

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████)
)
Petitioner,)
)
vs.) Case No. 08-6345APD
)
AGENCY FOR PERSONS WITH)
DISABILITIES,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A final hearing was conducted in this case on February 25, 2009, by video teleconference between sites in Tallahassee and Jacksonville, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Cynthia A. Mikos, Esquire
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For Respondent: Brian Hayden, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent properly assigned Petitioner to the Tier Three Waiver pursuant to Section 393.0661, Florida Statutes (2008), and Florida Administrative Code Rules 65G-4.0021 through 65G-4.0025.

PRELIMINARY STATEMENT

On September 2, 2008, Respondent Agency for Persons with Disabilities (Respondent) notified Petitioner [REDACTED] that [REDACTED] would be assigned to the Tier Three Waiver of the Developmental Disabilities Home and Community Based Services Waiver Program (the Waiver program), effective October 15, 2008.

On September 12, 2008, Petitioner requested an administrative hearing to contest Respondent's decision. On December 17, 2008, Respondent referred the case to the Division of Administrative Hearings. A Notice of Hearing dated December 30, 2008, scheduled a video teleconference hearing for February 25, 2009.

On January 14, 2009, Respondent filed a Motion in Limine, seeking to preclude the introduction of evidence related to issues involving medical necessity and evidence related to any change in Petitioner's circumstances since October 15, 2008.

An order dated January 27, 2009, denied the Motion in Limine. However, at the start of the hearing, the undersigned noted that, upon further consideration, the admissibility of

Petitioner's evidence would be considered as offered subject to Respondent's objections.

On January 28, 2009, Respondent filed a Motion for Judicial Recognition. The motion was granted in an Order dated February 10, 2009.

On February 13, 2009, Respondent filed an Unopposed Motion for Enlargement of Time to file Joint Prehearing Stipulation. An Order dated February 17, 2009, granted the motion.

On February 18, 2009, the parties filed unilateral prehearing statements.

On February 19, 2009, Petitioner filed a Motion for Judicial Recognition. The motion was granted when the hearing commenced. Petitioner re-filed the motion, together with attachments, on February 27, 2009.

During the hearing, Petitioner presented the testimony of four witnesses. Petitioner introduced six exhibits identified as P3 through P8 that were accepted as evidence. Petitioner's Exhibits P1 and P2 were proffered after objections to their relevance were sustained.

Respondent presented the testimony of one witness. Respondent offered nine exhibits, R1 through R9 that were accepted as evidence.

At the close of the hearing, the parties agreed that a continuance was needed to address an issue first raised in

Petitioner's unilateral "Prehearing Stipulation." The issue was whether Respondent's form entitled "Criteria for Tier Selection: Rule and Operational Detail," was a rule as defined in Section 120.52(16), Florida Statutes (2008), that had not been adopted as required by Section 120.54(1)(a), Florida Statutes (2008).

On March 2, 2009, the undersigned issued an Order Rescheduling Hearing for March 27, 2009.

On March 3, 2009, the court reporter filed the original transcript of the hearing.

On March 10, 2009, Respondent filed a Motion to Dispense with Hearing. On March 18, 2009, Petitioner filed a Notice of Voluntary Withdrawal of Request for Judicial Determination of Unadopted Rule and Motion to Cancel Pending Hearings. An Order Canceling Hearing dated March 20, 2009, granted Petitioner's motion and cancelled the March 27, 2009, hearing.

On March 20, 2009, Petitioner filed a second copy of the hearing transcript.

On March 24, 2009, Petitioner filed an unopposed Motion for Enlargement of Time to File Proposed Recommended Orders. An Order dated March 26, 2009, granted the motion.

On April 15, 2009, Petitioner filed an unopposed Motion for Judicial Recognition. An Order dated April 16, 2009, granted the motion.

On April 15, 2009, Petitioner filed a Notice of Filing Portions of Hearing and Deposition Transcripts.

