "trigger" services are not defined in any rule or statute.

21. No one identified who made Petitioner's initial tier assignment or when that assignment was made. The staff members responsible for verifying Petitioner's placement in the field and approving the placement in Tallahassee did not review anything other than Petitioner's cost plan and the operational detail checklist.

22. While an Individual Cost Guideline (ICG), an assessment tool identified as a valid assessment tool, was completed for Petitioner on January 16, 2007, the ICG was not used in the preparation of the support plan and therefore not considered in the cost plan for 2007-2008 or 2008-2009. Had the ICG been considered, its use would have supported placement in Tier Three.

23. The support plan itself was not considered in assigning Petitioner to Tier Three. However, had the support plan been considered, the information contained would have supported the decision to place Petitioner in Tier Three.

24. Petitioner's service needs as determined through the prior service authorization process to be medically necessary were not considered in the assignment to Tier Three, except to the extent that the cost plan revealed that Petitioner was approved to receive residential habilitation services, and his

need for behavioral analysis services was reviewed to determine whether it was approved for more or less than 60 hours. If the number of hours approved had been over 60 hours, which is considered intensive behavioral services, Ms. Johnson, who reviewed Petitioner's Tier placement, would have contacted the area office to have them review his needs and see if a different service was required.

25. Petitioner's need for adult day services, transportation, adult dental services, medication review and support coordination were not considered in the tier assignment process. There is no question that, in order to come below the cap, Petitioner will have to reduce some services. However, the level of services authorized for Petitioner is not inconsistent with his Tier Assignment.

CONCLUSIONS OF LAW

26. 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.

27. 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 Three waiver. § 120.57(1)(j), Fla. Stat.

28. 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. (Emphasis supplied.)

29. 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) <u>The client's level of need in functional, medical, and behavioral areas, as determined through Agency evaluation of</u>

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. (Emphasis supplied.)

30. Tier One is limited to those clients whose needs for medical and adaptive services cannot be met in any of the other

tiers and where those 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(1).

31. 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.

32. Florida Administrative Code Rule 65G-4.0024 includes the following criteria for placement in Tier Three:

> (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.

33. Rule 65G-4.0021 requires that the Agency consider 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; the client's service needs as determined through the prior service authorization process to be medically necessary; the client's age and current living setting; and the availability of supports and services from other sources. The Agency clearly did not meet its obligation in this regard.

It considered only the cost plan, the current living setting, and the number of residential habilitation hours currently approved.

Agency personnel testified that no documents other than the cost plan and the "operational detail checklist" were consulted in making Petitioner's tier assignment. No reference was made to the needs assessment completed for Petitioner; to the Petitioner's support plan; or to what available supports and services are or are not available from other sources, except to the extent that the number of hours of behavioral services was reviewed.

34. The Agency took the position at hearing that only the cost plan was really relevant because information in the support plan was already considered in the prior service authorization process and thus considered in the development of the cost plan. However, Rule 65G-4.0021 clearly requires the Agency to consider the client's level of need in functional, medical and behavioral areas, and specifically references use of support planning information and the assessment process. The cost plan, standing alone, simply does not paint a picture of what a client needs to avoid institutionalization. If that was all the Agency was to consider, presumably the Rule would have said so, but such a Rule would be inconsistent with the directive of Section 393.0661(3). The cost plan simply identifies what services have been approved and the costs allocated for those services. Moreover, by focusing only on "core" services, the Agency fails to take into account those medically necessary services that have been approved, but do not amount, in the Agency's estimation, to "services that count."

35. While the Agency did not demonstrate that it complied with the requirements of its rules when determining the Tier placement for Petitioner, it appears from the evidence presented in this de novo proceeding that the placement in Tier Three is appropriate at this time. Petitioner's placement in Tier Three is consistent with the factors identified in Rule 65G-4.0024(5).

Petitioner's support coordinator testified that there were several factors that could have led to the escalation of Petitioner's explosive behavior, including two moves and the previous decrease in residential habilitation services. However, the support coordinator has not asked for additional residential habilitation hours or additional behavioral analysis services following the approval of additional services in September 2008. Given the level of need determined through the Agency's support planning information and prior service authorization process, and the Petitioner's age and current living setting, Tier Three is the appropriate placement at this time.

RECOMMENDATION

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

RECOMMENDED:

That a final order be entered assigning Petitioner to the Tier Three Waiver.

DONE AND ENTERED this 23rd day of June, 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
Fax Filing (850) 921-6847
www.doah.state.fl.us

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

COPIES FURNISHED:

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

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

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

Cynthia A. Mikos, Esquire
Allen Dell, P.A.
202 South Rome Avenue, Suite 100
Tampa, Florida 33606

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

James DeBeaugrine, Executive Director
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.