IN THE FIRST DISTRICT COURT OF APPEALS
IN AND FOR THE STATE OF FLORIDA

,
Petitioner/Movant,
v.
Agency for Persons With Disabilities,
Respondent.

Case No. _____

PETITION FOR WRIT OF MANDAMUS

Petitioner named above, , by and through the undersigned attorney, applies pursuant to Article V, Section 4(b)(3) of the Florida Constitution and F. R. App. P. 9.030(b)(3) for Writ of Mandamus directed to Respondent named above. In support hereof, the Petitioner states as follows:

I. BASIS FOR INVOKING JURISDICTION

This Court has original jurisdiction over this matter pursuant to Article V, Section 4(b)(3) of the Florida Constitution and Fl. R. App. P. 9.100(a). The Petitioner seeks the extraordinary remedy of a writ of mandamus as relief in regards to the Agency for Persons With Disabilities' issuance of a Final Order Denying Hearing Request (hereinafter referred to as the "Agency's Order"), dated December 1, 2008, a copy of which is attached hereto and made a part hereof as "Exhibit A." The Agency's Order is an essential departure from the requirements of law and due process and will cause the Petitioner irreparable material harm to his health and safety. Appellate review of this final administrative action would not provide an adequate remedy as the Petitioner's medically necessary services will not continue throughout an appeal process causing his safety and health to irretrievably deteriorate. The Agency's Order denies the Petitioner his due process rights to a fair hearing as prescribed by State and Federal statutes and

deprives him the freedom of choice afforded him by 42 U.S.C. 1396n(C)(2), between living in a home-like setting or being institutionalized.

II. STATEMENT OF THE FACTS

A. The parties

This Petition for Writ of Mandamus is filed by , a person with developmental disabilities who receives home and community based services under a Medicaid Waiver for persons with developmental disabilities (HCBS waiver recipients). Respondent is the Agency for Persons with Disabilities (hereinafter the "Agency"), a state of Florida agency charged with the administration of the Medicaid Waiver for persons with developmental disabilities under an agreement with the single state Medicaid agency, the Florida Agency for Health Care Administration.

B. The waiver program

Pursuant to 42 U.S.C. §1396n(c) Medicaid home and community-based services waiver programs provide services to individuals with developmental disabilities who would otherwise require the level of care provided in an institution. Medicaid home and community-based services waiver programs are governed by 42 C.F.R. §§ 441.300-310. Each State has the option of providing services through the community necessary to meet the level of care criteria for an intermediate care facility. Providing services through the community affords Florida's population with developmental disabilities the

opportunity to reside in their family homes or in home-like settings at a much less costly rate than residing in intermediate care facilities. Florida has recognized that institutionalization of such Floridians is "ineffective in bringing the individual client to his or her maximum potential, and are in fact debilitating to many clients." F.S. 393.062. Florida has determined to provide such services by its adoption of Florida Statutes Ch. 393.066 and Fla. Admin. Code Ch. 59G-13.080, which authorize the Florida Medicaid Developmental Disabilities Wavier (hereinafter the "DD waiver program"). The Florida DD waiver program is a home and community based services waiver meant to maintain persons with developmental disabilities in a home setting with supporting services necessary to prevent institutionalization. Florida Statute 393.062 provides the Legislature's intent a follows:

> "Further, the greatest priority shall be given to the development and implementation of community-based services that will enable individuals with developmental disabilities to achieve their greatest potential for independent and productive living, enable them to live in their own homes or in residences located in their own communities, and permit them to be diverted or removed from unnecessary institutional placements."