On April 15, 2009, Respondent filed its Proposed Recommended Order. Petitioner filed his Proposed Recommended Order on April 16, 2009.

On April 20, 2009, Petitioner filed an Unopposed Motion to Permit Late Filing of Petitioner's Proposed Recommended Order. That motion is hereby granted.

On April 24, 2009, Respondent filed a Motion to Strike two paragraphs from the Conclusions of Law in Petitioner's Proposed Recommended Order. Petitioner filed a response in opposition to the motion on May 6, 2009. The motion is hereby denied.

FINDINGS OF FACT

1. Petitioner is a 50-year-old [REDACTED] who has been diagnosed with mental retardation, glaucoma, cataracts, diabetes, hypertension, recurrent urinary tract infection, and skin fungi. [REDACTED] lives in a group home for the developmentally disabled in [REDACTED], Florida, with five [REDACTED] housemates.

2. A group home is a type of licensed residential facility. Living in a group home does not constitute "supported living." Rather, "supported living" describes only persons who live in their own homes or apartments.

3. Petitioner's visual impairment causes the following problems: (a) difficulty in negotiating his environment;

(b) safety issues in the community; and (c) increased reliance on others for personal care. Petitioner receives some services from the Division of Blind Services.

4. Petitioner has difficulty communicating. [REDACTED] uses sounds, gestures, a communication picture book, and some sign language to make [REDACTED] needs known.

5. Petitioner has a history of leaving [REDACTED] group home without permission. Petitioner's inclination to elope could create dangerous situations for Petitioner.

6. Petitioner is a Medicaid recipient who participates in the Waiver program. The purpose of the program is to provide beneficiaries with the opportunity to receive an array of services in their own home or a home-like setting to avoid institutionalization in a nursing home or intermediate care facility (ICF). In order to be eligible for the Waiver program, Petitioner has to qualify for placement in an ICF for developmentally disabled persons.

7. Once qualified for the Waiver program, Petitioner is able to receive services described in the Medicaid Developmental Disabilities Waiver Services Coverage and Limitations Handbook (Handbook). However, Respondent must first determine that the amount, duration, and scope of the services are medically necessary and no other paid or unpaid source of that service is available to the recipient.

8. A third-party vendor, contracted by Respondent, makes determinations of medical necessity by issuing prior service authorizations (PSAs). In this case, the vendor reviewed several documents about Petitioner's condition for July 1, 2008, to June 30, 2009, hereinafter referred to as "the 2008 cost plan year."

9. The vendor approved the following services in specified amounts as medically necessary: (a) standard residential habilitation services; (b) adult day training services; (c) adult dental services; (d) support coordination services; (e) transportation services; and (f) medication review services.

10. Next, Respondent approved Petitioner to receive the above referenced services as determined in the PSA. The dollar amounts of Respondent's approved services are reflected in Respondent's computerized Allocation Budget and Contract Control System (cost plan).

11. For the 2008 cost plan year, Respondent initially authorized Petitioner to receive a total of \$47,242.87 for medically necessary services. Subsequent rate reductions reduced this amount to \$43,262.87.

12. For the 2008 cost plan year, Respondent allocated \$500 for adult dental services. The Handbook describes these services as dental treatments and procedures not covered by the Medicaid State Plan. The purpose of adult dental services under

the Waiver program is to prevent or remedy dental problems that, if left untreated, could compromise a recipient's health by increasing the risk of infection or disease, or by reducing food options, resulting in restrictive nutritional intake.

13. Respondent allocated \$1,571.40 for Petitioner's support coordination services. The Handbook describes these services as advocating, identifying, developing, coordinating and accessing supports and services on behalf of the Waiver recipient.

14. For the 2008 cost plan year, Petitioner's Waiver Support Coordinator prepared an annual summary, known as the support plan. The support plan identified Petitioner's preferences, interests, talents, attributes, available supports and services, and current needs and goals. The support plan attempts to name the most cost-effective services that are necessary to maintain Petitioner in the least restrictive environment.

