

Disabilities Waiver Program ("Medicaid Waiver Program") pursuant to Section 393.0661, Florida Statutes (2008),¹ is correct.

PRELIMINARY STATEMENT

On September 2, 2008, Respondent, Agency for Persons with Disabilities ("APD"), sent Petitioner, ██████ ("Petitioner"), a letter notifying ██████ that, effective October 1, 2008, ██████ was assigned to Tier Two. The letter advised Petitioner that in accordance with Section 393.0661, Florida Statutes, based on the Tier Two assignment, ██████ annual spending limit would be \$55,000 a year. Also, the letter noted that APD's records indicated that Petitioner's current Cost Plan exceeded the \$55,000 limit and, thus, needed to be adjusted to come within the prescribed limit.

On September 12, 2008, Engime Dieu, Petitioner's then representative, filed a Petition for Hearing regarding Petitioner's assignment to Tier Two. On March 26, 2009, APD filed the request to the Division of Administrative Hearings for assignment of an Administrative Law Judge to conduct the final hearing. The final hearing was held as noted above.

Prior to the evidentiary part of the proceeding and at APD's request, the undersigned took official recognition of Section 393.061, Florida Statutes, and Florida Administrative Code Rules 65G-4.0021 through 65G-4.0025.

At hearing, APD presented the testimony of René Johnson, a Governmental Operations Consultant II with APD, and APD's Composite Exhibit 1 and Exhibit 2 were admitted into evidence. Petitioner presented the testimony of three witnesses:

- (1) [REDACTED], owner of a transportation company;
- (2) [REDACTED], speech therapist; and (3) [REDACTED], Petitioner's waiver support coordinator.

The hearing Transcript was filed on May 11, 2009. No post-hearing submittal was filed by Petitioner. APD timely filed its Proposed Recommended Order, which has been considered in 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. APD administers the Florida Medicaid Waiver Program. Pursuant to Subsection 393.0661, Florida Statutes, APD assigns clients receiving services through the Medicaid Waiver Program to a four-tiered waiver system.
2. Petitioner is a [REDACTED]-year-old [REDACTED] who resides at [REDACTED] Assisted Living Facility in [REDACTED], Florida.
3. Petitioner is non-verbal, has been diagnosed with profound mental retardation, autism, behavior disorders, tics

and renal insufficiency, and has a history of seizures.

Petitioner has congestive heart failure and diabetes.

4. At all times relevant to this proceeding, Petitioner was eligible for and receiving services from the Medicaid Waiver Program.

5. On or about November 20, 2008, Petitioner's waiver support coordinator and other persons involved in Petitioner's care participated in the development of a Support Plan for Petitioner. The Support Plan, which was for the period July 1, 2008, through June 30, 2009, identified the various support/service and program needs of Petitioner.²

6. A prior authorization review was conducted by an entity with whom APD contracts to determine which support/service and program needs identified in the Support Plan should be approved.

7. The Cost Plan for Petitioner covering the period July 1, 2008, through June 30, 2009, was based on the prior service authorized.

8. Petitioner's Cost Plan for the period July 1, 2008, through June 30, 2009, includes the following approved services and their respective fund allocations: (1) adult dental services--\$514.05; (2) support coordination services--\$1,571.40; (3) adult-day training services--\$8,551.53; (4) transportation service--\$12,364.80; (5) behavioral therapy by level one certified behavior analyst--\$4,126.41³; (6) behavior therapy--

\$10,815.90⁴; (7) standard residential habilitation at the moderate level--\$41,181.00; (8) speech therapy--\$6,944.26; and (9) medication review--\$71.97.

9. René Johnson is a Governmental Operations Consultant II with APD's Home and Community-Based Waiver Services Program. Ms. Johnson's job responsibilities include reviewing the tier assignments of Medicaid waiver clients to ensure that those assignments are in accordance with applicable laws and rules.

10. Based on the results of a computer-generated program and a review by APD area office, APD initially assigned Petitioner to Tier Two.

