

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DOUGLAS GUNTHER, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 01-2451  
 )  
 DEPARTMENT OF CHILDREN AND )  
 FAMILY SERVICES, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, this cause came on for formal hearing before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings, on October 3, 2001, in Daytona Beach, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Gordon B. Scott, Esquire  
Advocacy Center for Persons with  
Disabilities, Inc.  
2671 Executive Center Circle, West  
Tallahassee, Florida 32301-5092

For Respondent: Cathy McAllister, Esquire  
Department of Children and  
Family Services  
210 North Palmetto Avenue  
Suite 412  
Daytona Beach, Florida 32114

STATEMENT OF THE ISSUES

This issues to be resolved in this proceeding concern whether the Petitioner's funding for skilled nursing services

should continue to be provided in the manner and from funding sources presently operative, or whether there is a more cost-effective means of addressing his need for skilled nursing services; and whether there are sufficient funds for use by the developmental disability program for his skilled nursing services.

PRELIMINARY STATEMENT

This dispute relates to an authorization by the Legislature for the Department of Children and Family Services (Department) to implement programs to prevent, correct, cure, or reduce the severity of developmental disabilities. The Department is thus responsible for administering the developmental disabilities Home and Community-Based Services Waiver (HCBS)(Waiver). The HCBS or Waiver is a Medicaid program that pays for the services for developmentally disabled persons with a combination of federal and state funds. The Petitioner is a Medicaid recipient and is developmentally disabled and eligible for the HCBS Waiver. Although skilled nursing services are covered and provided for under this waiver, the Petitioner's nursing services are instead paid from general revenue because there are no HCBS Waiver-fee accepting, skilled nursing providers in the Daytona Beach area who can provide that service to him under the fee reimbursement protocol required by the HCBS Waiver program.

The Department, by letter of May 15, 2001, advised the Petitioner that his skilled nursing services would be terminated because (1) "there is a more cost-effective means of addressing the situation that requires the service"; and (2) "there are insufficient funds with which to continue funding the service." The Petitioner timely contested that initial decision and this formal proceeding ensued.

The cause was ultimately assigned to the undersigned Administrative Law Judge and came on for hearing as noticed. At the hearing, the Respondent, the Department, presented seven exhibits and the testimony of two witnesses: Edwin B. DeBardleben, Program Administrator with the Developmental Disabilities Program Office in District 12; and Casey Flug, Program Specialist with the Developmental Disabilities Program Office in District 12. Official recognition was taken of Section 393.066(4), Florida Statutes. The Petitioner presented the testimony of Douglas Gunther, the Petitioner, and Dana Sanders, his support coordinator. Subsequent to the hearing, the parties availed themselves of the right to submit Proposed Recommended Orders which have been considered in the rendition of this Recommended Order.

#### FINDINGS OF FACT

1. The parties essentially agree on all relevant facts involving the Petitioner's eligibility for, and receipt of,

developmental disability program services. Neither party disputes that the Petitioner is currently eligible and is receiving services under the HCBS Waiver, because of the primary diagnosis of spina bifida, and but for the current scarcity of HCBS Waiver (Medicaid Waiver) (Med Waiver) funding or fee-accepting skilled nursing service providers, this dispute would not exist.

2. The Florida Medicaid Waiver program is a waiver by the federal government of regular Medicaid rules to service individuals in community-based settings as an alternative to institutional placement in intermediate care facilities for the developmentally disabled. The Legislature in the Appropriations Act for the 2001-2002 fiscal year passed "proviso language" which limited spending on the developmentally disabled recipients to spending provided by a "spending plan" enacted by the Department in which the districts of the Department are to provide services pursuant to an established set of priorities and prohibitions.

3. The Department enacted a spending plan which states in pertinent part, "Effective immediately, all covered waiver services must be provided through waiver funding. The purchase of wavier billable services through the IFS budget category [general revenue] is no longer allowable unless the central office has approved an exception." Thus, funding for the HCBS

Waiver is intended to be in accordance with the spending plan developed by the Department, which was required to be submitted to the Governor for approval by November 1, 2001. Pursuant to this plan, the Department prohibits the use of general revenue funds to pay for services provided with the HCBS Waiver program unless an exception is authorized by the central office of the Department.