15. In developing the support plan, Petitioner's Support Coordinator did not use Respondent's Individual Cost Guidelines. Respondent has approved the guidelines as a valid assessment tool to prepare the 2008 support plan.

16. Respondent allocated \$6,681.60 for Petitioner's adult day training services. The Handbook describes these services as training services to support the participation of recipients in

daily, meaningful, valued routines of the community. For adults, the training usually takes place in a facility or work-like setting. The services typically are furnished at a minimum of six hours per day on a regularly scheduled basis.

17. Petitioner receives adult day training services at the ARC of Jacksonville, six hours per day for 240 days per year. For the past five years, Petitioner has earned a small bi-weekly paycheck at [REDACTED] adult day training facility for folding boxes. Petitioner's earnings provide [REDACTED] with pocket money for community outings.

18. Respondent allocated \$6,999 for Petitioner's transportation services. The Handbook describes these services as the provision of rides to and from the recipients' homes and their community-based Waiver services, enabling the recipients to receive their approved supports and services.

19. Respondent allocated \$27,443.52 for Petitioner's standard residential habilitation services. The Handbook describes these services as supervision and specific training activities that assist the recipient to acquire, maintain, or improve skills related to activities of daily living. The training includes personal hygiene skills, homemaking skills, and social and adaptive skills that enable the recipient to reside in the community.

20. Petitioner needs the following on-going residential habilitation training: (a) personal hygiene tasks such as toileting, washing hair, and shaving; (b) homemaking tasks such as meal preparation and clothes hanging; and (c) social and adaptive skills such as communication and community safety.

21. Based on the July 1, 2008, Provider Rate Table for Residential Habilitation Services in a Licensed Facility, the approved expenditure for Petitioner's residential habilitation services is consistent with the rate for a minimal level of support. The current Handbook indicates that the minimal level of residential habilitation requires the provider to maintain a staffing level at four hours per day of direct care staff time.

22. Petitioner's group home provider currently does not staff the home during the day shift when the residents are scheduled to attend adult day training.

23. Respondent allocated \$66.78 for Petitioner's medication review service. The Handbook describes this service as an independent review and assessment of all prescription and over-the-counter medications taken by a recipient.

24. Petitioner currently takes six medications, two for hypertension, one for diabetes, one for high cholesterol, one for bladder spasms, and one for an unidentified purpose. Petitioner also receives daily monitoring of ■■■ blood sugar and blood pressure, triggering ■■■ need for medication review.

25. Petitioner receives some medical services that are provided by the Medicaid State Plan, including treatment by a primary care physician, an urologist, an ear, nose, and throat physician, an ophthalmologist, and a podiatrist.

26. In October 2008, Petitioner was hospitalized for [REDACTED]
[REDACTED]
[REDACTED]. The hospital services were provided by the Medicaid State Plan.

27. By letter dated September 2, 2008, Respondent notified Petitioner that [REDACTED] would be assigned to Tier Three under the redesigned service delivery system. The Tier assignment process occurred in several stages.

28. First, Respondent's central office in Tallahassee, Florida, ran a computer analysis that preliminarily assigned Petitioner to one of four tiers based on factors such as [REDACTED] service needs. The analysis considered Petitioner's age, [REDACTED] group home residence, and the descriptor of [REDACTED] standard residential habilitation services as minimal.

29. Second, Respondent's area staff reviewed Petitioner's preliminary Tier assignment to determine whether it should be approved based on information set forth in [REDACTED] cost plan and the specific criteria set forth in Section 393.0661, Florida Statutes (2008) (the Tier Statute), and Florida Administrative Code Rules 65G-4.0021 through 65G-4.0025 (the Tier Rules).