In 2007, the Florida Legislature amended Florida Statute 393.0661 into a four-tiered waiver system to serve clients in the DD waiver program. Prior to the amendment to Florida Statute 393.0661, there had been two waivers provided through the DD waiver program. The first was the "Developmental Disability Waiver" which did not have an annual cost limit. The second was the

"Family and Supported Living Wavier" which had an annual cost limit of $14,792. DD waiver recipients were placed in a waiver program based upon their plan of care as developed with the services of their Waiver Support Coordinator. The recipient's services approved by the Agency through their prior service authorization process had to meet the criteria of "medically necessary" as defined in Florida Administrative Code Rule 59G-1.010(166). Said rule defines "medically necessary" as follows:

> **"**1. Be necessary to protect life, to prevent significant illness or significant disability, or to alleviate severe pain;
> 2. Be individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment, and not in excess of the patient's needs;
> 3. Be consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational;
> 4. Be reflective of the level of service that can be safely furnished, and for which no equally effective and more conservative or less costly treatment is available; statewide; and
> 5. Be furnished in a manner not primarily intended for the convenience of the recipient, the recipient's caretaker, or the provider."

The Florida Legislature provided brief descriptions of the newly created tiers and their corresponding annual cost limit. Tier One is described by the legislature as "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 exception in intensity, duration, or frequency and present a substantial risk of harm to themselves or others." F.S. 393.0661(3)(a). Tier Two is

described by the legislature as “limited to clients whose service needs include a licensed residential facility and greater than 5 hours per day in 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 $55,000.00 per client each year.” F.S. 393.0661(3)(b). Tier Three is described by the legislature as “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.” F.S. 393.0661(3)(c). Tier Four is described by the legislature as “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, 2008. Total annual expenditures under tier four may not exceed $14,792 per client each year.” F.S. 393.0661(3)(d).

The Florida Legislature directed APD to assign all waiver recipients to a tier based on “valid assessment instrument, client characteristics, and other appropriate assessment methods.” F.S. 393.0661(3). In the scheme of implementing the amendment to Florida Statute 393.0661, the Agency promulgated Florida Administrative Code Rule 65G-4.0021 which states the Agency will determine the tier assignments within prescribed rules and considering four factors. One such factor is “the client’s needs as determined through the Agency’s prior service authorization process to be medically

necessary." F.A.C. Rule 65G-4.0021.

C. The Petitioner,

The Petitioner, , had previously participated in the Developmental Disability Waiver with no annual cost limit. The Petitioner is a who lives with his. He is diagnosed with Dandy Walker Syndrome and Detached Cerebellum. cannot read, write, count currency or make decisions on his own. requires constant supervision as he is. is able to take care of his personal care with some reminders, however he requires . can prepare. He is able to and assist his household chores. volunteers with . 's previously plan of care, attached hereto and incorporated hereof as "Exhibit B," included , amounting to an annual cost plan of $20,674.60.

Effective October 15, 2008, the Agency for Persons with Disabilities assigned the Petitioner to Tier Four of the newly enacted Tier Waiver system. Under Tier Four, 's services will be subject to a cost ceiling of $14,792.00 per year requiring a corresponding services reduction of approximately $6,000.00. By the assignment to Tier Four, the Petitioner will lose many services including adult dental care, respite care and companion services, all of which were previously approved in his annual cost plan and therefore considered medically necessary.

The Petitioner's Notice of Implementation of Changes in Law For Tier Waiver Assignment Effective October 15, 2008, attached hereto and incorporated hereof as "Exhibit C," cites no assessment tools, process,

information, documents or other information as the sources considered to determine the Tier assignment. On or about September 16, 2008, Petitioner , through his legal guardian, filed a timely Request for an Administrative Hearing, attached hereto and incorporated hereof as "Exhibit D," with regard to the act of assigning Petitioner to Tier Four. The Request for an Administrative Hearing sought the Agency's review of his Tier assignment because it would not allow for services previously approved in the Agency's prior service authorization process. On December 1, 2008, Appellant received the Agency's Final Order Denying Hearing Request, "Exhibit A," citing two grounds for the denial. First the Agency cited that Petitioner did not comply with Section 120.569(2)(c), F.S. (2008) (requiring a concise statement of the ultimate facts alleged including specific facts the petitioner contends warrant reversal or modification) and, second, that the request was in contradiction with 42 C.F.R. 431.220(b) (relieving the Agency from granting a hearing if the sole issue is a change in Federal or State law.)