4. The Petitioner, Douglas Gunther, is a waiver program participant and has been since April 2000. He has been receiving skilled nursing services funded by the Med-Waiver program and funded partially through Individual and Family Support (IFS), a general revenue budget category, since April 2000.

5. The Petitioner's skilled nursing services are covered "waiver services," all of which would be paid by the Med-Waiver program if provided by an approved, Med-Waiver provider (nurse), instead of a non-waiver provider (a nurse who has not entered into an agreement to accept the Med-Waiver fee schedule). A request for an exception to continue the funding of some skilled nursing services through general revenue IFS budget funds, was made by District 12, but was not granted by the Department's central program office. The District 12 Developmental Disabilities Office is prohibited by the state-wide spending plan from continuing the purchase of service, such as the

Petitioner needs, with the general revenue IFS budget funds for all services normally covered by the Med-Waiver program, because of a directive to "maximize federal funding." See Department's Exhibit 2 in evidence. According to the Department, the funding of such skilled nursing services through the use of any general revenue IFS budget funds would require an exception to the spending plan provisions to be granted by the central program office of the Department which has not as yet been accomplished. No other source of funding, such as "spina bifida fund" monies were shown to be currently available to fund skilled nursing services for the Petitioner other than the Med-Waiver funding program, or if the Petitioner was in an institutional facility (more expensive) then state Medicaid funds could be provided.

6. Skilled nursing services are more costly when paid to a non-waiver provider than to a Med-Waiver nursing provider because a Med-Waiver provider must negotiate and agree to accept certain lower Medicaid rates in order to become a Med-Waiver provider, contract nurse.

7. The Petitioner has a physician's prescription for skilled nursing to be provided from one to two hours per day. He is developmentally disabled because of his spina bifida condition and arnold-chairi syndrome. He basically must use a wheel chair for all ambulation.

8. He receives a bowel therapy program with digital stimulation, range of motion therapy, blood pressure monitoring, and his personal care needs, such as showering, dressing, and transfer. Occasionally he receives treatment for decubitus ulcers. The bowel program therapy requires the services of a skilled nurse.

9. The Petitioner became eligible for the HCBS Waiver in May 2000. Shortly thereafter, the Department agreed to continue to pay his skilled nursing service with general revenue dollars because there were no HCBS Waiver nursing providers enrolled in the Daytona Beach area who could provide that service to him for the HCBS Waiver-approved rates.

10. The Department allowed the Petitioner one year to transition his provision of nursing services to Med-Waiver services. He did not do that because such an HCBS Waiver provider could not be located in the Daytona Beach area. When the Petitioner failed to obtain skilled nursing services from a Med-Waiver provider, the Department sent him a notice to terminate the service of skilled nursing with general revenue funds on May 15, 2001, which engendered this dispute. The Petitioner was notified that his skilled nursing services funded by general revenue were to be terminated because "there was a more cost-effective means of addressing his nursing requirements

and that there were insufficient funds with which to continue funding that service." See Exhibit 7 in evidence.

11. The Department was aware at the time the termination notification was sent to the Petitioner that there were no HCBS Waiver skilled nursing providers available in the Daytona Beach area to care for the Petitioner's needs. Without skilled nursing services, the Petitioner would be required to be institutionalized, which is at a much higher cost in dollars, aside from the human cost involved. The Department currently has funding with which to pay for the skilled nursing care from its IFS funds, because it is paying for them currently, pending resolution of the subject dispute. The spending plan referenced above, while mandating that such not be provided from general revenue or IFS funds but rather through HCBS Waiver funding, allows for the central office of the Department to grant an exception to the prohibition on the current mode of payment. That is an alternative available which could keep the Petitioner from more costly institutionalization while the parties work diligently to attempt to locate and enroll, by contract, an appropriate nursing service provider or providers who will accept the fee reimbursement levels mandated by the HCBS Waiver program.



## CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction of parties hereto and the subject matter hereof in accordance with Sections 120.569 and 120.57(1), Florida Statutes.

13. Generally the burden of proof is on the party asserting the affirmative of the issue and who seeks to change the status quo. See Balino vs. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1985). In the instant situation, the Respondent agency has the burden, by seeking to change the Petitioner's services and funding. It thus must establish that a more cost-effective means of addressing the Petitioner's need for skilled nursing services exists, and that sufficient funds with which to continue paying for those services in the present mode are not available.

