

PRELIMINARY STATEMENT

In correspondence dated January 15, 2009, the Agency for Persons with Disabilities ("APD"), advised the Petitioner, [REDACTED], that [REDACTED] request for immediate crisis enrollment in the Medicaid Waiver Program was denied because [REDACTED] did not meet the criteria for crisis enrollment as defined in Florida Administrative Code Rules 65G-1.046 and 65G-1.047. The letter included a Notice of Administrative Hearing Rights, and the Petitioner's [REDACTED], [REDACTED], requested an administrative hearing challenging the APD's decision. The APD transmitted the matter to the Division of Administrative Hearings for assignment of an administrative law judge, and, pursuant to notice, the final hearing in this matter was conducted on April 15, 2009.

At the hearing, the APD presented its case first even though [REDACTED] has the burden of proof in this case, and it presented the testimony of Kent Carroll; Respondent's Exhibits 1 through 7, 8, and 9 were offered and received into evidence.

[REDACTED]'s [REDACTED], [REDACTED], testified on [REDACTED]'s behalf.

No transcript of the proceedings was filed. The APD timely filed proposed findings of fact and conclusions of law, and [REDACTED] timely filed a letter describing [REDACTED]'s condition and explaining why [REDACTED] thinks [REDACTED] is eligible for crisis enrollment in the Medicaid Waiver Program. Both post-hearing submittals have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. The APD is the state agency responsible for making eligibility determinations and for providing all services available to persons with developmental disabilities under Chapter 393, Florida Statutes (2008),¹ including the operation of all state institutional programs and the management of the Medicaid Waiver Program under which home and community-based services are provided to persons with developmental disabilities. See §§ 393.063(1) and 393.065, Fla. Stat. Among the APD's responsibilities is the determination of crisis eligibility for enrollment in the Medicaid Waiver Program. § 393.065(2), Fla. Stat.

2. [REDACTED] is an eight-year-old child who has been diagnosed with Down's Syndrome, developmental delay, hypothyroidism, a severe heart defect, pulmonary hypertension, and several other medical conditions.

3. [REDACTED] lives with [REDACTED] and, at the time of the final hearing, received exceptional student education services through [REDACTED] as a medically fragile student.

6. ██████ was receiving physical therapy, occupational therapy, and speech therapy services through Medicaid until ██████ was assigned to a new Health Maintenance Organization that terminated ██████ services.

7. ██████'s ██████ is ██████ who is not in the family home for six months each year. During these times, ██████'s ██████, is ██████ only caregiver. ██████ has no family in the area and no back-up system in place to allow ██████ a few hours away from ██████ for respite or to step in to help when ██████ is ill. Because ██████ is ██████'s only caregiver, ██████ is under a great deal of stress, has panic attacks, and worries about how ██████ will care for ██████ if ██████ were to become ill.

8. ██████ is requesting services through the Medicaid Waiver Program that include a support coordinator, speech therapy, occupational therapy, physical therapy, respiratory therapy, behavior therapy, and respite services.

9. The APD determined that ██████ was eligible for services under the Medicaid Waiver Program. There were, however, insufficient funds to provide services to ██████ immediately under the Medicaid Waiver Program, and ██████ name was placed on the waiting list for Medicaid Waiver Program services maintained by the APD, as provided in Appendix C to the Developmental Disabilities Waiver Services Coverage and Limitation Handbook

("Developmental Disabilities Handbook"), which is incorporated by reference in Florida Administrative Code Rule 59G-13.083.

10. [REDACTED]'s [REDACTED] applied for [REDACTED] to be immediately enrolled in the Medicaid Waiver Program on the grounds that [REDACTED] was in crisis. Crisis enrollment in the Medicaid Waiver Program entitles the individual to receive immediate services.

11. [REDACTED]'s application for crisis enrollment in the Medicaid Waiver Program was reviewed by the APD's Area Office, and it found that [REDACTED] may meet the criteria for persons in crisis. The APD Area Office, therefore, sent [REDACTED]'s application and supporting information to the APD's Central Office for review. The APD's Central Office found that [REDACTED] did not meet the criteria for crisis enrollment in the Medicaid Waiver Program, and [REDACTED] was put on the waiting list for enrollment in the Medicaid Waiver Program.

