

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

FILED

DEC 11 2009

OFFICE OF APPEAL HEARINGS
DEPT OF CHILDREN & FAMILIES

APPEAL NO. 09F-05518

PETITIONER,

Vs.

AGENCY FOR HEALTH
CARE ADMINISTRATION
CIRCUIT: 01 Escambia
UNIT: AHCA

RESPONDENT.
_____ /

FINAL ORDER

Pursuant to notice, an administrative hearing was convened before the undersigned hearing officer on October 2, 2009, at 8:45 a.m., in Pensacola, Florida. The petitioner was present and represented herself. The respondent was represented by Amber Vaughn, acting field office manager, Agency for Health Care Administration (AHCA). Testifying on behalf of the respondent was Teri Perkins, Medicaid Waiver case manager, Council on Aging (COA); _____, caregiver, Tender Loving Care (TLC); Lou Donaldson, manager, TLC; Pat Husted, Medicaid Waiver specialist, AHCA; Candace Hoting, TLC; Tracey James, Human Resources coordinator, One Stop; Genevieve Hutfless, assistant director, COA and Tamika George, CNA, Care Staff. Also testifying on behalf of the respondent was Kenny Holt, social and community services, COA. Observing the proceeding was Jose Navaro, administrator Home Health Agency, Agency Care Staff; Aleya Garrett, lead case manager, COA;

Angela Bernard, Medicaid Waiver specialist, AHCA and Adrianna Williams, scheduler, TLC. Due to the lengthy testimony, the hearing was continued for October 8, 2009.

The petitioner requested a second continuance. The hearing was rescheduled for October 14, 2009 at 8:30. The petitioner's representative arrived late and the hearing was convened at approximately 9:00 a.m. The petitioner's representative,

was present. Present on behalf of the petitioner was her son

He did not provide testimony. Present on behalf of the respondent was Amber Vaughn, AHCA. Observing the proceeding was Angela Bernard, Medicaid Waiver specialist, AHCA; Genevieve Hutfless, COA and Pat Husted, AHCA.

ISSUE

At issue is the Agency's action of August 27, 2009 to suspend In Home Respite Services under HCBS/ADA Medicaid Waiver Program for a period of 30 days based on the contention that stipulations in a behavioral contract were violated. The Agency for Health Care Administration contracts with the Department of Elder Affairs to be the lead agency in the provisions of services.

The respondent bears the burden of proof.

FINDINGS OF FACT

1. The petitioner is a 103 year old recipient of Home and Community Based Care (HCBS) Medicaid Waiver Services. Her daughter is the primary caregiver and will be referred to as the representative.

2. The petitioner is bedbound. She has Alzheimer's disease, is incontinent, and uses a feeding tube. She requires around the clock care and supervision. The In-Services Plan of Care dated May 27, 2009 authorizes respite care for the representative. The purpose of respite care services in-home is to provide on a short-term basis, relief for the recipient's primary caregiver.
3. The in-home services Plan of Care describes the activities the respite provider is expected to perform. In this case, respite services consisted of supervision of the petitioner, interaction with petitioner, assist with ambulation/transfer, assist with toileting/dressing, turning/positioning and to take phone messages. The petitioner was provided up to 12 hours per week with TLC as the provider. The schedule was Wednesdays and Fridays 10:00 a.m. until 2 p.m. and Sundays 9:00 a.m. until 1:00 p.m.
4. There were several complaints filed against the representative (daughter) in reference to her failure to return at the time scheduled and demands or requests to expand service provisions beyond the limits of the service plan as early as December 10, 2008. The complaints assert that the representative had the workers clean the bathtub, sweep the carpet with a broom, mop the kitchen floor, late returns as much as 45 minutes to an hour, moving a lawn mower, request to have provider look for a lost toe ring, rudeness and belittling staff. The representative acknowledged that she did ask someone to look for the toe ring and move the lawn mower. She further acknowledged

that she was late on occasions but disputes the length of time she was late or that it was consistent behavior. Further, she acknowledged that she had been late quite a bit, initially, but had improved a lot. She denies scolding or belittling the service providers and believes that her relationship with them was amicable.