Florida Statute 120.569 prescribes procedures for requesting and granting a hearing when an individual's substantial interests are determined by an Agency. Florida Statue 120.57 further describes the process for said hearings. If the petition involves disputed issues of material fact, it is referred to the Division of Administrative Hearings. In cases involving no disputed issues of material fact, the matter is then heard before the Agency or hearing officer. It is Petitioner's contention that Florida Statutes 120.569 and 120.57 requires the Agency to continue his services and to set an informal hearing before the Agency

for Persons with Disabilities at a minimum. Should disputed material facts arise the Petitioner would further be entitled to a formal hearing with the Department of Administrative Hearings.

III. NATURE OF RELIEF SOUGHT

The Petitioner is requesting that his Writ of Mandamus be granted and that this Court direct the Agency for Persons with Disabilities to grant his request for a hearing and continue his services until the hearing process is completed.

IV. ARGUMENT IN SUPPORT OF THE PETITIONER'S REQUEST FOR A WRIT OF MANDAMUS

Petitioner has a clear legal right to the requested relief, the Respondent has a ministerial duty to afford the Petitioner with a hearing, and the Petitioner has no other remedies available but to ask this Court to grant his request for a Writ of Mandamus and direct the Agency for Persons with Disabilities to grant his request for a hearing and continue his services until the hearing process is completed.

A. Clear Legal Right to the Requested Relief

42 C.F.R. 431.200 (2) prescribes procedures for an opportunity for a hearing if the State agency takes action to suspend, terminate, or reduce services. Pursuant to 42 C.F.R. 220 (2), the Agency "*must*" grant a request for a hearing to any recipient who requests it because they believe the agency "has taken an action erroneously."

Florida Statute 120.569 and F.S. 120.57 provides for two types of hearings when a party's substantial interests are determined by that agency. The agency may determine there is a disputed issue of material fact and refer the matter to the Department of Administrative Hearings for a formal hearing. However, should there be no disputed issue of material fact, the agency must "give parties or their counsel the option, at a convenient time and place, to present to the agency or hearing officer written or oral evidence in opposition to the action of the agency or to its refusal to act, or a written statement challenging the grounds upon which the agency has chosen to justify its action or inaction." F.S. 120.57(2).

Florida courts have continuously held that an individual who is substantially affected by an agency action has the right to a hearing. "Any person substantially affected by an APD decision, concerning eligibility for developmental disability services initially, or concerning subsequent changes in a support plan regarding such services arising from annually reviews thereafter, has the right to a hearing pursuant to section 120.57." J.M. v. A.P.D., 938 So.2d 535 (Fla. 1st DCA 2006). "Unless waived by all parties, an informal hearing is appropriate whenever the substantial interests of a party are determined, but no material facts are in dispute." Rosenzweig v. D.O.T., 979 So.2d 1051 (Fla. 1st DCA 2008).

Even where a state has sought to terminate an optional Medicaid service, even for facially lawful reasons, courts have held that due process procedures apply. Eder v. Beal, 609 F.2d 695 (3rd Cir. 1979)(State of Pennsylvania enjoined

from terminating certain vision care services from its optional coverage program until it provided notice and an opportunity to be heard to the recipients). Procedural due process was required in the case of Cramer v. Chiles, 33 F.Supp.2d 1342 (S.D. Fla. 1999). In Cramer, the State of Florida had attempted to convert privately owned Intermediate Care Facilities for the Developmentally Disabled (ICF/DD) services to the Home and Community Based Waiver program. The effect of the proposed legislation would have ended funding for room and board services for those recipients in privately owned ICF/DD. Essentially, those living in the ICF/DDs would have to be institutionalized because they would no longer have the funding available to effectuate a choice between living in a community-like setting or being institutionalized. The court in Cramer held that "In denying Petitioner's and class member's adequate notice and an opportunity for a hearing to challenge the termination of the private ICF/DD program and continued benefits pending their appeals, defendants have violated federal Medicaid law and fundamental due process." Id. at 1352.