11. Ms. Johnson reviewed Petitioner's initial tier assignment to determine if that assignment was correct. In making her determination, during the course of her review, Ms. Johnson reviewed the following documents related to Petitioner: (1) the most recent and prior service authorizations; (2) the approved Cost Plan for July 1, 2008, through June 30, 2009; and (3) the Support Plan, including the updated Support Plan. The information contained in the above-referenced documents was considered in light of the provisions in Section 393.0661, Florida Statutes, and Florida Administrative Code Rules 65G-4.0021 through 65G-4.0025.

12. Petitioner's Cost Plan and [REDACTED] Support Plan indicate that [REDACTED] receives standard residential habilitation at the moderate

level.⁵ Moreover, there is nothing in Petitioner's records to indicate that ■■■ belongs in a different type of residential habilitation or that ■■■ needs behavior focus residential habilitation services.

13. The total funds for approved services allotted under Petitioner's current Cost Plan are \$86,141.32. This amount exceeds the maximum amount of money that can be allocated under Tier Two, which is \$55,000. Thus, to come within the prescribed funding limits of Tier Two, some of the services Petitioner is receiving must be reduced, eliminated or somehow modified.⁶

14. Petitioner contends that ■■■ should be assigned to Tier One because that would allow ■■■ to continue receiving all the services for which he is currently approved.

15. In reviewing the appropriateness of Petitioner's tier assignment, Ms. Johnson did not consider as a factor the total funds allocated for the services in Petitioner's 2008-2009 Cost Plan. Rather, she properly relied on the criteria in applicable laws and rules.

16. Tier One has no budget limitation for approved services. However, Tier One is limited to clients who are determined by APD to meet prescribed criteria as follows:
(1) clients' intensive medical or adaptive needs cannot be met in Tiers Two, Three or Four; or (2) clients' behavioral problems are exceptional in intensity, duration, or frequency and present

substantial risk of harm to themselves or others. See
§ 393.0661(3)(a), Fla. Stat.

17. Tier Two is 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." See § 393.0661(3)(b), Fla. Stat.

18. Petitioner meets the eligibility criteria for Tier Two in that [REDACTED] approval services include standard residential habilitation at the moderate level. See paragraph 8.

19. Ms. Johnson's review and determination that Petitioner was appropriately assigned to Tier Two is supported by the record and the criteria prescribed in law. See
§ 393.0661(3)(b), Fla. Stat.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes.

21. This is a proceeding designed to formulate final agency action. See Hamilton County Bd. of County Commissioners v. State Department of Environmental Regulation, 587 So. 2d 1378 (Fla. 1st DCA 1991) and § 120.57(1)(k), Fla. Stat.

22. The burden of proof in an administrative hearing is on the party asserting the affirmative of the issue. See Florida

Department of Transportation v. J. W. C. Company, Inc., 396

So. 2d 778 (Fla. 1st DCA 1981). The standard burden of proof in an administrative hearing such as this one is the preponderance of evidence. § 120.57(1)(1), Fla. Stat.

23. In this proceeding, APD is asserting the affirmative of the issue. Therefore, to prevail, APD must prove by a preponderance of evidence that it appropriately assigned Petitioner to Tier Two.

24. Section 393.0661, Florida Statutes, provides for a comprehensive re-design of the home and community-based services delivery system for persons with disabilities. This system requires that clients be assigned to one of four tiers.

25. Subsection 393.0661(3), Florida Statutes, describes and defines the tier system as follows:

The agency [Agency for Persons With Disabilities] shall assign all clients receiving services through the developmental disabilities waiver to a tier based on a valid assessment instrument, client characteristics, and other appropriate assessment methods. All services covered under the current developmental disabilities waiver shall be available to all clients in all tiers where appropriate, except as otherwise provided in this subsection or in the General Appropriations Act.

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

26. Pursuant to its rulemaking authority, APD promulgated rules which implement the tier system established in Section 393.0661, Florida Statutes. See § 393.0661(3)(e), Fla. Stat.

