STATE OF FLORIDA
DEPARTMENT OF CHILDREN AND FAMILIES
OFFICE OF APPEAL HEARINGS

APPEAL NO. 09F-04105

PETITIONER,

Vs.

AGENCY FOR HEALTH
CARE ADMINISTRATION
CIRCUIT: 01 Santa Rosa
UNIT: BSCP

RESPONDENT.
_____/

FINAL ORDER

Pursuant to notice, an administrative hearing was convened before the undersigned hearing officer on August 20, 2009, at 10:15 a.m., in Pensacola, Florida. The petitioner was present. He was represented by , attorney with the Advocacy Center for Persons with Disabilities. Also present was , intern, Advocacy Center for Persons with Disabilities. Testifying on behalf of the petitioner was . The respondent was represented by Daniel Lake, assistant general counsel. Testifying on behalf of the respondent was Karen Henderson, Medicaid Waiver Specialist with Department of Health, Arlene Walker, medical health care program analyst with Agency for Health Care Administration (AHCA) and Cindy Henline, medical health care program analyst, AHCA.

The hearing was originally scheduled to be held on July 29, 2009 but was continued at the request of the petitioner. The hearing record was held open until

August 31, 2009 so that both parties could submit proposed orders. Proposed orders and Memorandums of Law were received and the hearing record was closed.

ISSUE

At issue is the respondent's action of June 5, 2009 to terminate Brain and Spinal Cord Injury Program (BSCIP) Medicaid waiver services based on the contention that medical necessity is not evident as the petitioner "continues to refuse to cooperate with service delivery and continues to place your in-home services providers in jeopardy".

The respondent bears the burden of proof.

PRELIMINARY STATEMENT

1) Prior to convening the hearing, the undersigned received respondent's motion to exclude as a witness. based on the grounds that the witness was properly noticed for deposition through the petitioner's attorney and failed to appear. This motion was withdrawn on record.

2) At the hearing, the petitioner submitted a motion to prohibit the entry into evidence any testimony relating to the procurement or use of illicit drugs based on the contention that the deposition evidence was hearsay and could not be relied on to make findings of fact.

The petitioner has requested a hearing on the termination of Medicaid waiver benefits under 42 USC § 1396a(a) which states in part:

> (3) provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness...

The federal government has published regulations to implement this provision 42 C.F.R. 431.200.

The respondent asked that depositions taken for this case be entered as evidence. Both parties agree that the disposition statements are hearsay.

The federal regulations are silent on the use of hearsay in this proceeding, although the regulation does say the hearing system must meet the due process standards set forth in Goldberg v. Kelly, 397 U.S. 254 (1970). Goldberg is silent on the use of hearsay.

The hearsay standard in the Chapter 120 F.S. has been applied by the courts to fair hearings in James L. Doran v. Department of Health and Rehabilitative Services 558 So.2d 87 (Fla. 1st DCA 1990).

The Florida Administrative Code s. 65-2.057 (6) states in part:

> To the extent that the rules of discovery in the Florida Rules of Civil Procedure are not inconsistent with Chapter 120 F.S., the rules of discovery of the Florida Rules of Civil Procedure shall be applicable.

Based on these authorities and the absence of a conflict with federal authorities, the reliance on the testimony taken by deposition is controlled by state authorities.

Florida Statute s. 120.57(1) states in part: "

> (c) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

The respondent argued that the deposition would be admissible over objection in civil action under Florida Statute s. 90.803 Hearsay exceptions; availability of declarant immaterial. Section (22) which states in part:

> FORMER TESTIMONY.—Former testimony given by the declarant which testimony was given as a witness at another hearing of the same or a different proceeding, or *in a deposition taken in compliance with law in the course of the same or another proceeding*, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, or a person with similar interest, *had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination;* provided, however, the court finds that the testimony is not inadmissible pursuant to s. 90.403. (emphasis added).