In Petitioner's case, the assignment to Tier Four, with a spending cap of $14,972.00 annually, amounts to a reduction in his services that were previously approved, medically necessary, services as recently as July 31, 2008. While the Agency may purport to be merely effectuating a lawfully enacted statute, the Agency's implementation of the statute, i.e. the assignment to a Tier with a lower spending cap instead of a Tier with a higher spending cap, substantially affects the medically necessary services the Petitioner receives and amounts to a valid

allegation of an erroneous action pursuant to 42 C.F.R. 220 (2). Thus, any challenge to the tier assignment is subject to be resolved through the fair hearing process.

B. The respondent must have an indisputable legal duty to perform the requested action

The Agency's duty is ministerial in nature and not discretionary. Florida Statutes 120.569 and 120.57 (1) & (2) clearly afford the Petitioner a right to a fair hearing. The only act of the Agency that is discretionary is the determination of whether or not disputed issues of material fact exist. Should there be no disputed issues of material fact, the Agency sets an informal hearing; should disputed issues of material fact exist, the Agency must refer the matter to the Division of Administrative Hearings.

However, The Agency has cited two grounds to deny the hearing. First the Agency states that the Petitioner is not entitled to a hearing because the request for a hearing was merely a challenge to the change in State law. The Final Order Denying Hearing Request cites Blackwood v. Agency for Health Care Administration, State of Florida, 896 So.2d 656 (Fla. 4th DCA 2004) as supporting authority for the dismissal; Blackwood is not applicable in this proceeding. Blackwood involved a denial of an assisted living facility license in which the Agency for Healthcare Administration gave specific reasons for denial: a history of abuse and neglect. In her request for hearing the licensee did not address the specific allegations set forth in the denial of the license, thus no

disputed issues of material fact were raised in the Petition. In this case, the Agency for Persons with Disabilities' notice of tier assignment does not state the specific reasons for its tier placement of Petitioner. Specifically, the notice does not provide information regarding the exclusion of his previously approved, medically necessary, services. Thus, all that is required to meet the requirements for formal hearing is a general statement that the petitioner does not agree with the tier placement. The petition, in this case, exceeds the Blackwood standard by stating disputed issues of services that were previously approved as medically necessary to show why the tier placement is erroneous.

The Agency need not grant a request for a hearing if the "*sole*" issue is an automatic change in federal or state law that adversely affects some or all recipients. 42 C.F.R. 220 (2)(b). In the instant matter, Petitioner requested a hearing because his Tier assignment would not allow for the particular needs of the Petitioner, all of which had been previously approved as "medically necessary" only six months prior. The Tier Notice did not provide information regarding any valid and reliable assessment methods, supporting documents or other information used to determine his tier assignment. Thus, the Petitioner was without knowledge as to how the Agency specifically applied the statute and rules to his situation in making the Tier assignment. Therefore, the Petitioner's hearing request was not based *solely* on the change in state law as the Agency states in its Order Denying Hearing Request, but rather on the implementation of the statute to his specific medical needs.

F.A.C. Rule 65G-4.0021 states the agency will determine the tier assignments in accordance with F.S. 409.906(13), 393.0661 and F.A.C. Rule 59G-13.080, as well as four factors described within, specifically including "the client's needs as determined through the Agency's prior service authorization process to be medically necessary." It follows that because the Petitioner's previous service authorizations were deemed to be "medically necessary," the discontinuation of those services due to the Agency's tier assignment, is an "erroneous action" of which the Petitioner has a right to contest pursuant to 42 C.F.R. 220 (2).

The exact assessment instruments the Agency has used to determine his tier assignment are unknown to the Petitioner. Florida Statute 393.0661(3) states,

> "The agency 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."

