

**IN THE CIRCUIT COURT  
IN AND FOR THE SECOND  
JUDICIAL CIRCUIT,  
LEON COUNTY, FLORIDA**

**WILLIAM LAYTON LYONS,  
FRANCESCA CORREA, by and through  
her guardian Lorraine Rodriguez,  
JOHN BODACK, and THE ADVOCACY  
CENTER FOR PERSONS  
WITH DISABILITIES, INC.,**

**Plaintiffs,**

**CASE NO:**

**vs**

**THE AGENCY FOR PERSONS WITH  
DISABILITIES, a State of Florida agency,**

**Defendant**

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**COMPLAINT FOR INJUNCTION AND DECLARATORY JUDGMENT**

Plaintiffs, by and through undersigned counsel, hereby petition this Court for declaratory and injunctive relief and state as follows:

**INTRODUCTION**

1. This action is filed by three persons with developmental disabilities (DD) who receive home and community based services under a Medicaid Waiver for persons with DD (waiver recipients), and the Advocacy Center for Persons with Disabilities, Inc., (the Center), the Florida not-for-profit, protection and advocacy agency that provides legal and advocacy services to all persons with disabilities under federal mandate.
2. Plaintiffs seek a declaratory judgment as Defendant, the Agency for Persons with Disabilities, has placed in doubt the right to an administrative hearing for waiver

recipients who timely request a hearing after receipt of notice of an agency's adverse action.

3. Plaintiffs believe that waiver recipients have the right to a fair hearing under 42 U.S.C. § 1396a(a)(3), 42 C.F.R. 431.200 (2), chapters 393 and 120, Florida Statutes<sup>1</sup>.

4. Plaintiffs have a need for a declaration, as on December 1, 2008, the Defendant Agency for Persons with Disabilities, (APD), initiated a process of issuing Final Orders Denying Hearing Requests, (final order), to approximately 3500 waiver recipients out of the 5,000 waiver recipients who filed a request for fair hearing to challenge tier assignments made as a result of the implementation of section 393.0661, Florida Statutes. APD announced that it would refer for administrative hearing a total of 700 hearing requests.

5. The rights of the individual plaintiffs and those of thousands of waiver recipients whose interests are represented here by the Center are antagonistic to those of Defendant APD. A declaration that waiver recipients have a right to a fair hearing will serve to provide relief to all the individuals affected by APD's action.

6. Plaintiffs also seek temporary injunctive relief as stated in the accompanying Motion for Temporary Injunction. Waiver recipients are entitled to continuation of services that they are currently receiving through the completion of the fair hearing process. The issuance of the final orders means the immediate cessation of services as of the date the Order goes into effect. For the reasons stated in this complaint and in Plaintiffs' motion for temporary injunction, Plaintiffs contend that the final orders violate the due process rights of waiver recipients and cause waiver recipients irreparable material harm to their health and safety.

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<sup>1</sup> The statutory framework will be discussed below.

7. For the reasons stated in this complaint, Plaintiffs request that this Court issue a permanent injunction ordering APD to afford all the affected waiver recipients their due process rights to present their case before an Administrative Law Judge.

### **JURISDICTION AND VENUE**

8. This court has jurisdiction on this matter pursuant to section 86.021, Florida Statutes.

9. Venue in Leon County, Florida is proper as the central office of Plaintiff Advocacy Center and Defendant APD are located therein.

### **PARTIES**

10. Plaintiff WILLIAM LAYTON LYONS is a 33 year old resident of Baker County, Florida. He resides with his parents at 249 College Street, Macclenny, Florida 32063. Mr. Lyons is a person with digestive disorders, mental retardation, neurological disorders, and numerous physical and orthopedic impairments. Mr. Lyons is a recipient of Medicaid services through the Florida Medicaid Developmental Disabilities Waiver (DD Waiver) and a client of APD.

11. Plaintiff FRANCESCA CORREA is 19 years old and a resident of Miami-Dade County, Florida. She resides at 201 East 64th Street, Hialeah, Florida 33013. Ms. Correa lives with her mother and guardian, LORRAINE RODRIGUEZ, her twin sister, Nadieska, and her brother. Both Francesca and Nadieska are autistic and are recipients of Medicaid DD waiver services and clients of APD.

