

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████)
)
Petitioner,)
)
vs.) Case No. 09-0379APD
)
AGENCY FOR PERSONS WITH)
DISABILITIES,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On March 26, 2009, an administrative hearing in this case was held in ██████████ before Lawrence P. Stevenson, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: ██████████
██████████ waiver support
coordinator
██████████

For Respondent: Sabrina E. Redd, Esquire
Office of the Attorney General
One Mac-Cali Center, Suite 1100
501 East Kennedy Boulevard
Tampa, Florida 33602

STATEMENT OF THE ISSUE

Whether the assignment of Petitioner, ██████████ (Petitioner), to the Tier Three Waiver of the Medicaid waiver program pursuant

to Section 393.0661, Florida Statutes, and Florida Administrative Code Rules 65G-4.0021 through 65G-4.0025, is correct.¹

PRELIMINARY STATEMENT

The Agency for Health Care Administration administers the Florida Medicaid program. Pursuant to an interagency agreement, the Agency for Persons with Disabilities (APD) operates the Medicaid waiver program for persons with defined developmental disabilities. Section 393.0661, Florida Statutes, requires that APD assign all clients receiving the subject Medicaid waiver services to a tier within a four-tier system. Florida Administrative Code Rules 65G-4.0021 through 65G-4.0025 set forth the criteria for the tier assignments.

At all times relevant to this proceeding, Petitioner has been eligible for and receiving services from the Medicaid waiver program.

By letter dated September 2, 2008, APD notified Petitioner of its intent to assign ██████ to the Tier Three Waiver, effective October 15, 2008. A Tier Three Waiver assignment would cap Petitioner's annual spending limits at \$35,000. The letter also advised Petitioner of ██████ right to request a hearing contesting that tier assignment. Petitioner's legal guardian, ██████ mother ██████ timely objected to the assignment and requested a formal hearing. The matter was forwarded to the Division of

Administrative Hearings (DOAH) for the assignment of an Administrative Law Judge and the conduct of a formal hearing.

At the hearing, Respondent presented the testimony of Leslie Varhol, its consumer directed care liaison for District 7, and Kent Carroll (by telephone from Tallahassee), an APD management review specialist. Respondent's Exhibits 1 through 3 were admitted into evidence without objection. Petitioner presented the testimony of [REDACTED] the program coordinator for the group home that houses Petitioner; [REDACTED] a residential trainer who works with Petitioner; and [REDACTED] the vocational service coordinator at the day training center attended by Petitioner. Petitioner offered no exhibits into evidence.

A Transcript of the hearing was filed at DOAH on April 29, 2009. The parties filed their Proposed Recommended Orders on May 19, 2009.

FINDINGS OF FACT

1. Respondent administers the Florida Medicaid Waiver Program. At all times relevant to this proceeding, Petitioner was eligible for, and has been receiving services from, the Medicaid Developmental Disabilities Waiver Program.

2. Petitioner is a 42-year-old [REDACTED] who is autistic and legally blind. [REDACTED] lives at the Lake Margaret Group Home in [REDACTED], a parent-owned facility that houses a total of four

clients. The group home is managed by the [REDACTED] [REDACTED] a not-for-profit organization that provides an array of services to disabled adults in [REDACTED]. Petitioner attends adult day training five days per week at the Primrose [REDACTED] training facility. Petitioner spends weekends with [REDACTED] family at their home.

3. Due to [REDACTED] blindness, Petitioner requires some assistance with [REDACTED] hygiene and other activities of daily living. [REDACTED] has glaucoma in one eye, and is subject to a daily regimen of eye drops with which [REDACTED] requires assistance. Petitioner is also on a restricted low fat, low sugar diet that must be monitored. [REDACTED] has [REDACTED] own bedroom and shares a bathroom at the group home. Staff and fellow residents at the group home are solicitous of Petitioner's needs, and Petitioner is comfortable in this setting.

4. Kent Carroll, a management review specialist with APD, reviewed Petitioner's tier assignment to determine whether APD made a correct assignment in accordance with Section 393.0661, Florida Statutes, and Florida Administrative Code Rules 65G-4.0021 through 65G-4.0025.

5. The "cost plan" is the document that lists all approved waiver services requested by the client, and the allocated cost of each waiver service. The cost plan for each client is updated annually based upon the results of the support planning

process intended to reflect the client's current needs and situation. APD must approve the cost plan prior to services being provided. Cost plans establish the client's service needs and are used to assign the tier waivers.

6. Under the current cost plan, Petitioner was approved for standard residential habilitation at the minimal level (\$27,443.52), support coordination (\$1,571.40), adult day training (\$8,551.53) and transportation (\$3,585.41), for a total cost of \$41,151.86.