It is unclear if the Petitioner was assigned to Tier Four based upon an assessment through the use of the Individual Cost Guideline or the QSI. Regardless of the allegedly valid and reliable assessment used to determine the Petitioner's Tier assignment, the Notice of tier assignment itself absolutely failed to contain any indication of the manner in which APD applied the statutes and rules to the Petitioner's factual circumstances. By providing no information to the

Petitioner as to how his assignment was determined, the Petitioner is left with no information to formulate specific allegations of error. Therefore, the Petitioner submitted a valid Request for Hearing by delineating his previous "medically necessary" services that would have to be reduced. Pursuant to the Petitioner's request for hearing, the Agency should have set an informal hearing before the agency or hearing officer as a minimum, or referred the matter to the Division of Administrative Hearings.

C. The Petitioner has no other adequate remedy

The Petitioner's services have been reduced because he was denied a hearing. Had he been afforded a hearing, the services would have had to continue until the hearing was completed. 42 C.F.R. 431.220. By denying the hearing, the Petitioner was left with no real options to avail himself of an adequate remedy. If he attempted to file an amended petition for a request for a hearing, without any information or knowledge of the assessments and information used to assign his Tier, he would be at a loss for specific statements or allegations of error to formulate said amended petition as the Agency requested. Petitioner's only other option by the Agency is to file an appeal of the Final Order Denying a Hearing and going through a lengthy appellate process in which no real record apparently exists. However, in both circumstances, Petitioner's services would either be terminated or in imminent danger of being terminated if an amended petition for hearing is denied yet again. Thus,

attempting to pursue either of those avenues would only lead the Petitioner on the path to institutionalization, as his services end and his health deteriorates.

There is an exception to the general rule, allowing judicial review prior to exhaustion of administrative remedies when "agency errors are so egregious or devastating that the promised administrative remedies are too little or too late." Communities Financial Corp. v Fla. Dept. of Environmental Regulation, 416 So.2d 813, 816 (Fla. 1st DCA 1982). Abstaining from filing an appeal of the denial of his hearing request is proper as the Agency has erred egregiously by placing him in a tier that will have the devastating effect of cutting medically necessary services from his cost plan which was approved to continue through June 30, 2009 by APD.

The remedy afforded by the Agency, appeal of the Agency decision to the District Court of Appeal, is inadequate as 's benefits are terminated when there is no further challenge in the administrative agency. Thus, while proceeding through an appellate process, will have lost medically necessary services placing him at medical risk. By denying the Request for Hearing and concurrently terminating his previous services, the Agency has stripped away from the Petitioner any further meaningful administrative remedies and has deprived the Petitioner of a real choice between being institutionalized or living in the community, contrary to the stated intent of Florida's Legislature.

D. Conclusion

The Agency's Final Order Denying Hearing Request deprives the Petitioner of his right to a hearing afforded by F.S. 393.0661, 393.125, 120.569 and 120.57, J.M. v. A.P.D., 938 So.2d 535 (Fla. 1st DCA 2006). Petitioner is in need of this Court to grant this Writ of Mandamus and/or issue an Order to Show Cause to Respondent to grant his hearing request and allow his services to continue until the completion of said hearing. Should disputed issues of material fact arise, the Petitioner should be afforded a hearing before the Division of Administrative Hearings.

WHEREFORE the Petitioner prays this Honorable Court will grant this Petition for Writ of Mandamus direct the Agency for Persons with Disabilities to grant his request for a hearing and continue his services until the hearing process is completed.

Respectfully Submitted this _____ day of January 2008,

The Advocacy Center for Persons With Disabilities, Inc.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to John Newton, APD General Counsel, Cathy Bedell, APD Asst. General counsel, APD Agency Clerk, on this _____ day of January 2009

The Advocacy Center for Persons With Disabilities, Inc.

_____
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that a true and correct copy of the foregoing complies with the styling and font requirements prescribed in Fl. R. App. P. 9.100(l).

The Advocacy Center for Persons With Disabilities, Inc.

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