12. Plaintiff JOHN BODACK is a 27 year old resident of Hillsborough County, Florida. He resides with his father and brother at 4247 Forester Lane, Tampa, Florida 33618. Mr. Bodack has a benign brain tumor that impairs his functional abilities. He is a

recipient of DD waiver services and is a client of APD.

13. The ADVOCACY CENTER FOR PERSONS WITH DISABILITIES, INC. (the Center) is a not-for-profit-corporation serving as Florida’s federally funded protection and advocacy system for individuals with disabilities. The Center maintains offices in Tampa, Hollywood and Tallahassee. Its main office is located at 2728 Centerview Drive, Suite 102, Tallahassee, Florida 32301. The Center’s mission is to advance the quality of life, dignity, equality, self-determination, and freedom of choice of persons with disabilities through collaboration, education, advocacy, as well as legal and legislative strategies.

14. The Center is authorized by federal law to “pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of individuals within the State who are or who may be eligible for treatment, services, or habilitation, or who are being considered for a change in living arrangements.” *See* 42 USC 15041 SEC. 141; 42 USC 15043 SEC. 143(a)(2)(A)(i). As such, the Advocacy Center represents the interests of all persons with developmental disabilities in the state of Florida.

15. Defendant APD is a State of Florida agency charged with the administration of the DD Waiver under an agreement with the single state Medicaid agency, the Florida Agency for Health Care Administration. APD’s address is 4030 Esplanade Way Tallahassee, Florida 32399-0950.

## **BACKGROUND**

### **Florida’s DD Waiver**

16. Medicaid home and community-based services (HCBS) waiver programs are

authorized by 42 U.S.C. § 1396n(c) and governed by 42 C.F.R. §§ 441.300-.310. Waiver programs enable states to provide home and community-based services to individuals with developmental disabilities or mental retardation who would otherwise be institutionalized.

17. The Florida DD Waiver is a Medicaid program whose purpose is to maintain Florida residents with DD in a home setting with supporting services necessary to prevent institutionalization. Florida Statutes Chapter 409 and the Fla. Admin. Code Ch. 59G-13.080 authorize the DD waiver.

18. Section 393.062, Florida Statutes provides legislative intent for the DD waiver:

...”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...”.

19. There are approximately 30,000 waiver recipients in Florida. All waiver recipients are entitled to receive Medicaid services in intermediate care facilities for the developmentally disabled, (ICF/DD), either private or state owned, with Medicaid paying the cost. All waiver recipients chose to receive services in the community through the DD waiver.

20. Waiver recipients reside in a variety of settings. Some reside independently with supports, some reside in community group homes and others reside with family members. They include children, adults and the elderly.

21. Waiver recipients have developmental disabilities such as Autism, Cerebral Palsy, Mental Retardation, Prader Willi Syndrome and Spina Bifida. Many also have behavior problems, mental illness and a variety of complex medical conditions such as seizure

disorder, heart problems, paralysis, dementia, diabetes, kidney disease and blindness.

22. The Federal Government funds a share of cost to states for Medicaid services.<sup>2</sup> The share of costs percentage for ICF/DD and waiver services is the same. Institutionalization is costlier than community based services. The average annual cost of a Medicaid ICF/DD is \$148,000. The average annual cost of a Medicaid waiver recipient's services is \$36,000.<sup>3</sup>

23. In order to receive waiver services, waiver recipients undergo a process of assessment and evaluations to determine need for specific services. Once the needs are identified, each service requested for the recipient goes through a prior authorization process which determines if the service is "medically necessary" pursuant to the provisions of Rule 59G-1.010(166), Florida Administrative Code . If the service does not meet medical necessity standards, the request for the service is denied.

24. All services that waiver recipients are presently receiving have been determined to be medically necessary. Once the services are approved, the waiver recipient is issued a cost plan that describes the amount, duration, scope and cost of each service.

### **Tier System**

25. Prior to the amendment to Section 393.0661, Florida Statutes, only two waivers existed – the DD Waiver which had no cap on costs of home based services and the Family and Supported Living Waiver which had an annual cost budget limit of \$14,972.