5. The representative requested that seven hours of service be provided on Tuesdays and Saturdays. She began receiving 14 hours of in-home respite care. The respite care provider asserts that the representative failed to adhere to scheduled time or respite hours, requested a change in time at the last minute and was not prompt about returning. There were reports that many respite caregivers did not want to provide services at the home as the representative has no consideration of time or schedules. After consulting with the representative on May 20, 2009, the agreed schedule was Wednesdays 10 a.m. to 2:00 pm, Fridays 10:00 am. to 4:00 p.m. and Sundays 9:00 to 1:00 p.m. The representative was advised that services could be jeopardized if she failed to adhere to the schedule.
6. On the following day, the representative contacted the service provider to make changes in the respite hours due to doctor visits. It was explained that changes to the schedule should be addressed with the case manager rather than the service provider. The issue of scheduled and proper procedures

was reviewed with the representative and a letter was hand delivered on May 27, 2009 during the annual reassessment.

7. It was reported that the representative was 45 minutes late returning home on May 31, 2009. The shift ended at 4:00 p.m. and the representative returned at 4:45 p.m. The representative acknowledged that she returned late because the provider was 20 minutes late to provide the services. She believed that the provider's late arrival was reason to extend her time to return. One of the caregivers scheduled to provide respite services called to quit.
8. The representative also requested that another respite provider not return to the home because of a bad attitude and unprofessional behavior. The caregiver, _____, attested that she was instructed to do chores outside the scope of the Plan of Care. Such chores were to put garbage out by the dumpster, vacuum as requested and fold laundry in the dryer. She attested that she was taken outside and scolded by the representative. Although the representative requested that _____ not return, the respite caregiver in question did come back. The representative believed that their issues were resolved and that they were on amicable terms. The caregiver attested that she felt intimidated by the daughter.
9. The case management provider, COA of West Florida, Inc. discussed the possibility of switching to another vendor. The representative was receptive

- to the idea. The representative requested that TLC not return to her home as she believed that one of their workers was lying about her, had bad attitudes and she understood that the provider could provide light housekeeping. The new vendor was CareStaff. The vendor was able to accommodate the schedule originally set forth. The vendor was not authorized to provide homemaking services as the petitioner is bedbound and remains in a small part of the home. It was determined the representative is capable of cleaning the home and, as the petitioner is bedbound, a worker would only be allowed to clean the small area the petitioner remains in, the living room. The representative believes that there should be more flexibility with the hours.
10. The In-Home Services Plan of Care originally signed on May 27, 2009 was updated for CareStaff. The same services under respite care were indicated with the addition of light, client-related housekeeping tasks. The addition indicated only for the petitioner in and around her area. The light housekeeping tasks may be performed so long as the worker can closely supervise the client.
11. CareStaff reported that the representative was late returning on July 19, 2009. The hours scheduled were 9:00 a.m. until 1:00 p.m. The representative believed she had until 2:00 p.m. to return. No prior authorization had been given for an extended amount of respite hours nor had the schedule been changed.

12. The respondent determined that the representative was not cooperating with the approved Plan of Care and was abusive toward service providers resulting in several individuals requesting to quit. There were numerous contacts and conversations with the representative about the situation or behavior and possible consequences if the situation or behaviors continued. The case manager determined there was no improvement as a result of the numerous contacts, therefore; a behavior management contract was deemed necessary.
13. A behavior management contract was provided to the representative on July 22, 2009 advising her of the terms and limitations of the relationship between the Council on Aging of West Florida, Inc, the petitioner and the representative. The in-home services funded through the Medicaid Waiver program, designed to assist the petitioner to remain at home, instead of a nursing home were at risk of termination or suspension due to the representative's behavior toward workers and staff. Behaviors asserted were yelling, belittling staff, and requiring staff to complete chores not assigned. The purpose of the contract demonstrated the intent and desire of the Council on Aging to continue providing for the petitioner's care. The conditions to be met in order for services to continue were outlined as follows: behavior towards all workers and providers must be respectful, phone calls to the case manager and/or providers are to be strictly limited to service related issues,

demands/requests to expand service provision beyond the limits of the service as defined on the In-Home Services Plan of Care will not be entertained. The behavior contract stated that respite services are limited to supervision, interaction, preparing a simple meal/snack for the consumer, assist with feeding, assist with ambulation/transfer, turning/positioning, reminders for medications, taking phone messages, doing consumer's personal laundry, doing light, client related housekeeping tasks, which may be performed so long as the worker can closely supervise the consumer. "Please note that this does not include sweeping, mopping, vacuuming, or dusting. Light housekeeping tasks may include washing the dishes that your mother uses during the use of Respite services, and making her bed." The contract also explained that failure to adhere to the standards will result in suspension or termination of services in the home. The first offense of any criteria would result in suspension of respite service for 30 days. A second offense within 12 months of the first offense would result in suspension of respite service for another 30 days. A third offense within 12 months of the second offense would result in termination of Respite services.

