

STATE OF FLORIDA
AGENCY FOR PERSONS WITH DISABILITIES

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DOAH Case NO. 09-1586APD
RENDITION No. APD-■■■■-FO

Petitioner,

v.

AGENCY FOR PERSONS WITH DISABILITIES

Respondent.

_____ /

FINAL ORDER

This cause is before the Agency for Persons with Disabilities for consideration and final agency action determining the correct Tier Waiver assignment for Petitioner, ■■■■ pursuant to Section 393.0661, Florida Statutes (2009), and Rules 65G-4.0021 through 65G-4.0025, Florida Administrative Code. The 2007 Legislature created the four tier waiver system and directed the Agency to assign all clients receiving services through the developmental disability waiver to one of four tiers. See Chapter 2007-64, Laws of Florida.

■■■■ disagreed with the Agency's proposed assignment of him to the Tier Two Waiver and timely requested a hearing. The Agency for Persons with Disabilities referred this cause to the Division of Administrative Hearings for an administrative hearing. Administrative Law Judge Carolyn S. Holifield conducted the hearing on April 28, 2009. After a de novo hearing, the Administrative Law Judge issued a Recommended Order concluding that APD correctly assigned ■■■■ ■■■■ to the Tier Two Waiver. No exceptions to the Recommended Order were filed. The Recommended Order is attached and incorporated by reference.

PRELIMINARY STATEMENT

The issue to be decided in this case is to which tier of the four tier waiver system Petitioner should be assigned. At the time of the hearing, the administrative rules (Rules 65G-4.0021 through 65G-4.0025) adopted by the Agency to explicate and implement the four tier waiver program had been found not to be invalid exercises of delegated legislative authority by an administrative law judge. See *Moreland v. Agency for Persons with Disabilities*, Case No. 08-2199RP (DOAH Final Order, August 6, 2009). Since that time, however, the Florida First District Court of Appeal has issued an order finding the rules to be invalid. See *Moreland v. Agency for Persons with Disabilities*, Case No. 1D08-4353 (Fla. 1st DCA August 21, 2009), Motion for Reconsideration Denied, October 9, 2009.

In her Recommended Order, the Administrative Law Judge recommended, based on her Findings of Fact, that Petitioner should be assigned to Tier Two. A review of the Recommended Order reveals that, while the ALJ referred to and quoted from the Agency's rules for the tier system, her conclusion that Petitioner should be assigned to Tier Two was reached and can be supported by applying the facts to the law—not to the rules. Thus, quoting paragraph 32 of the Recommended Order,

“The evidence established that Petitioner's determined and approved service needs, as reflected in Petitioner's prior service authorization and Cost Plan, are for residential habilitation services at the moderate level of support. This level of support meets the criteria for assignment to Tier Two as set forth in Subsection 393.0661(3)(b), Florida Statutes. Therefore, APD correctly determined that Petitioner should be assigned to Tier Two.”

The ALJ also considered whether, as Petitioner contended, ■■■ should be assigned to Tier One.

“30. The eligibility criteria for Tier One is established in Subsection 393.0661(3)(a), Florida Statutes, quoted above. Also see Fla. Admin Code R. 65G-4.0022. Pursuant to the foregoing, Tier One is limited to clients: (1) who have service needs that could not be met in Tier two, three, or four for intensive medical or adaptive needs that are essential for avoiding institutionalization; or (2) who possess behavior problems that are exceptional in intensity, duration, or frequency and present a substantial risk of harm to themselves and others.

31. There is no evidence that at times relevant to this proceeding (1) Petitioner possessed behavior problems that were deemed exceptional in intensity, duration, or frequency or presented a substantial risk of harm to himself or others; (2) Petitioner was receiving or approved for any of the extensive or intensive services referenced in Florida Administrative Code Rule 65G-4.0022; or (3) Petitioner’s service needs could not be met in his current Tier Two assignment. Accordingly, Petitioner does not meet the criteria for Tier One.”

It is clear from a reading of the Recommended Order that Petitioner’s assignment to Tier Two is consistent with the provisions of Fla. Stat.

393.0661(3)(b) and can be supported by applying the Findings of Fact to that section of the law without reference to the administrative rules.

FINDINGS OF FACT

The Recommended Order’s Findings of Fact are approved and adopted.

CONCLUSIONS OF LAW

The Recommended Order’s Conclusions of Law, with the exception of her reliance on Fla. Admin Rules 65G-4.0021-4.0025, are approved and adopted.

Accordingly, upon review of the complete record in this case, including the Recommended Order, the submissions and arguments of the parties, and being otherwise fully advised in the premises, Petitioner is hereby placed in Tier Two.

Petitioner shall contact his Waiver Support Coordinator to submit a revised cost plan to the Area Office consistent with this decision.

DONE AND ORDERED in Tallahassee, Leon County, Florida, this ___ day of _____, 2009.

Mac McCoy, Operations Officer
Agency for Persons with Disabilities

RIGHT TO APPEAL

A party who is adversely affected by this final order is entitled to judicial review. To initiate judicial review, the party seeking it must file one copy of a "Notice of Appeal" with the Agency Clerk. The party seeking judicial review must also file another copy of the "Notice of Appeal," accompanied by the filing fee required by law, with the First District Court of Appeal in Tallahassee, Florida, or with the District Court of Appeal in the district where the party resides. Review proceedings shall be conducted in accordance with Florida Rules of Appellate Procedure. The Notices must be filed within thirty (30) days of the rendition of this final order.¹

Copies furnished to:

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¹ The date of the "rendition" of this Final Order is the date that is stamped on its first page. The Notices of Appeal must be received on or before the thirtieth day after that date.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Final Order was provided to the above-named individuals at the listed addresses, by U.S. Mail or electronic mail, this ___ day of _____, 2009.

Percy W. Mallison, Jr., Agency Clerk
Agency for Persons with Disabilities
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Tallahassee, FL 32399-0950