26. In 2007, the Florida Legislature amended section 393.0661, Florida Statutes to

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<sup>2</sup> At the current time, the Federal Government pays Florida 55.4% of every dollar spent on Medicaid services, including DD waiver services. Source, Snipes, Dyke, "Agency for Health Care Administration Overview of Schedule VIII B Reductions," December 16, 2008, page 2.

<sup>3</sup> For a more complete analysis of costs of institutions vs community services see: Smith, Gary. "Status Report: Litigation Concerning Home And Community Services For People With Disabilities", January 9, 2007, p. 2

implement a four-tiered waiver system to serve clients with developmental disabilities in the DD and Family and Supported Living Waivers.

27. In order to implement the tier system, the Legislature directed the Agency for Health Care Administration, (AHCA), in consultation with APD to seek federal approval for the additional tiers. *See* § 393.0661(3), Florida Statutes.

28. Following the Legislative direction, AHCA applied to the Center for Medicare and Medicaid Services, (CMS) of the U.S. Department of Health and Human Services for two new waivers implementing tiers 2 and 3. CMS approved the tiers in February, 2008. A copy of the CMS approval letter and tier 2 waiver application pages 1-10 and Appendix F-1:1 is attached hereto and incorporated herein as Exhibit A to this complaint.

29. The Legislature also directed APD to assign all waiver recipients to a tier based on a “valid assessment instrument, client characteristics, and other appropriate assessment methods.” *See* § 393.0661(3), Florida Statutes.

30. Tier 1 is “limited to clients who have service needs that cannot be met in tier 2, 3, or 4 for intensive medical or adaptive needs and that are essential for avoiding institutionalization, or who possess behavioral problems that are exceptional in intensity, duration, or frequency and present a substantial risk of harm to themselves or others.” *See* § 393.0661(3)(a), Florida Statutes.

31. Tier 2 is “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.” *See* § 393.0661(3)(b), Florida Statutes.

32. Tier 3 is “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.” *See* § 393.0661(3)(c), Florida Statutes.

33. Tier 4 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.” *See* § 393.0661(3)(d), Florida Statutes.

34. APD promulgated Rules 65G-4.0021 - .0025, Florida Administrative Code. Rule 65G-4.0021, Florida Administrative Code sets out the criteria APD uses for individual tier assignments. APD evaluates factors such as the client’s level of need in functional, medical, and behavioral areas, client characteristics, the Agency approved assessment process, and support planning information; the client’s service needs as determined through the Agency’s prior service authorization process to be medically necessary; the client’s age and the current living setting; and the availability of supports and services from other sources, including natural and community supports. *See* Rule 65G-4.0021(1), F.A.C.

35. By APD’s own projection, the tier assignment process resulted in reductions in services to 7,527 waiver recipients.



## STATEMENT OF FACTS

### Notices of Tier Assignments

36. On or about September 2<sup>nd</sup>, 2008, APD issued and mailed to 30,000 waiver recipients a Notice of Tier Assignment (notice). Copies of the notices sent to Plaintiffs Lyons and Bodack are incorporated herein and attached hereto as Composite Exhibit B.

37. Plaintiffs' notices are representative of the notice sent to the other waiver recipients. Save for a couple of generic variations, the notices were the same for all waiver recipients, changing only to identify the waiver recipient and the tier assignment.

38. The notices did not specify APD's reasons that formed the basis for APD's assignment to a particular tier for the individual waiver recipient to whom the notice was addressed; did not cite the specific rule or statutory section upon which his or her individual tier assignment decision was based; failed to contain any indication of the manner in which APD applied the statutes and rules to a person's circumstances; and failed to state facts that related to the specific requirement of the statute or rules pertaining to the individual's tier assignment.

39. The notices included provisions of the right to a hearing and instructions for filing a hearing request. Of the 7527 waiver recipients who were adversely affected by the tier assignment, approximately 5,000 waiver recipients filed timely requests for hearing. The large majority of affected waiver recipients did not have legal representation at the time the petitions were filed.

40. Upon information and belief, of the 5000 waiver recipients filing requests for hearing, some used form petitions, some used form letters and some simply wrote that they disagreed with the tier assignment because it would reduce services they needed.

### **Final Orders Denying Hearing Request**

41. In November 2008 APD issued a press release stating that out of 4300 requests for hearing on tier assignments, APD would issue a Final Order Denying Hearing Request (final order) to 3500 waiver recipients who requested hearings. Only six hundred hearing requests out of the 5000 filed would be forwarded to the Division of Administrative Hearings (DOAH). A copy of the APD press release is attached hereto and incorporated herein as Exhibit C.