12. [REDACTED] is not homeless, and [REDACTED] is not a danger to [REDACTED] or others. [REDACTED], [REDACTED]'s only caregiver for six months each year, is under a great deal of stress and suffers from panic attacks, but [REDACTED] is able to continue caring for [REDACTED], albeit with difficulty given the lack of family in the area or a person or persons to act as back-up if [REDACTED] were, for some reason, unable to care for [REDACTED]

13. The evidence presented establishes that [REDACTED]'s situation is serious and that [REDACTED] family, especially [REDACTED]

is experiencing a great deal of stress trying to cope with [REDACTED] medical needs and [REDACTED] increasingly difficult behavior. The evidence also establishes that, unless [REDACTED] receives almost constant supervision, it is possible that [REDACTED] will injure [REDACTED] as a result of [REDACTED] physical frailty, especially given the medications [REDACTED] is taking for [REDACTED] heart problems. Nonetheless, the evidence does not establish that [REDACTED] is under extreme duress or unable to care for [REDACTED] because of [REDACTED] age or because of illness or that [REDACTED]'s home environment is unsafe or that [REDACTED] behaviors are such that [REDACTED] or others are at high risk for serious or life-threatening injury.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Sections 120.0569 and 120.57(1), Florida Statutes.

15. Because [REDACTED] is requesting that approval for crisis enrollment in the Medicaid Waiver Program, [REDACTED] has the burden of proving by a preponderance of the evidence that [REDACTED] is entitled to such crisis enrollment. See Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st. DCA 1977).

16. Section 1. of Appendix C to the Developmental Disabilities Handbook, Waiver Eligibility Determinations, provides in pertinent part:

B Upon a preliminary determination that the applicant is eligible or ineligible for a waiver based on the disability criteria, the following action shall be taken:

* * *

(2) Eligibility is approved: If an applicant is determined to meet the disability criteria the APD Area Office shall consult with the Central Office to determine whether funding is available.

(a) If funding is available, the procedures outlined in the Section 3 of this Appendix shall be followed.

(b) If funding is not available and the applicant does not require immediate ICF/DD placement, or if ICF/DD placement is not requested, the applicant shall be placed on the wait list, as described in Section 2 of this Appendix.

* * *

3. Waiver Enrollment

A When the level of funding annually appropriated by the Florida Legislature provides funding for additional enrollment, recipients will be added to the waiver in the following order, unless otherwise specified in the Appropriations Act:

(1) Individuals determined, pursuant to Chapter 65G-1, F.A.C., to be in crisis shall have first priority for services.

(2) Children on the wait list who are from the child welfare system with an open case

in the Department of Children and Family Services' statewide automated child welfare information system.

(3) All other individuals shall be considered for enrollment on the waiver in the date order in which they are listed on the statewide wait list, beginning with the earliest dates.

17. Florida Administrative Code Rule 65G-1.046 outlines the APD's crisis determination procedure and provides in pertinent part as follows:

(1) Subject to funding availability, the Agency will accept oral or written requests for crisis enrollment in a HCBS waiver by the applicant or the applicant's family, guardian, guardian advocate, or support coordinator.

(2) The applicant or applicant's representative shall request crisis enrollment through the Area Office in the service area where the applicant resides. The Agency may not enroll an applicant on the waiver unless the Agency has determined that the applicant has a developmental disability, as defined in Section 393.063(9), F.S., and also meets the following waiver eligibility requirements listed in the Handbook, Chapter 2 "Requirements to Receive Services":

(a) The recipient's intelligence quotient (IQ) is 59 or less; or

(b) The recipient's IQ is 60-69 inclusive and the recipient has a secondary handicapping condition that includes:

1. Cerebral palsy, spina bifida, Prader-Willi syndrome, epilepsy, autism, or

2. Ambulation, sensory, chronic health, and behavioral problems;

(c) The recipient's IQ is 60-69 inclusive and the recipient has severe functional limitations in at least three of the following major life activities:

1. Self-care,
2. Learning,
3. Mobility,
4. Self-direction,
5. Understanding and use of language,
6. Capacity for independent living; or

(d) The recipient is eligible under a primary disability of autism, cerebral palsy, spina bifida, or Prader-Willi syndrome and the condition results in substantial functional limitations in three or more major life activities listed in paragraph (c), above.