27. Florida Administrative Code Rule 65G-4.0021 provides in relevant part the following:

(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.

* * *

(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.

28. Florida Administrative Code Rule 65G-4.0022

established the criteria for assignment to Tier One and provides:

(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, and 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.

29. Petitioner contends that ■ was inappropriately assigned to Tier Two and, instead, 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 ■ 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 ■ current Tier Two assignment. Accordingly, Petitioner does not meet the criteria for Tier One.

32. 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.

33. The issue in this proceeding is limited solely to whether APD's tier assignment for Petitioner is correct. As noted above, the assignment of Petitioner to Tier Two was consistent with the eligibility requirements for that tier. However, a client's tier assignment is not necessarily a permanent one.

34. Pursuant to Florida Administrative Code Rule 65G-4.0021(4), APD is authorized to review a client's tier eligibility: (1) when the client has a significant change in circumstance or condition that impacts the client's health, safety, or welfare; or (2) when the client's plan of care is required to avoid institutionalization. According to the above-referenced rule, this APD review is triggered when the client's waiver support coordinator submits to the appropriate APD area office information identifying and documenting the

significant change in the client's circumstance or condition that necessitates additional or different services.

35. In light of the foregoing, Petitioner is not precluded from requesting additional services from APD if there is a significant change in Petitioner's circumstances and an identified and documented need for additional or different services. APD's review of the request and supporting and related documentation may result in a change in tier assignment.

RECOMMENDATION

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

RECOMMENDED that Respondent, Agency for Persons with Disabilities, enter a final order which: (1) finds that Petitioner, [REDACTED], meets the eligibility criteria for Tier Two; and (2) assigns Petitioner to Tier Two.

DONE AND ENTERED this 17th day of July, 2009, in Tallahassee, Leon County, Florida.

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CAROLYN S. HOLIFIELD
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of July, 2009.

ENDNOTES

^{1/} All statutory references are to Florida Statutes (2008), unless otherwise noted.

^{2/} According to the Support Plan form, the purpose of the plan was to identify Petitioner's strengths, needs, and preferences that will promote a positive quality of life. The form also indicates that the supports needed by the client should be identified in the Support Plan regardless of the availability of funds.

^{3/} This certified behavior analyst is responsible for providing on-going assessments, developing behavioral plans, and providing oversight of implementation of the plans.

^{4/} This therapy is provided by a behavioral analyst who provides on-going assessment of Petitioner's behaviors and training to staff in how to address Petitioner's behaviors.

^{5/} Ms. ██████ testified that moderate level of habilitation for a standard residential habitation may require among other things, "substantial prompting and/or physical assistance to perform self care for daily living activities." According to Ms. ██████, "clients eligible for moderate habilitation may exhibit behaviors that require frequent [behavior] plan and formal interventions and/or exhibit self-injury or aggressive behavior toward others."

^{6/} This review process must take into account services which are deemed medically necessary and any changes concerning Petitioner that require modifications in the services that he needs.

COPIES FURNISHED:

James DeBeaugrine, Executive Director
Agency for Persons With Disabilities
4030 Esplanade Way, Suite 380
Tallahassee, Florida 32399-0950

John Newton, General Counsel
Agency for Persons With Disabilities
4030 Esplanade Way, Suite 380
Tallahassee, Florida 32399-0950

Cathy Bedell, Esquire
Agency for Persons with Disabilities
Fair Hearing Coordinator
4030 Esplanade Way, Suite 380
Tallahassee, Florida 32399-0950

M. Catherine Lannon, Esquire
Office of the Attorney General
Administrative Law Section
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

Helen Brewer Fouse, Esquire
Office of the Attorney General
501 East Kennedy Boulevard, Suite 1100
Tampa, Florida 33602

[REDACTED]
[REDACTED] Living Facility
2073 Balfour Circle
Tampa, Florida 33619

Cynthia Best, Support Coordinator
Post Office Box 89035
Tampa, Florida 33689

[REDACTED]
(Address of record)

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.