7. The annual spending limit under the Tier Three Waiver is \$35,000.00

8. Mr. Carroll concluded from his review that Petitioner had been correctly placed in the Tier Three Waiver. Petitioner receives residential habilitation at the minimal level of five hours or less per day, and does not have the intense medical or adaptive needs that would qualify [REDACTED] for placement at a higher level.

9. Petitioner is not receiving behavioral services, is not in supported living, and is not receiving in-home support services.

10. Petitioner qualifies for placement in the Tier Three Waiver because [REDACTED] lives in a licensed residential facility and is not eligible for Tier One or Tier Two.

11. Petitioner will likely have to reduce [REDACTED] attendance at adult day training to avoid spending in excess of the \$35,000 funding cap. This reduction would result in Petitioner's spending more time at the residential facility, where [REDACTED] would require supervision. The evidence demonstrated that the [REDACTED] could move Petitioner to another of its group homes that is staffed during the day. Petitioner is unlikely to be institutionalized as a result of [REDACTED] assignment to the Tier Three Waiver.

12. Petitioner always has the ability to request that APD make a change in [REDACTED] tier assignment if [REDACTED] experiences a substantial change in [REDACTED] condition or circumstances.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. § 120.57(1), Fla. Stat.

14. The burden of proof in an administrative hearing is on the party asserting the affirmative of an issue. Wilson v. Department of Administration, Division of Retirement, 538 So. 2d 139, 141-42 (Fla. 4th DCA 1989); and Florida Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778, 786 (Fla. 1st DCA 1981). Respondent bears the burden of proof in this case.

15. The standard of proof in an administrative hearing such as this one is a "preponderance of the evidence." Florida Department of Health and Rehabilitative Services v. Career Service Commission, 289 So. 2d 412, 414 (Fla. 4th DCA 1974).

16. In 2007, the Florida Legislature enacted Chapter 2007-64, Laws of Florida, "an act relating to home and community-based services for persons with developmental disabilities." The law added cost containment language to current Subsection 393.0661(8), Florida Statutes, requiring the agency to "implement the plan so as to remain within the appropriation." The law provides specific means to effect this cost containment by directing APD to assign all clients receiving developmental disability services to one of four tiers.

17. The tiers are defined by Subsection 393.0661(3), Florida Statutes, as follows:

(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 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 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 shall not exceed \$14,792 per client each year.

18. APD must approve the cost plan, and an approved cost plan is agency action subject to administrative review.

§§ 120.52(2) and 393.125, Fla. Stat.

19. If a client has a significant change in circumstances or condition that has an impact on his or her health, safety, or welfare, APD will review a client's tier eligibility at such time. Fla. Admin. Code R. 65G-4.0021(4).

20. The only issue before the undersigned is whether Petitioner's tier assignment is appropriate, based on the criteria set forth in Section 393.0661, Florida Statutes, and Florida Administrative Code Rules 65G-4.0021 through 65G-4.0025.

21. APD assigned Petitioner to Tier Three using the criteria set forth in Section 393.0661, Florida Statutes, and Florida Administrative Code Rules 65G-4.0021 and 65G-4.0024.

22. Florida Administrative Code Rule 65G-0021 provides, in relevant part, as follows:

(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 59G-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"). . . .

(3) For all Tiers, client 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 circumstance 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.

23. Florida Administrative Code Rule 65G-4.0024, contains the following criteria for the Tier Three Waiver:

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 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.

24. Respondent has demonstrated by a preponderance of the evidence that Petitioner is receiving residential habilitation at the minimal level, does not receive behavior focus

residential habilitation services, and does not have current intensive medical or adaptive service needs that are essential to avoid institutionalization.

25. Petitioner resides in a licensed residential facility and is not eligible for the Tier One or Tier Two Waiver, based upon the level of residential facility and specific services needed to care for [REDACTED] condition. Therefore, [REDACTED] placement in the Tier Three Waiver is appropriate. Fla. Admin. Code R. 65G-4.0024.

RECOMMENDATION

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

RECOMMENDED that a final order be entered holding that the Tier Three Waiver is the appropriate tier assignment for Petitioner.

DONE AND ENTERED this 29th day of May, 2009, in Tallahassee, Leon County, Florida.

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LAWRENCE P. STEVENSON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of May, 2009.

ENDNOTE

^{1/} All statutory references are to Florida Statutes (2008). All rule references are to the version of the rule published in the Florida Administrative Code as of the entry of this Recommended Order. Consistent with the language of Florida Administrative Code Rules 65G-4.0021 through 65G-4.0025, the four tiers will be referred to as the Tier One Waiver, the Tier Two Waiver, the Tier Three Waiver, and the Tier Four Waiver.

COPIES FURNISHED:

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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.