Based on the statute alone, the hearing officer would be able to rely on the testimony given in the depositions to make findings of facts as it would meet the listed hearsay exception. However, the petitioner's counsel argued that the First District Court of Appeal declared this section of the statute as unconstitutional as it applies to this case in Grabau v. Department of Health, Bd. Of Psychology, 816 So.2d 701 (Fla 1st DCA 2002). The court stated:

> We conclude that the amended statute is unconstitutional as an infringement on the authority conferred on the Florida Supreme Court by article V, section 2(a), of the Florida Constitution; and as a violation of article II, section 3, of the Florida Constitution, because it obviates and conflicts with section 90.804, Florida Statutes; and with Florida Rule of Civil Procedure 1.330; and denies due process. Therefore, the statutory provision is not a proper basis for the admission into evidence of K.R's deposition in the administrative proceeding below.

The question is whether this decision is on point for this case. The first DCA certified the issue of the constitutionality of the statute to the Supreme Court as a matter of great public importance. The Supreme Court has not taken up the matter. Should

the petitioner appeal, the appeal would fall under the jurisdiction of the First District Court of Appeal.

In Grabau, the court addressed applying the statute to an agency action taken under Chapter 120 which is similar to the matter before the hearing officer. Additionally, the administrative law judges in the Division of Administrative have applied this Grabau in Chapter 120 hearings. Based on these concepts, the hearing officer finds Grabau to be controlling and that the testimony introduced by deposition to be hearsay that does not meet an exception and therefore may only be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding.

FINDINGS OF FACT

1. The petitioner is 49 years old and is a quadriplegic. He has been enrolled in the BSCIP Medicaid waiver program since at least 1999 and also receives State-Plan Medicaid coverage. The BSCIP is one of the Home and Community Based Services Medicaid Waiver Programs; the purpose is to allow individuals who would otherwise require nursing home care or other institutional care to receive services in their own homes or in home-like settings.

2. The petitioner lives in his own home. He is currently receiving companion and personal care services through the BSCIP Medicaid waiver program.

3. The petitioner meets the criteria for individuals who can receive services provided in the BSCIP Waiver Services Handbook.

4. In July 2008, the respondent completed an annual assessment of the petitioner's needs (Petitioner's Exhibit 2). The summary indicated the petitioner suffers from periodic bouts of severe depression. He was taking anti-depressant medications and refused mental health services. The depression was determined to be based on social isolation. There was no indication that the petitioner required or requested assistance with drug abuse programs. Further, the physical environment was determined to be generally well equipped and supportive including the building, neighborhood and necessary furnishings. The respondent indicated the petitioner's home and neighborhood were safe environments.

5. The case notes kept as a part of the Department of Health's business record showed several entries made by the Medicaid Waiver Specialist indicating several reports of abusive behavior, cursing and threats and allegations of inappropriate use of services as well as allegations of illicit drug use. There were indications that it was difficult to find and/or retain service providers based on the difficult nature of the petitioner and his mother.

6. The parties stipulated that a police report regarding use of "cocaine" was filed with the Police Department following an incident on May 31, 2009. However, the petitioner was not arrested or charged with drug use and there was no evidence provided to show the nature of the drug other than hearsay testimony.

7. Based on provider allegations of illicit drug use since at least February 2009, the Medicaid Waiver Specialist responsible for oversight of the BSCIP waiver services,

determined the services did not meet "medical necessity" in that the petitioner's use of illicit drugs interfered with the providers ability to safely deliver services and placed his in-home service providers in jeopardy. A recommendation to terminate BSCIP services was made.

8. On June 5, 2009, the petitioner was notified through a notice from the Waiver Program that his "seeking and use of elicit (sic) drugs since February 2009, is putting all providers in jeopardy that attempt to provide in-home services to you. Therefore, the decision has been made to terminate your BSCIP Waiver services effective July 6, 2009." The petitioner continues to receive the services pending the outcome of the appeal.

9. The petitioner's current certified nursing assistant (CNA) who has been providing services since the intended action to terminate BSCIP waiver services indicated there have been no behavioral issues. She indicated that the petitioner has no visitors in his home and that she attempts to help him with socialization skills by taking him out in the community. She has observed no illicit drug use and has not experienced any rude or difficult behavior.

CONCLUSIONS OF LAW

By agreement between the Agency for Health Care Administration and the Department of Children and Families, the Agency for Health Care Administration has conveyed jurisdiction to the Office of Appeal Hearings to conduct this hearing pursuant to Chapter 120.80 F.S.