30. Third, Respondent's area office staff determined that the preliminary Tier assignment was questionable. Therefore, the area office staff sent the central office a request to review the assignment and to make a final Tier assignment determination.

31. In making the final Tier assignment, Respondent considered the criteria set forth in the Tier Statute and Tier Rules. Respondent also considered Petitioner's service needs, level of need, age, current living setting, and available supports and services. Respondent used a form referred to as an "Operational Detail" to assist in the review of Tier assignments.

32. For purposes of Tier assignment, a "core" or "trigger" Waiver service is a service that, under the Tier Statute and Tier Rules, is capable of determining the Tier to which a client is assigned. In other words, non-core or non-trigger Waiver services have no effect on Tier assignment.

33. Of the various Waiver services in Petitioner's 2008 cost plan, only the standard residential habilitation services constitute "core" or "trigger" Waiver services. Petitioner does not possess any intensive medical or adaptive needs or any intensive behavioral problems that are exceptional in intensity, duration, or frequency.

34. While they are not "core" Waiver services, Petitioner cannot eliminate [REDACTED] Waiver Support Coordinator services or [REDACTED] medication review.

35. Petitioner's proposed Tier Three assignment will limit Petitioner's annual expenditures for Waiver services to \$35,000 per year. This will result in a reduction or termination of services in the amount of \$8,262.30.

36. According to the Tier notice letter, Petitioner must choose the Waiver services most important to [REDACTED] in adjusting his plan to stay within the \$35,000 annual limit. The Tier notice letter emphasized that under the new Tier system, the Legislature required client choice in selecting Waiver services. The record is not clear as to what would happen if an individual does not choose to voluntarily eliminate services.

37. Tier one assignments require the following:

- (a) recipients living in a licensed residential facility and receiving special medical home care;
- (b) recipients living in a licensed residential facility and receiving intensive behavioral residential habilitation services;
- (c) children and adults receiving behavior focus residential habilitation services at the current moderate or higher level of support; and/or
- (d) clients living in a licensed residential facility and receiving standard residential habilitation services at the

extensive one or higher level of support. Petitioner does not qualify for a Tier One Waiver assignment.

38. Tier Two assignments require placement in licensed residential facility and authorization for greater than five hours per day of residential habilitation services. Petitioner does not qualify for a Tier Two Waiver assignment.

39. Tier Three is appropriate for Petitioner because ■ lives in a group home, ■ receives residential habilitation services at the basic or minimal level, and ■ is not eligible for the Tier One or Tier Two waiver.

40. In order to reduce the cost of his services, Petitioner may choose to eliminate his attendance at the adult day training program and the cost of transportation to and from the program. This may also mean that Petitioner will no longer be able to earn pocket money.

41. In lieu of adult day training, Petitioner might elect to request companion services as ■ meaningful day activity at the service level of one companion to three Waiver recipients. In that case, Petitioner's Waiver Support Coordinator would have to locate a companion Waiver provider.

42. Petitioner could also voluntarily relinquish ■ adult dental services. In that case, Petitioner could travel to Gainesville, Florida, to see a dentist at Tacachale, an ICF.

CONCLUSIONS OF LAW

43. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this case pursuant to Sections 120.569, 120.57(1), and 393.125, Florida Statutes (2008).

44. This proceeding is de novo. See § 120.57(1)(k), Fla. Stat. The purpose of the hearing is to formulate final agency action regarding Petitioner's Tier assignment, not to review Respondent's proposed assignment. See McDonald v. Dept. of Banking & Finance, 346 So. 2d 569 (Fla. 1st DCA 1977).

45. Respondent has the burden of proving by a preponderance of the evidence that it properly assigned Petitioner to the Tier 3 Waiver. See Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981); Balino v. Dep't of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977); Fla. Dep't of Health and Rehabilitative Services v. Career Serv. Comm'n, 289 So. 2d 412, 414 (Fla. 4th DCA 1974).