14. The representative refused to sign the behavior contract as she believed it to be arbitrary, too stringent and overly punitive. In addition, the contract indicated that Adult Protective Services would be contacted if she failed to return on time as this is considered neglect of the consumer. Further, the

representative contends that the behavioral contract is not a valid contract as she did not agree with the terms of the document and refused to sign it. The representative expressed that she is overwhelmed at times providing for the care of the petitioner. The respondent offered Caregiver support group meetings to provide coping skills.

15. The behavioral contract was typewritten and the case manager's name was typewritten in the signature line (Respondent's Exhibit 1). There was no handwritten signature on the document presented and it was not signed by the case manager's supervisor.
16. The representative inquired about the possibility of changing Sunday respite hours to Monday. This could not be accommodated. The respite for Sundays was terminated on July 24, 2009 at the representative's request but was placed on hold instead of terminating at her request. Sunday respite hours were resumed.
17. The vendor, CareStaff, reported problems with the representative in that she returned a few minutes late on August 26, 2009. A new caretaker, Anita Stafford, was sent to the petitioner's home to provide Respite care. It was reported that the representative requested the caretaker to vacuum and sweep areas of the house not in the immediate vicinity of the petitioner. When the caretaker offered to allow the representative to review the In-Home Services Plan of Care as to what tasks she was allowed to perform while in

the home, the caregiver reported that the representative became upset and was very rude to her. The representative complained about the agency and her inability to run errands due to the stringent schedule. The caretaker requested that she not return to the petitioner's home as the representative was rude to her and she felt uncomfortable.

18. The representative denies the alleged incidents. She believes that she returned 10 minutes early and that she never requested the worker to vacuum the hallway but did request she vacuum the living room as this is the area the petitioner occupies. She denies she requested the worker to sweep the kitchen or hallway.
19. The provider submitted copies of the Daily Service Log (DSL) for August 26, 2009, July 24, 2009, July 22, 2009, July 19, 2009, July 10, 2009, July 8, 2009, July 5, 2009 and July 3, 2009. The DSL on August 26, 2009 does not reflect that the petitioner was late. The respondent indicated that the actual time was not shown as the workers are only paid for hours contracted. Therefore, the workers have not recorded the actual hours worked because they cannot be paid for any time they remain after their contracted hours. There is no evidence to show that the petitioner arrived late on August 26, 2009 in violation of the behavioral contract. However, the other allegations were rude behavior toward the worker and her request to vacuum which is beyond the scope of Respite services. The representative acknowledged that she

requested the caretaker to vacuum but she believed that vacuuming was an allowed activity. She asserted that some of the terms of the behavior contract were difficult to read as they were located at the bottom of the document and partially obscured by the footer on the page. The respondent pointed out that the contract was discussed with the representative and that it clearly states, "Doing Light, client related housekeeping tasks, which may only be performed so long as the worker can closely supervise your mother. Please note that this does **not** (emphasis added) include, sweeping, mopping vacuuming, or dusting".

20. The respondent sent a memo dated August 27, 2009 to the petitioner and the representative advising that In-Home Respite services were placed on HOLD effective immediately due to stipulations violated in the behavioral contract. The violations included failure to be respectful to worker, failure to return at the time scheduled, and demands/requests to expand service provisions beyond the limits of the service as defined on the In-Home Services Plan of Care. The contract outlined the penalties for violation of the behavior contract. The first offense for violating any stipulations of the contract would result in suspension of respite services for 30 days.
21. The Notice placing services on hold placed an immediate suspension of services and did not provide the petitioner with a 10 day advance written notice of the action. The notice did not advise the petitioner of her fair

hearing rights. As the petitioner requested an appeal on August 31, 2009, within 10 days of the respondent's action to place In-Home Respite Services on hold, benefits were restored pending the outcome of the appeal.