42. Prior to the issuance of the Final Orders, APD issued to some individuals form Orders of Incomplete Hearing Requests with a checklist of items missing in the hearing requests and provided for 10 days to submit the information. A copy of one such order is attached hereto and incorporated herein as Exhibit D.

43. The Order of Incomplete Hearing Request stated that failure to submit the information would cause the hearing request to be dismissed. Many families and support coordinators did not understand what was required, and sought assistance from various stakeholders and legal service organizations. It is unknown how many individuals failed to submit timely information.

44. On December 1, APD began issuing generic final orders. A copy of the final orders issued to Plaintiffs Lyons and Correa are attached and incorporated herein as Composite Exhibit E.

45. Upon information and belief, APD to date has issued 300 final orders. The Center has received final orders for 11 of its clients.

46. Citing statutes, rules and case law, the final order gives four general reasons why the APD denied the hearing request: the tier placement is based on a change in state law; the hearing request does not state facts that demonstrate there was an error in the tier assignment; the hearing request did not contain a concise statement of the ultimate facts alleged including specific facts that the petitioner contends warrant reversal or modification; and the hearing requests did not allege facts that relate to the specific requirements to the statute or rule.

47. The final order 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.

48. On page 3 of the final order, APD states that “the request for administrative hearing is DENIED and this cause is DISMISSED without prejudice.” (Emphasis in original).

49. Also on page 3, the final order contains a statement of rights advising that the petitioner may “either file an amended petition or file an appeal of this *final* decision” and refers petitioners to Rule 28-106, Florida Administrative Code and Ch. 120.68, Florida Statutes. (Emphasis added).

50. No copies of the statute, case law or rules are attached to the Final Order. Waiver recipients are referred to the APD website for information and reference to 393.0661, Florida Statutes and Rules 65G-4.0021 through .0025, Florida Administrative Code.

51. The APD website does not contain copies of Rule 28-106, Florida Administrative Code; the *Blackwood* case or section 120.68, Florida Statutes.

52. The final order states that an amended petition “must be consistent with the requirement of the Notice of Hearing Rights and filed within ten (10) days of the date of

this order.” No copy of the Notice of Hearing Rights is attached to the final order.

53. Each final order is dated in two or three different places. Confusion was caused by the dates the amended petitions were due. The final order states that an amended hearing request is due 10 days from the date it was issued, not received. Waiver recipients are accustomed to the deadlines for hearing requests being 10 days from receipt.

54. It is unknown at this time how many waiver recipients have received a final order and how many failed to file an amended hearing request or did not file a timely one.

**William Layton Lyons**

55. Mr. Lyons requires 24 hour daily care due to his severe cognitive and motor developmental growth patterns secondary to hexafluenza meningitis contracted at the age of 9 months. He has tardive dyskinesia and is unable to complete any of his daily living skills without substantial assistance. He receives medically necessary services through the DD waiver. His annual cost plan totals \$49,247. Although he lives with his parents, both are employed. His parents take care of him and provide his services when they are at home or when a provider is unavailable.

56. Mr. Lyons received a notice on or about September 7, 2008 advising him that he was assigned to tier 3 with a cap of \$35,000. He filed his hearing request with APD on September 10, 2008. A copy of the initial petition is attached hereto as Exhibit F. As he filed a timely hearing request he has not suffered a reduction in services.

57. APD issued an Order of Incomplete Hearing Request which was received on September 26, 2008. A copy of the Order of Incomplete hearing request is attached hereto as Exhibit G.

58. In response to the Order of Incomplete hearing request, on September 26, 2008, Mr. Lyons' attorney filed a "Response to Order of Incomplete Hearing Request, Amended Petition and Notice of Appearance of Counsel", a copy of which is attached as Exhibit H.

59. On December 1, 2008, APD issued Mr. Lyons a Final Order Denying Hearing Request. A copy of the final order was not served on his counsel. On December 17, the undersigned filed a response to the final order and second amended petition, basically incorporating by reference the allegations in the original and amended petition.