(3) The [APD] Area Office will collect pertinent information and supporting documentation relevant to a crisis determination and conduct a preliminary assessment based on the crisis status criteria specified in Rule 65G-1.047, F.A.C.

(a) If the [APD] Area Office concludes that the applicant does not meet crisis status or that the services needed are available from other agencies or programs or covered by other third-party payors, the [APD] Area Office will deny the crisis enrollment request and provide written notification of the denial to the applicant or applicant's representative.

(b) If the [APD] Area Office concludes that the applicant may meet crisis status and

does not have access to insurance, other agencies or programs for needed services, or concludes that programs in which the applicant is participating cannot meet the applicant's service needs, the [APD] Area Office will submit its initial assessment and supporting documentation to the [APD] Central Office for review and final determination of whether the applicant meets crisis status. The applicant or the applicant's representative may, upon request, review the initial assessment and supporting documentation to ensure that all necessary information is included.

(4) The [APD] Central Office will notify the [APD] Area Offices of deadlines for submission of crisis enrollment requests to the Central Office for periodic review. Following review of the submissions, the [APD] Central Office will notify the [APD] Area Office whether it has approved or denied each submission. The [APD] Area Office is responsible for notifying the applicant or applicant's representative of the [APD] Central Office's final crisis determination.

* * *

(b) DENIAL. The Area Office will notify the applicant or applicant's representative in writing of a denial of crisis enrollment. If the Agency denied the application based on lack of documentation and additional documentation becomes available, or a change in the applicant's situation may affect the applicant's status for crisis determination, the applicant may reapply to the Area Office for crisis consideration.

18. Florida Administrative Code Rule 65G-1.047 sets forth crisis status criteria and provides in pertinent part:

(1) Individuals determined to be in crisis will be prioritized for available waiver

placements in order of the severity of crisis, with the severity determined by risk to the health, safety, and welfare of each applicant relative to that of the other applicants, as indicated by the applicable criteria for each crisis category met by the applicant.

* * *

(4) "First priority" crisis category: The applicant is currently homeless, living in a homeless shelter, or living with relatives in an unsafe environment. In such cases, the following indicia, supported by credible evidence, are relevant to a crisis determination in this category:

(a) Without immediate provision of waiver services, the health and safety of the applicant are at risk;

(b) The applicant has no shelter available and needs emergency placement by the Agency or another state agency;

(c) Alternative funding is not available for other placement and services to the applicant;

(d) The applicant temporarily is staying with friends or relatives but residence is not expected to last more than several weeks;

(e) The applicant's caregiver has no legal obligation to provide shelter to the applicant and the caregiver's commitment to shelter the applicant is low;

(f) Factors affecting the applicant's safety in the current setting include risk of physical abuse of the applicant or risk of insufficient supervision and support;

(g) The home has insufficient room to shelter the applicant, or the applicant must

share a room in an inappropriate living arrangement, based on the ages, genders, and conditions of the persons sharing the room;

(h) The applicant's desire for placement creates a reasonable expectation that the applicant will be cooperative with placement;

(i) Violence or illegal activities within the applicant's current living environment by the applicant or others has required the intervention of local or state law enforcement authorities;

(j) Complaints of neglect, exploitation, or abuse of the applicant to Protective Services, or other adverse environmental conditions affecting the applicant, have been investigated and confirmed pursuant to Chapter 39, Part II, or Section 415.104, F.S.;

(k) The applicant requires services of greater intensity.