22. The case manager explained that there is no issue with the petitioner. "She is a lovely lady and had no shortage of people willing to spend time with her (Respondent's Exhibit 3)." There was concern that providers of services to the petitioner were requesting not to return to the home because of issues with the representative. There are limited resources in the community. The purpose of the behavior contract was to effect improvement in the representative's actions so that the petitioner would not run out of providers willing to provide for her care.

23. The representative argued that she could pay the caregivers when she was late. The Agency countered that the same caregivers had other clients to tend to and that this was not an acceptable arrangement. The Plan of Care authorized the hours of services to be provided. Consideration was given to the petitioner's needs however, schedules are created so as to serve everyone.

CONCLUSIONS OF LAW

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

Medicaid home and community-based services (HCBS) waiver programs are authorized under Section 1915(c) of the Social Security Act and governed by Title 42, Code of Federal Regulations (C.F.R.), Part 441.302.

The Florida Medicaid Aged and Disabled Adult Waiver Program is authorized by Chapter 409, Florida Statutes (F.S.) and Chapter 59G, Florida Administrative Code (F.A.C.)

Florida Statutes at 409.815 (1) states in part:

(1) MEDICAID BENEFITS.--For purposes of...benefits available under Medicaid...those goods and services provided under the medical assistance program authorized by Title XIX of the Social Security Act, and regulations thereunder, as administered in this state by the agency. This includes those mandatory Medicaid services authorized under s. 409.905 and optional Medicaid services authorized under s. 409.906, rendered on behalf of eligible individuals by qualified providers, in accordance with federal requirements for Title XIX, subject to any limitations or directions provided for in the General Appropriations Act or chapter 216, and according to methodologies and limitations set forth in agency rules and policy manuals and handbooks incorporated by reference thereto.

Florida Statutes at 409.906(13) states.

13) HOME AND COMMUNITY-BASED SERVICES.--

(a) The agency may pay for home-based or community-based services that are rendered to a recipient in accordance with a federally approved waiver program. The agency may limit or eliminate coverage for certain

services, preauthorize high-cost or highly utilized services, or make any other adjustments necessary to comply with any limitations or directions provided for in the General Appropriations Act.

(b) The agency may consolidate types of services offered in the Aged and Disabled Waiver, the Channeling Waiver, the Project AIDS Care Waiver, and the Traumatic Brain and Spinal Cord Injury Waiver programs in order to group similar services under a single service, or continue a service upon evidence of the need for including a particular service type in a particular waiver. The agency is authorized to seek a Medicaid state plan amendment or federal waiver approval to implement this policy.

(c) The agency may implement a utilization management program designed to prior-authorize home and community-based service plans and includes, but is not limited to, assessing proposed quantity and duration of services and monitoring ongoing service use by participants in the program. The agency is authorized to competitively procure a qualified organization to provide utilization management of home and community-based services. The agency is authorized to seek any federal waivers to implement this initiative.

The Florida Medicaid Aged and Disabled Adult Waiver Services Coverage and Limitations Handbook (March 2004) page 2-35 describes respite services and service limitations and states in part:

Description Respite services are provided on a short-term basis to individuals unable to care for themselves in order to provide relief for the recipient's primary caregiver....

The following general service limitations apply to respite care services:

- Respite services are limited to the amount, duration and scope of services described in the recipient's plan of care as authorized by the case manager.

The Florida Administrative Code at 59G-13.080, "Home and Community Based Services Waivers: defines the waiver services and requirements.

(6) Program Requirements – General.

(a) The Medicaid program will deny an applicant's enrollment request if the proposed enrollment could cause the program to exceed the maximum enrollment level authorized by the Health Care Financing Administration in

the applicable HCB services waiver.

(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.

The Florida Medicaid Aged and Disabled Adult Waiver Services Coverage and Limitations Handbook (March 2004) page 2-42, Suspension of Services, state:

Where the recipient does not cooperate with the approved plan of care or is abusive toward service providers, the case manager can suspend services. When either of these situations is present, the case manager will contact the recipient about the situation or behavior and possible consequences if the situation or behavior continues. These contacts must be documented in the case record.