60. Neither Mr. Lyons nor his counsel has received any indication that APD has now accepted the second amended petition and will refer the case for hearing.

**Francesca Correa**

61. Ms. Correa is a person with autism and serious behavior disorders. She is nonverbal although her caregivers and family have learned to read her facial expressions, body language and other signs including her aggression as a form of communication. She functions at the level of a 2<sup>nd</sup> to 4<sup>th</sup> grader and cannot be left unsupervised. She receives behavior analysis services 2 hour a week, behavior assistant services 2 hours a day, and companion services 8 hours a week. Ms. Correa's annual cost plan for these services is \$24,136. Her mother provides for her care the rest of the time.

62. Through the school system, Ms. Correa attends school with a full time paraprofessional. During the school day, Ms. Correa does not receive the waiver services.

63. Ms. Correa's mother, Lorraine, is a single parent with three children including Ms. Correa and her twin Nadieska both of whom have autism and behavior disorders.

Lorraine has recently suffered serious medical problems which render her unable to properly care for her children without the supports they receive through the waiver.

64. On September 2<sup>nd</sup>, 2008 APD issued a notice assigning Ms. Correa to tier 4 with a cap of \$14,000. APD also issued a notice to Nadieska assigning her to tier 4. In tier 4, companion services are not available.

65. On September 9, 2008, Lorraine filed individual hearing requests for each of her daughters. A copy of the hearing requests are attached hereto as Exhibits I and J. The hearing requests stated reasons for her belief that the tier assignments were in error.

66. On December 4, 2008, APD issued the generic final order to Ms. Correa. Her twin sister's case was referred to the Division of Administrative Hearings<sup>4</sup>, (DOAH).

67. Lorraine is now in the untenable position of having one daughter's petition dismissed as insufficient while the other daughter's nearly identical petition has been referred for formal hearing.

68. Ms. Correa, through counsel, filed a response to the final order. To date, no response has been received from APD on whether the amended pleading is sufficient to afford Ms. Correa the same hearing rights as her sister.

**John Bodack**

69. John Bodack was born with a benign brain tumor that caused developmental delays. He also has several health problems such as diverticulitis. He requires periodic dental services. Mr. Bodack was living independently with supports until about March of 2008, when due to financial problems, he had to move back with his father. He receives the services of a companion 15 hours a week to assist him in attending medical and dental appointments and safely engaging in community activities. Mr. Bodack also has the

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<sup>4</sup> N.C. vs APD, DOAH case number 0800613APD

services of a job coach to assist him with employment issues and receives specialized mental health services. Mr. Bodack is employed 25 hours a week with the assistance of the services he receives through the waiver, including transportation. His father assists with money management, room and board and companionship and support during the hours Mr. Bodack does not receive or cannot access waiver services. Mr. Bodack's stated goal is to eventually live independently again with supported living services through the waiver.

70. Mr. Bodack's cost plan for July 1, 2008 through June 30<sup>th</sup>, 2009 is \$27,941. APD placed Mr. Bodack in tier 4 with a cap of \$14,000. Tier 4 does not have companion, dental or specialized mental health services, leaving Mr. Bodack without the supports he needs to maintain and develop skills to continue as a contributing member of the community.

71. After receipt of the generic notice, Mr. Bodack filed a Request for Hearing on September 9, 2008 and sought legal assistance from the Advocacy Center. A copy of the Request for Hearing is attached as Exhibit K to this complaint. It is Mr. Bodack's belief that his request for hearing is sufficient to afford him a hearing on the issue of the error of the tier assignment. On September 12, 2008, he received a letter from APD acknowledging receipt of the hearing request and advising him that his services would continue pending the hearing process. On December 15<sup>th</sup>, in an abundance of caution, Mr. Bodack's counsel filed an amended petition.

72. To date, APD has not taken any action on Mr. Bodack's hearing request. He worries about his case and calls his counsel and the Center's staff periodically to find out the status of his case. He is afraid his request for hearing will be dismissed and he will

lose his essential supports.

### **The Advocacy Center**

73. During the month of September, 2008, the Center received over 200 inquiries and 172 requests for assistance with tier hearings. It provided technical assistance to a majority of individuals and its attorneys are providing direct legal assistance to 76 waiver recipients in the administrative actions challenging the tier placements. It has also posted information on its website about the tier implementation for use of affected waiver recipients, families and stakeholders.