Fla. Admin. Code 59G-13.080 entitled "Home and Community-Based Services Waivers" establishes:

> (1) Purpose. Under authority of Section 2176 of Public Law 97-35, Florida obtained waivers of federal Medicaid requirements to enable the provision of specified home and community-based (HCB) services to persons at risk of institutionalization. Through the administration of several different federal waivers, Medicaid reimburses enrolled providers for services that eligible recipients may need to avoid institutionalization. Waiver program participants must meet institutional level of care requirements. The HCB waiver services are designed to allow the recipients to remain at home or in a home-like setting. To meet federal requirements, Medicaid must demonstrate each waiver's cost-effectiveness...(6) Program Requirements – General. ...
> (c) The Agency or its designee will conduct home visits of waiver program applicants or participants. Assessments of the applicant's or participant's home situation will be made to determine if it is acceptable in providing for his general health or safety. If the applicant's or participant's home situation does not provide for the applicant's or participant's general health or safety, the Agency shall restrict the applicant or participant from participation in the waiver program...(h) In providing applicants or participants freedom of choice, the Agency or its deisngee must: ...
> 3. Afford all enrolled recipients the right to disenroll at any time.
> (i) The Agency or its designee, will disenroll waiver program participants who:
> 1. Do not follow a recommended plan of care, as evidenced by: not keeping two consecutive appointments, or demonstrating multiple failures to avail themselves of offered services.
> 2. Demonstrate behavior that is disruptive, unruly, abusive, or uncooperative to the extent that their participation in the program seriously impairs the provider's ability to furnish services to the participant or other

> participants. Prior to disenrolling participants for the above reasons, the Agency or its designee must provide the participant at least one verbal and at least one written warning that the consequence of their actions, or inactions will be disenrollment from the program...
> (9) Home and Community-Based Services Waiver Programs. The following are authorized HCB services waivers: Adult Cystic Fibrosis Waiver; Adult Day Health Waiver; Aged and Disabled Adult Waiver; Alzheimer's Disease Waiver; Assisted Living for the Elderly Waiver; Channeling Waiver; Consumer-Directed Care Waiver; Developmental Disabilities Waiver; Family Supported Living Waiver; Familial Dysautonomia Waiver; Model Waiver; Project AIDS Care Waiver; and Traumatic Brain Injury and Spinal Cord Injury Waiver.

The above rule explains that Florida obtained waivers of federal Medicaid requirements to enable the provision of specified home and community-based services to persons at risk of institutionalization. One of the waivers obtained was for the BSCIP. The home and community-based service waivers are designed to allow the recipients to remain at home or in a home-like setting. The above rule also explains that the agency will disenroll waiver program participants who demonstrate behavior that is disruptive, unruly, abusive, or uncooperative to the extent that their participation in the program seriously impairs the provider's ability to furnish services to the participant or other participants. The rule sets forth that prior to disenrolling participants for the above reasons, the Agency or its designee must provide the participant at least one verbal and at least one written warning that the consequence of their actions, or inactions will be disenrollment from the program.

Fla. Admin. Code 59G-13.130 promulgates into rule the Traumatic Brain and Spinal Cord Injury Waiver Services Coverage and Limitations Handbook as follows:

> (1) This rule applies to all traumatic brain and spinal cord injury waiver

> services providers enrolled in the Medicaid program.
> (2) All traumatic brain and spinal cord injury waiver services providers enrolled in the Medicaid program must be in compliance with the Florida Medicaid Traumatic Brain and Spinal Cord Injury Waiver Services Coverage and Limitations Handbook, April 2006, incorporated by reference, and the Florida Medicaid Provider Reimbursement Handbook, Non-Institutional 081, which is incorporated by reference in Rule 59G-13.001, F.A.C. Both handbooks are available from the Medicaid fiscal agent...

Florida Statute 409.913 addresses oversight of the integrity of the Medicaid program, with (1)(d) describing "medical necessity or medically necessary" standards and saying in relevant part that: "...For purposes of determining Medicaid reimbursement, the agency is the final arbiter of medical necessity..." Consistent with statute, Fla. Admin. Code 59G-1.010 (166) defines "medically necessary," informing that such services must:

> (a) Meet the following conditions:
> 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. ...
> (c) The fact that a provider has prescribed, recommended, or approved medical or allied care, goods, or services does not, in itself, make such care, goods or services medically necessary or a medical necessity or a covered service.

