

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████,)
)
Petitioner,)
)
vs.) Case No. 09-1529APD
)
AGENCY FOR PERSONS WITH)
DISABILITIES,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On June 3, 2009, an administrative hearing in this case was held in ████████, Florida, before Lawrence P. Stevenson, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: ████████ parent and legal guardian
(Address of record)

For Respondent: Tesha Scolaro Ballou, Esquire
Department of Children and Family Services
400 West Robinson Street, Suite S-1114
Orlando, Florida 32801

STATEMENT OF THE ISSUE

Whether Petitioner should be placed on the waiting list to receive Medicaid Waiver services with an effective date of March 6, 2009, as preliminarily found by the Agency for Persons with Disabilities (APD).

PRELIMINARY STATEMENT

The Agency for Health Care Administration administers the Florida Medicaid program. Pursuant to an interagency agreement, the APD operates the subject Medicaid waiver program for persons with defined developmental disabilities. Petitioner was originally approved for participation in the waiver services program in 2002, and voluntarily discontinued services in November 2005. APD's file on Petitioner was closed in January 2006. On March 6, 2009, Petitioner submitted an application for Medicaid waiver services. By letter dated March 9, 2009, APD notified Petitioner that she had been approved to participate in the Developmental Disabilities Home and Community-Based Services ("HCBS") waiver. The letter further informed Petitioner that APD lacked funding to serve all eligible HCBS waiver participants, and that Petitioner has been placed on a waiting list for a waiver with an effective date of March 6, 2009.

Petitioner timely requested a fair hearing regarding the waiting list effective date, arguing that the date should relate back to Petitioner's original receipt of services in 2005. On March 23, 2009, APD forwarded the matter to the Division of Administrative Hearings (DOAH) for assignment of an administrative law judge and the conduct of a formal hearing. The hearing was scheduled for and took place on June 3, 2009.

At the hearing, APD presented the testimony of Monica Robinson, Petitioner's original waiver support coordinator, and of Pat Rosbury, APD's supervisor for Brevard County. APD's Exhibits A through H were admitted into evidence. Petitioner presented the testimony of ■■■■■, Petitioner's mother. Petitioner's Composite Exhibit A was admitted into evidence.

A Transcript of the hearing was filed at DOAH on June 15, 2009. Both parties timely filed a Proposed Recommended Order.

FINDINGS OF FACT

1. Respondent administers the Florida Medicaid Waiver Program. At all times relevant to this proceeding, Petitioner was eligible for the HCBS waiver program.

2. Petitioner is a ■■■■■-year-old female whose primary disability is mental retardation with an intelligence quotient of 59 or less. ■■■■■ lives at home with ■■■■■ parents.

3. In 2002, Petitioner's application for participation in waiver services was approved and ■■■■■ was placed on a waiting list. Petitioner accepted services when they became available in 2005.

4. Monica Robinson is the director of Changing Directions of America, Inc., a company that contracts with APD to provide waiver services. Ms. Robinson was assigned to act as Petitioner's waiver support coordinator in August 2005.

Ms. Robinson completed a support plan for Petitioner and submitted it to APD.

5. In October 2005, [REDACTED], Petitioner's mother and legal guardian, contacted Ms. Robinson and told her that Petitioner did not need waiver services. Ms. Robinson testified that she encouraged Petitioner to continue receiving services because if [REDACTED] discontinued them, [REDACTED] would go to the bottom of the waiting list should [REDACTED] decide to re-apply in the future. [REDACTED] told Ms. Robinson that Petitioner did not require services at that time, and that [REDACTED] wanted to be sure that someone who did need services could receive them.

6. Ms. Robinson told [REDACTED] that if she wanted to discontinue services, she should send a letter expressing that wish to APD. On November 11, 2005, Ms. Robinson received a letter from [REDACTED] requesting that Petitioner be removed from the waiver program. Ms. Robinson forwarded the letter to APD, and Petitioner's case file was closed in January 2006.

7. On March 6, 2009, Petitioner submitted an application to APD for waiver services. The application was approved on the date submitted. Due to a lack of funding, Petitioner was placed on a waiting list for a waiver, and was notified of placement on the waiting list by letter from APD's acting area administrator dated March 9, 2009. Petitioner's position on the waiting list became effective on March 6, 2009.