74. All the persons who contacted the Center filed their individual hearing requests without assistance of counsel. The Center attorneys reviewed the requests for hearing of 172 persons and contend that they stated disputed issues of material fact to challenge the tier assignments to confer standing for formal hearing.

75. In addition to the individual Plaintiffs, some of the Center's clients include:

- a. a 12 year old waiver recipient with autism, immune system dysfunction, and seizure disorder, mental health and life-threatening behavior issues, including incidents of physical aggression. He lives with his physically disabled mother and was placed in tier 4 despite a cost plan of more than \$28,000 of behavior services. APD issued a final order on December 1, 2008;
- b. a waiver recipient with severe mental health and behavioral issues, subject to both aggressive and destructive tendencies. His primary caregivers are his 70+ year old parents who cannot control their son without the \$51,609 worth of services he receives. He has now been placed in Tier 4, capping his services at \$14,792. No indication from APD has been received as to the disposition of his case;
- c. a 41 year old waiver recipient with cerebral palsy and mental retardation who resides in a group home. She has behavior problems, balance problems and is now using a walker. She also has a life threatening infection which requires hospitalization, frequent treatments and additional supervision. She has serious gum disease. She takes a lot of prescribed medications. She must be supervised at all times. Her health is



deteriorating and her needs for services are increasing due to her age and medical condition. Her cost plan services total \$44,393.52. APD assigned her to tier 3. A final order was issued but it is unclear of the effective date as the order contains 3 different dates;

- d. a 77 year old waiver recipient who has no family and who has lived in a group home for over 10 years. His cost plan is \$68,800, yet APD placed him in tier 2. There has been no indication from APD whether his hearing request will be accepted;
- e. a married couple, both waiver recipients, with severe medical and behavioral problems. They live independently with supports. Both were placed in tier 3 and will require institutionalization should their services be reduced. The wife's cost plan is \$64,000. The husband's cost plan is almost \$60,000. The husband's hearing request was referred to DOAH for hearing. There has been no word on the wife's hearing request despite their attorney's repeated request to have the cases heard together;
- f. a 27 year old waiver recipient with mental retardation, seizure disorder and autism. He has behavior problems which tend to escalate when he does not have an activity. He lives in the family home with his aging parents. He is 6 feet tall and weighs over 200 pounds. His father is not physically able to take care of him and his mother works full time. His cost plan exceeds \$55,000, yet APD placed him in tier 3. APD issued a final order denying his hearing request;
- g. A 19 year old waiver recipient with cerebral palsy with spastic quadriplegia, generative osteoarthritis, scoliosis, and respiratory disease. She lives with her mother who has cerebral palsy and is unable to care for her. APD placed her in tier 4 and denied her request for hearing.
- h. APD also denied a hearing request to a 28 year old group home resident with mental retardation, Rett Syndrome, epilepsy, and neuromuscular degenerative disease. She currently receives dietician services, medication review, consumable medical supplies, transportation services, residential habilitation services, dental services, adult day training, and support coordination. She was placed in tier 3 despite a cost plan exceeding \$58,000.

76. Of the 172 tier assignments reviewed, the Center found several patterns in the manner in which tier assignments were made. For example,

- a. A majority of waiver recipients living in their own homes or with family in the family home were assigned to tiers 3 & 4, regardless of identified needs and services the individual currently receives.

- b. APD tier assignments routinely reduce services in excess of \$10,000 and some as much as \$30 - 40,000.
- c. APD assigned waiver recipients to tier 4 who were receiving companion services, adult dental services and specialized mental health services. These services are not available to tier 4 waiver recipients.
- d. Elderly waiver recipients in declining health have been assigned to a tier that substantially reduces services and does not allow for meeting service needs as their condition worsens.
- e. Adult waiver recipients living at home with parents who are in their 70's and can no longer provide services, were assigned tiers where services such as respite and personal care assistance are reduced to unsustainable level.
- f. Waiver recipients in group home placement received tier assignments which substantially reduce residential rehabilitation services placing them in danger of institutionalization.
- g. Waiver recipients who reside with single working parents are assigned to tiers which give the parent the choice of losing their job or institutionalizing their child.
- h. Waiver recipients in group homes, family homes and supported living were assigned to tiers which required substantial reductions in services such as meaningful day activity and adult day training, which may lead to increased behavior problems, increased requests for more expensive services or institutionalization.