(5) "Second priority" crisis category: The applicant exhibits behaviors that, without provision of immediate waiver services, may create a life-threatening situation for the applicant or others, or that may result in bodily harm to the applicant or others requiring emergency medical care from a physician. In such cases, the following indicia supported by credible evidence are relevant to a determination of crisis under this category:

(a) Without immediate waiver services, the health and safety of the applicant or others in the household is at risk;

(b) The applicant's injury to self or others is frequent or intense;

(c) The applicant or others are at risk for serious injury or permanent damage;

(d) There is documentation of medical treatment for the applicant's injury to self or others;

(e) No other supports are available to address the applicant's behaviors;

(f) Other attempted behavioral assessments and interventions have proven ineffective;

(g) The relative ages, sexes, and sizes of the aggressor and the subjects of aggression place the subjects of aggression at risk of injury;

(h) The caregiver has insufficient ability to control the applicant;

(i) The ages or disabilities of the applicant or caregiver exacerbate the problems;

(j) Violence or illegal activity within the applicant's current living environment by the applicant or others has required the intervention of local or state law enforcement authorities;

(k) Complaints of neglect, exploitation, or abuse of the applicant, or other adverse environmental conditions affecting the applicant have been investigated by Protective Services and confirmed pursuant to Chapter 39, Part II, or Section 415.104, F.S.;

(l) The applicant requires services of greater intensity.

(6) "Third priority" crisis category: The applicant's current caregiver is in extreme duress and is no longer able to provide for the applicant's health and safety because of illness, injury, or advanced age. The applicant needs immediate waiver services to remain living with the caregiver or to

relocate to an alternative living arrangement. In such cases, the following indicia, supported by credible evidence, are relevant to a determination of crisis in this category:

(a) Without immediate provision of waiver services, the applicant's health and safety are at imminent risk;

(b) Other potential caregivers, such as another parent, stepparent, brother, sister or other relative or person, are unavailable or are unwilling or unable to provide care;

(c) The caregiver's physical or mental condition prevents the provision of adequate care;

(d) The caregiver is deceased, about to expire, or permanently disabled;

(e) The caregiver's age impairs the caregiver's ability to provide sufficient care to the applicant;

(f) The caregiver cannot provide sufficient care because of the age or size of the applicant, or the physical, functional, or behavioral demands of the applicant;

(g) The services provided by the caregiver are limited in amount, duration, or frequency, rendering the applicant semi-dependent or totally dependent;

(h) The caregiver's economic situation is unstable and unlikely to improve as a result of the care-giving demands of the applicant;

(i) The caregiver's obligations to the needs of other dependents prevent the caregiver from providing the applicant with adequate care, or the caregiver's obligation of care to the applicant places other dependents at risk of insufficient care;

(j) Violence or illegal activities within the applicant's current living environment by the applicant or others has required intervention by local or state law enforcement authorities;

(k) Complaints of neglect, exploitation, or abuse of the applicant, or other adverse environmental conditions affecting the applicant have been investigated by Protective Services and confirmed pursuant to Chapter 39, Part II, or Section 415.104, F.S.;

(l) The individual requires services of greater intensity.

19. The Florida Constitution and the Florida Statutes prohibit agencies from spending any monies exceeding the amount appropriated to them unless authorized by law. See Art. VII, § 1(c), Fla. Const.; § 216.311(1), Fla. Stat.

20. Applicants for the Medicaid Waiver Program are entitled to receive services only to the extent of available resources, and the APD has discretion to prioritize how it will distribute funds. See § 393.13(3)(c) and (d), Fla. Stat.

21. ██████ meets the eligibility requirements for the Medicaid Waiver Program. Based on the findings of fact herein, however, ██████ has not proven by a preponderance of the evidence that ██████ meets the priority criteria to entitle him to immediate crisis enrollment in the Medicaid Waiver Program. Therefore, crisis enrollment must be denied at this time. ██████ may, however, resubmit the application for crisis enrollment and

provide additional information for consideration by the APD.

See Fla. Admin. Code R. 65G-1.046 (4) (b).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Agency for Persons with Disabilities enter a final order denying ██████'s request for crisis enrollment in the Medicaid Waiver Program at this time.

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

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PATRICIA M. HART
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 references to the Florida Statutes are to the 2008 edition unless otherwise noted.

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.