8. At the hearing, [REDACTED]. testified that in 2005, [REDACTED] was not aware that removing Petitioner from the waiver program would cause [REDACTED] to lose her place in line for services. Ms. Robinson was adamant that she had explained this matter to [REDACTED]. The undersigned accepts that Ms. Robinson explained the ramifications of withdrawing from the program to [REDACTED] who simply did not understand at the time that Petitioner would not be allowed to return to her 2005 position in the program should [REDACTED] decide to re-apply.

9. [REDACTED] believed that APD's actions may comply with the letter of the law, but not its spirit, and urged the undersigned to make an equitable recommendation restoring Petitioner to [REDACTED] 2005 position in the waiver program.

CONCLUSIONS OF LAW

10. DOAH has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.57(1), 393.0651(8), and 393.125(1)(a), Fla. Stat. See J.M. v. Florida Agency for Persons with Disabilities, 938 So. 2d 535, 539 (Fla. 1st DCA 2006).

11. 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). Petitioner bears the burden of proof in this case.

12. 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).

13. A document titled "Developmental Services Waiver Services Florida Medicaid Coverage and Limitations," effective July 2002, was adopted by reference in Florida Administrative Code Rule 59G-13.080 (since superseded as to this coverage and limitations document by Florida Administrative Code Rule 59G-13.083). Appendix F of the coverage and limitations document was entitled "Consumer Wait List." Section 4 of Appendix F was entitled "Waiver Enrollment." Subsection 4.E. provided as follows:

When a beneficiary is enrolled on the waiver, the waiver position allocated to the beneficiary is theirs until they become ineligible or choose to discontinue waiver services. If the beneficiary loses [sic] their eligibility or chooses to discontinue their waiver services during a waiver year (July 1 thru June 30), and later chooses to re-establish their eligibility, prior to the end of the same waiver year (before June 30), the individual may return to the same waiver position allocated and resume receiving waiver services.

If waiver eligibility cannot be re-established or the individual chooses to resume their waiver services after the

beginning of the next waiver year (July 1), they are no longer eligible to return to the waiver until a new waiver vacancy and funding is available. In this instance, the individual is added to the Wait List of individuals requesting waiver participation. Their new effective date is the date eligibility is re-established or the individual requests re-enrollment for waiver participation.

14. Petitioner's case file was closed in January 2006, while the quoted coverage and limitations document was in effect. Petitioner did not re-apply for services until March 2009, well outside the waiver year established in Appendix F. Under the terms of the coverage and limitations document, Petitioner's new effective date is March 6, 2009, the date eligibility was re-established.

15. The "Developmental Disabilities Waiver Services Coverage and Limitations Handbook," effective July 2007, has been adopted by reference in Florida Administrative Code Rule 59G-13.083. Appendix C of the handbook is titled "Waiver Eligibility Determination." Section 3.D. of Appendix C provides:

When a recipient is enrolled on the waiver, the waiver position allocated to the recipient is his until he becomes ineligible or chooses to discontinue waiver services. If the recipient loses [sic] his eligibility or chooses to discontinue waiver services, he may return to the same waiver position allocated and resume receiving waiver services provided that he has been disenrolled for less than one year.

If waiver eligibility cannot be re-established, or the individual who has chosen to disenroll has been continuously disenrolled for one year or longer, he is no longer eligible to return to the waiver until a new waiver vacancy and funding is available. In this instance, the individual is added to the wait list of individuals requesting waiver participation. Their new effective date is the date eligibility is re-established or the individual requests re-enrollment for waiver participation.

16. Even under the modestly less restrictive terms of the handbook, Petitioner clearly did not meet the "less than one year" provision that would allow her return to her previous waiver position. Petitioner's effective date on the waiting list of individuals requesting waiver participation is March 6, 2009. APD correctly followed its rules in establishing this effective date.

17. While sympathetic to Petitioner's position, the undersigned is an administrative law judge, a statutory officer lacking inherent or equitable powers. APD's presumptively valid rules bind this tribunal's discretion.

RECOMMENDATION

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

RECOMMENDED that a final order be entered affirming Petitioner's placement on the waiting list with an effective date of March 6, 2009.

DONE AND ENTERED this 3rd day of August, 2009, in
Tallahassee, Leon County, Florida.

S

LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of August, 2009.

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.