77. Of the 72 cases where the Center provides direct legal representation, three have been referred to DOAH and eleven have received final orders. One case is under appeal as the waiver recipient failed to file an amended petition because he did not understand the provision of the final order concerning amended petitions.

78. In the tier waiver applications submitted to the federal government, AHCA describes the procedures Florida uses to provide the opportunity to request a fair hearing. In Appendix F: Participant Rights of the CMS waiver application form, a state must

provide assurances that it will grant an opportunity to request a fair hearing to waiver recipients if the state agency takes action to suspend, terminate, or reduce services.

79. The description of the procedures AHCA submitted in Appendix F of the 4 waivers Applications implementing the tiers includes the statement that APD will provide a notice to recipients. A copy of Appendix F for the tier 2 waiver application is attached to this complaint at page 13 as Exhibit L.

80. The Appendix F procedure states the contents of the notice. The procedure assures CMS that the notice will state: “If you disagree with the Agency’s decision, you have the right to an administrative hearing before the division of administrative hearings (DOAH) to dispute that decision.”

81. Tellingly, in the Appendix F procedure, AHCA assures CMS that to request a hearing “no specific form is required.” (Emphasis added).

82. The final orders disproportionately adversely affect the vast majority of waiver recipients who are unrepresented by counsel. Most individuals who filed requests for hearing are not represented by counsel.

83. Waiver recipients who did not file an amended petition will have their services reduced as of the date of their final order. They will suffer irreparable harm by the loss of medical and behavioral therapies essential to their well being, and the denial of their right to hearing. Many will be at risk for institutionalization. Many will languish in their home without meaningful day activities, and their behavior problems will increase. Others will lose social and rehabilitative skills.

84. There is no other relief available to Plaintiffs to redress the violation of rights and loss of essential services. Plaintiffs and other waiver recipients do not know if APD will

grant hearings on their amended petitions. It is Plaintiffs' belief that since the original petitions in their individual cases met the requirements for formal hearing, there is no guarantee that APD won't proceed to issue another final order.

### **Applicable Law**

85. Under federal Medicaid law, waiver recipients are entitled to fair hearings when services are reduced or denied. 42 U.S.C. § 1396a(a)(3), 42 C.F.R. § 431.200 *et seq.*, *Cramer v. Chiles*, 33 F.Supp.2d 1342, 1347-49 (S.D.Fla.1999).

86. 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. 431.220 (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."

87. Florida Statute 120.569 and 120.57 provides for two types of hearings when a party's substantial interests are determined by an agency. The agency may determine there is a disputed issue of material fact and refer the matter to the DOAH 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 Statutes.

88. Section and 393.0651(3), (8), Florida Statutes provides that APD must grant a formal hearing pursuant to section 120.57(1) when material facts are in dispute and an applicant or client is "determined by the agency to be ineligible for developmental services," if the applicant or client "is substantially affected by the ... initial family or

individual support plan, or the annual review thereof.” § 393.065(3), Fla. Stat. (2005); § 393.0651(8), Fla. Stat. (2005); *J.M. v APD*, 938 So.2d 535, 541(1st DCA 2006).

89. Waiver recipients are entitled to a hearing either before the APD Director or DOAH. *J.M. v APD*, 938 So.2d 535, 536 (1st DCA 2006). In cases where a waiver recipient has stated disputed issues of material fact in the petition, she is entitled to a formal hearing. *JM* at 536, §120.57, Fla. Stats.

90. As a tier is assigned based on the individual’s assessment process and characteristics, the change in law provision of 42 CFR 431.220 does not apply in this case. Waiver recipients are entitled to a hearing pursuant to 42 CFR 431.220 (a)(2).

91. In cases where APD believes no disputed issues of material fact are alleged in the petition, section 120.57(2), Florida Statutes, requires that an informal hearing be held and provides that should disputed issues of material fact arise during the informal proceedings, the case should be referred to DOAH unless the parties agree to continue with the informal hearing.

92. APD’s conduct in denying hearing requests to thousands of Medicaid waiver recipients violates both federal and state provisions that grant the due process rights to the affected waiver recipients.