46. In 2007, the Legislature enacted Chapter 2007-64, Laws of Florida, "an act relating to home and community-based services for persons with developmental disabilities." See Ch. 07-64, preamble at 479, Laws of Fla. The law amended Section 393.0661, Florida Statutes, and mandated that Respondent "implement a four tier system for the purpose of serving clients

with developmental disabilities; providing requirements and limitations with respect to each tier . . ." Id. (Emphasis added).

47. Section 393.0661(7), Florida Statutes (2008), gives Respondent authority to make adjustments to Waiver benefits and services that are "necessary to comply with the availability of moneys and any limitations or directions provided for in the General Appropriations Act.

48. The Tiers are defined in Section 393.0661(3), Florida Statutes (2008), which states as follows in relevant part:

(a) Tier one shall be limited to clients who have services 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 services 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 placement, 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 of supported living situations 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.

49. Florida Administrative Code Rule 65G-4.0021(1) lists the following information that Respondent uses to evaluate Tier assignments.

(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 limitation 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.

50. Florida Administrative Code Rule 65G-4.0022 describes the following limitations/criteria related to the 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, or 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.

51. Florida Administrative Code Rule 65G-4.0023 sets forth the following limitations/criteria for the Tier Two Waiver in relevant part:

. . . 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.

52. Florida Administrative Code Rule 65G-4.0024 sets forth the following limitations/criteria for the Tier Three Waiver:

. . . 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 the 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 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.

53. Florida Administrative Code Rule 65G-4.0025(2) states as follows relative to the Tier Four Waiver:

(2) Clients who are not eligible for assignment to the Tier One Waiver, the Tier Two Waiver, or the Tier Three Waiver, and who meet the following criteria, shall be assigned to the Tier Four Waiver:

(a) Clients who are currently assigned to receive services through the Family and Supported Living Waiver unless there is a significant change in condition or circumstances as described in subsection 65G-4.0021(4), F.A.C.; or

(b) Clients who are under the age of 22 and residing in their own home or the family home, or

(c) Clients who are dependant children who reside in residential facilities licensed by the Department of Children and Families under Section 409.175, F.S.

54. In making Petitioner's Tier assignment, Respondent properly evaluated each of the factors set forth in Florida Administrative Code Rule 65G-4.0021. Additionally, Respondent used the criteria set forth in Section 393.0661, Florida Statutes (2008), and Florida Administrative Code Rules 65G-4.0022 through 65G-4.0025.

55. The Tier One Waiver is not appropriate for Petitioner because ■ does not possess any intensive medical or adaptive

needs or any behavioral problems that are exceptional in intensity, duration, or frequency. See § 393.0661(3)(a), Fla. Stat. (2008). Additionally, Petitioner is authorized to receive standard residential habilitation services but not at the extensive level.

56. Petitioner does not meet the criteria for assignment to the Tier Two Waiver because ■ is not authorized to receive either a moderate level of support for standard residential habilitation service or a minimal level of support for behavior focus residential habilitation services. See § 393,0661(3)(b), Fla. Stat. (2008). Petitioner receives standard residential habilitation services at the minimal level.

57. The only appropriate placement for Petitioner is to the Tier Three Waiver. Petitioner resides in a licensed residential facility, receives standard residential habilitation at the minimal level, and is not eligible for the Tier One Waiver or the Tier Two Waiver. See Fla. Admin. Code R. 65G-4.0024(1).

58. Petitioner does not seek additional services. ■ stipulates that there has not been a significant change in his circumstances or condition since October 15, 2008.

59. Respondent has met its burden of proof by a preponderance of the evidence. The Tier Three Waiver is the correct assignment for Petitioner.

RECOMMENDATION

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

RECOMMENDED:

That Respondent enter a final order assigning Petitioner to the Tier Three Waiver.

DONE AND ENTERED this 15th day of May, 2009, in Tallahassee, Leon County, Florida.

S

SUZANNE F. HOOD
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
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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.