If this action does not result in improvement, the case manager will inform the recipient that a behavior management contract is necessary and the timeline involved. The recipient, the case manager and the case manager supervisor must sign the contract. If the executed behavior management contract does not result in improvement, the case manager can suspend services after giving the recipient ten days advance written notice, including fair hearing rights. If the recipient is suspended, the length of the suspension should be stipulated in the notice.

Subsequent to the suspension period, if the recipient's behavior does not improve or a new behavioral condition as described above emerges and a second contract is negotiated with continued recipient noncompliance, the case manager may take action to terminate the recipient from the program. Documentation of the situation or behavior and corrective steps taken must appear in the case narrative. The recipient must be given a ten day written notification of the proposed termination and right to a fair hearing

The above authority provides that services can be suspended after giving the recipient 10 days advance written notice, including fair hearing rights. The Findings show that the suspension was put in place immediately on August 27, 2009 based on allegations that the petitioner was late returning by about 10 minutes, rude to the provider and requested the provider to vacuum which is not a covered activity under the In Home Respite plan of care. The requirement allowing for a 10 day advance written notice was not provided as the Notice of suspension or Hold on In-Home Respite services was dated the same date as the proposed action was to be implemented. There was no evidence to show that the petitioner was advised of her rights to a fair hearing. However, the findings show that the services were restored pending the outcome of the hearing. Further, the petitioner has been afforded the opportunity for an appeal. The respondent's action did not result in a loss of benefits or services.

The findings show the petitioner received In-Home Respite Care according to a Plan of Care approved in May 2009. The provider was TLC and was subsequently replaced by CareStaff. The testimony and evidence, including that of the representative show that there were numerous occasions when the representative was late returning and that the representative frequently requested expansion of service provisions beyond the limits of the service as defined in the In-Home Services Plan of Care, specifically vacuuming, moving a lawnmower and searching for a lost toe ring. The findings show that service providers assigned to the petitioner's care felt the behavior of the representative was abusive. As a result of the representative's actions and in an

effort to come to an agreement regarding the terms and limitations of the relationship between the service provider, the petitioner and the representative, a behavioral contract was provided to the representative.

The controlling authorities explain the circumstances when services can be suspended. The findings show that a behavioral contract provided to the representative outlined possible consequences if situations or behavior leading to the implementation of a behavior contract continued. The undersigned concludes that the respondent's action to implement a behavior contract due to the difficulties reported by the service providers and acknowledged in part by the representative is within the guidelines of the program. However, the above authorities state that if it is determined that a behavior management contract is necessary, it is to be signed by the recipient (in this case the representative), the case manager and the case manager supervisor. The findings show that the representative refused to sign the contract and that there were no signatures of the case manager or her supervisor.

The representative argued that there was no contract or agreement with the case manager or service provider as she refused to sign the document and because she felt the consequences for not adhering to the standards outlined were too stringent and punitive in nature. The respondent acknowledged that the purpose of the behavioral contract would be to impose punitive consequences in that the suspension of services would give the representative an opportunity to reflect on how the loss of those benefits would impact her. The governing authorities are silent on the consequences to be

taken if an individual refuses to sign or otherwise agree to terms and limitations set forth by the service provider in a behavioral contract. However, the undersigned concludes that a contract is an agreement between two parties and the reason the handbook instructs that the parties sign the agreement is to show the agreement between the parties as to the terms of the contract. Without signatures, there is no binding contract. The controlling authorities do not require that a behavioral contract be implemented prior to suspending services. It is only required that at least one verbal and one written warning that the consequence of their actions or inactions will be disenrollment from the program. In this case, the respondent attempted to impress upon the representative, the seriousness of her continued actions leading to the loss of vendors willing to provide contracted services by its attempt to implement a behavior contract. If the respondent chooses to impose a behavioral contract, it must conform to the terms of its controlling Medicaid Handbook.

After reviewing the controlling authorities, the undersigned concludes that the respondent's action to suspend In-Home Respite Services under HCBS/ADA Medicaid Waiver Program for a period of 30 days based on the contention that stipulations in a behavioral contract were violated is not upheld.

DECISION

The appeal is granted. The respondent's action to suspend services is reversed.

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

FINAL ORDER (Cont.)
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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 11th day of December, 2009,

in Tallahassee, Florida.


Linda Garton *SA*
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