The respondent argued that to be considered medically necessary, services must "be reflective of the level of services that can be safely furnished." It is the Agency's interpretation that this refers both to the safety of the provider and the safety of the recipient of services. The petitioner argued that the BSCIP Handbook addresses medical necessity and that BSCIP Headquarters will determine whether "there is adequate support in the community to ensure the recipient's safety and well-being..." There is no mention that provider safety is a factor with respect to determining medical necessity.

The Traumatic Brain and Spinal Cord Injury Waiver Services Coverage and Limitations Handbook provides that termination of a waiver service can occur when it is determined that:

> The recipient is non-compliant or repeatedly refuses to follow a written plan of care or to cooperate with waiver case managers, as determined by the Department of Health (DOH)...The community support coordinator and the case manager must discuss all decisions to terminate services with the recipient and the service provider prior to the action. If the decision is made to terminate a service, written notice must be sent to the recipient on a Notice of Decision form...at least ten days in advance of terminating the the service...

The Findings show the petitioner meets the basic eligibility requirements for the BSCIP. However, the respondent terminated the BSCIP Medicaid waiver program because of the petitioner's disruptive, abusive behavior and the provider's ability to furnish service to the petitioner was seriously impaired.

Fla. Admin. Code 65-2.060 in parts states:

> The burden of proof, except where otherwise required by statutes, is on the party asserting the affirmative of an issue. The burden is upon the Department when the Department takes action which would reduce or terminate the benefits or payments being received by the recipient. The burden is upon the petitioner if an application for benefits or payments is denied. The party having the burden shall establish his/her position, by a preponderance of evidence, to the satisfaction of the hearing officer.

The respondent held the burden of proof.

Fla. Admin. Code 65-2.056. Basis of Hearings.

> The Hearing shall include consideration of: ...
> (3) The Hearing Officer must determine whether the department's decision on eligibility or procedural compliance was correct at the time the decision was made. The hearings are de novo hearings, in that, either party may present new or additional evidence not previously considered by the department in making its decision.

The above rule explains that the hearing officer may consider new or additional evidence not previously considered by the Department. The current provider's testimony did not support the agency's allegations.

There was no non-hearsay evidence to show that the petitioner endangered the safety of himself or his providers during the delivery of services. There was no evidence to show that he received a verbal warning that his behavior would impact his ability to remain eligible for waiver services and no written warning other than a Notice of Decision terminating BSCIP Medicaid Waiver services.

Based on a review of the controlling legal authorities and the findings of fact, the undersigned authority concludes the respondent failed to meet its burden of proof to

show that there was cause to terminate the BSCIP waiver program. Although hearsay evidence may be admitted as evidence, the undersigned cannot rely solely on hearsay to make a finding of fact. Therefore, the respondent did not meet its burden to show the petitioner was correctly terminated from the BSCIP program.

DECISION

The appeal is granted. The Respondent's action is reversed according to the above Conclusions of Law.

NOTICE OF RIGHT TO APPEAL

This decision is final and binding on the part of the agency. If the petitioner disagrees with this decision, the petitioner may seek a judicial review. To begin the judicial review, the petitioner must file one copy of a "Notice of Appeal" with the Agency Clerk, Agency for Health Care Administration, 2727 Mahan Drive, Tallahassee, FL 32308-5403. The petitioner must also file another copy of the "Notice of Appeal" with the appropriate District Court of Appeal. The Notices must be filed within thirty (30) days of the date stamped on the first page of the final order. The petitioner must either pay the court fees required by law or seek an order of indigency to waive those fees. The agency has no funds to assist in this review, and any financial obligations incurred will be the petitioner's responsibility.

DONE and ORDERED this 10th day of September, 2009, in Tallahassee, Florida.

Linda Garton
Hearing Officer
Building 5, Room 255
1317 Winewood Boulevard
Tallahassee, FL 32399-0700
850-488-1429

Copies Furnished T