14. The amount, duration, scope, and type of the skilled nursing services required by the Petitioner was not contested in these proceedings nor was the risk of his institutionalization unless the nursing service is provided, in dispute. It is the notice of service termination, for the putative reason of cost-effectiveness and lack of funding, which is at issue.

15. The Department has the responsibility for the developmental disability program pursuant to Chapter 393, Florida Statutes. A "developmental disability" is defined as a

"disorder or syndrome which is attributable to . . . spina bifida . . . and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely." See Section 393.063(12), Florida Statutes. There is no question that Petitioner meets the definition of "developmentally disabled" and is entitled to the protections and services authorized by Chapter 393, Florida Statutes.

16. Terminating the provision of services is only cost-effective if those services are available from another, less expensive funding source. In the instant case, there was no proof that there is another effective funding source because there are no HCBS Waiver providers within a reasonable distance of Daytona Beach which could trigger the use of the cheaper HCBS Waiver funding. Since the Petitioner needs the services on a daily basis and is confined to wheel chair, with attendant transportation problems, it is not reasonable to expect him to drive great distances beyond Volusia County, at least, to obtain such daily services. There is no evidence in the record that there is any out-patient service at an institution in the immediate vicinity whereby the Petitioner could obtain such services in a less expensive manner as through the HCBS Waiver program. Additionally, the risk of institutionalization and its attendant higher cost was not shown to have been considered by the Department and, at present, is the only other known means of

the Petitioner obtaining the services, if the present IFS related funding is terminated, since there are no approved, HCBS Waiver nursing providers in his vicinity. Accordingly, the assertion that there is a more cost-effective means of addressing the Petitioner's nursing service needs is not proven in this record.

17. The Department also maintains that there are not sufficient funds with which to continue to pay for the Petitioner's nursing service needs in its present mode. It bases that assertion upon a directive from its central office in implementation of its spending plan to discontinue funding services to those entitled to services which are covered under the HCBS Waiver program and proviso language in the 2000 Appropriations Bill (Senate Bill 2000). That Appropriations Bill language and spending plan mandate does, however, provide for the granting of exceptions from the Department's central office, which has simply not been done in the Petitioner's case, at least as yet.

18. Thus, no evidence was presented to show that Petitioner's particular needs could be covered and met under the waiver program since there are no HCBS Waiver providers in the Daytona Beach vicinity that could serve his needs on a daily basis. Thus, as a practical matter, that is not a less

expensive funding source or alternative means of obtaining services at the present time.

19. Further, the Department continues to pay for his services from a skilled nursing provider. Thus, there are funds available to cover the Petitioner's needs; even if under the Department's currently adopted spending plan, these funds should not be used for this purpose, absent the granting of an exception from the Department's central office.

20. In summary, the Respondent has not established by preponderant evidence that a more cost-effective means of addressing the Petitioner's needs, in a practical sense, exists, nor has it been established that there are insufficient funds with which to continue to pay for the Petitioner's skilled nursing service needs in the near future. The obvious solution to this problem is for: (1) The Department to arrange for the granting of an exception so that the present mode of funding can continue; and (2) that both parties cooperate in making diligent efforts over a reasonable time, for instance, the next year, to attempt to find and qualify skilled nursing service providers under the HCBS Waiver program. It is somewhat disingenuous to argue, as did a Department witness, that the Department has no authority to seek to enroll HCBS Waiver program nursing providers when, under its spending plan, and the Appropriations

Act enacted by the Legislature, it has an obvious mandate to limit cost and conserve funds in every way appropriate.

RECOMMENDATION

Having considered the foregoing Findings of Fact and Conclusions of Law, and evidence of record, the pleadings and arguments of the parties, and the candor and demeanor of the witnesses, it is, therefore:

RECOMMENDED that a final order be entered continuing the present mode of funding for the Petitioner's skilled nursing services for the immediate future by the granting of an exception to the spending plan mandate referenced above by the Department. It is further

RECOMMENDED that both the Petitioner and the Department make strenuous efforts to collaborate and locate and enroll one or more appropriate skilled nursing service providers under the HCBS Waiver program within the next year from the date of the final order.

DONE AND ENTERED this 7th day of January, 2002, in Tallahassee, Leon County, Florida.

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P. MICHAEL RUFF  
Administrative Law Judge  
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Filed with the Clerk of the  
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this 7th day of January, 2002.

COPIES FURNISHED:

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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.