93. APD’s attempt to provide one opportunity to amend a request for hearing within the short time frame of 10 days from the date the final order is issued inserted into a convoluted and confusing four page final order does not serve to cure the violation of the waiver recipient’s right to a hearing, and violates federal and state statutes and rules cited above.

94. The final order is confusing to waiver recipients as they do not have legal training

or expertise.

95. APD's final order fails to state findings of fact and conclusions of law as required by section 120.569, Florida Statutes. Without specific findings of fact stating the alleged deficiencies in a waiver recipient's petition, the remedial provision allowing amendment of the petition is inadequate and illusory.

96. The final order's provision allowing 10 days to amend hearing requests further is rendered useless by the confusing instructions on the date the amended petition is due. The final order states that the effective date of the final order is the date it is "rendered" and amended petitions are due from the date the final order is rendered. Rendition is not defined and the specific date of rendition is not identified as such.

97. There is no guarantee that the amended petitions will secure a hearing, especially since numerous petitions APD has dismissed, such as those of the individual plaintiffs in this action, actually comply with the requirements for formal hearing found in ch 120.569 and 120.57, Florida Statutes.

98. The issuance of the final orders discriminates against the thousand of recipients who do not have legal counsel, cannot afford a lawyer, and are confused by the requirements of the final orders.

#### **COUNT ONE –DECLARATORY JUDGMENT**

99. Plaintiffs restate and reallege paragraphs 1 through 98 of this complaint.

100. APD's generic final order places in doubt the fair hearing rights of waiver recipients, including Plaintiffs.

101. There is no adequate administrative or legal remedy available to waive recipients. APD's conduct in issuing deficient, generic and confusing final orders denying fair

hearings to waiver recipients is so egregious as to render any administrative relief an exercise in futility. Services reduced through the tier assignments do not continue during lengthy appeals to the District Court.

102. APD has issued and will continue issuing the final order to thousands of waiver recipients who filed timely requests for hearing.

103. Defendant APD has created a present controversy by denying hearing rights to waiver recipients who filed timely requests for hearing challenging the facts upon which APD's individual tier assignments were made.

104. It is Plaintiffs' belief that the grounds upon which defendant APD based the hearing denials are erroneous and deprive plaintiffs of the right to hearing afforded by sections 393.0661, 393.125, Section 393.065(8), 120.569 and 120.567, Florida Statutes. *See: JM v AP*, 938 So.2d 535, 536 (1st DCA 2006).

105. Plaintiffs are in actual need of a declaration of the right to an administrative hearing under sections 393.0661, 393.125, Section 393.065(8), 120.569 and 120.567, Florida Statutes.

**WHEREFORE**, Plaintiffs respectfully requests that this court

1. Find that the Plaintiffs and waiver recipients are entitled to an administrative hearing by filing a request for hearing to challenge the tier assignment pursuant to 393.0661, 393.125, Section 393.065(8), 120.569 and 120.567, Florida Statutes; 42 U.S.C. § 1396a(a)(3), 42 C.F.R. § 431.200; and the procedures for referring requests for fair hearings to DOAH in the waiver applications approved by CMS.

2. Find that final order's provision to amend the complaint within ten days of the rendition is insufficient to ensure the right of waiver recipients to an administrative

hearing.

3. Order APD to refer to DOAH for formal hearing the cases of waiver recipients who were issued final orders denying hearing requests, and reinstate services to waiver recipients who failed to amend or otherwise respond to the final order for the duration of the fair hearing process.

4. Award attorneys' fees and costs to Plaintiffs' counsel.

5. Provide such other relief as may be proper.

## **COUNT 2 – MANDATORY PRELIMINARY AND PERMANENT INJUNCTION**

106. Plaintiffs reallege and restate paragraphs 1 through 105 of this complaint.

107. APD's action in denying hearing requests to thousands of waiver recipients is so egregious as to render any administrative relief a useless exercise.

108. Appellate relief, though available, will not be an effective remedy as services will not continue through the appeal.

109. Plaintiffs and thousand others have or will suffer immediate irreparable harm as a result of the Final Orders. Waiver recipients whose services are reduced or terminated are at imminent risk of neglect, damage to their health and safety, and institutionalization. As a result of the Final Orders, Plaintiffs and other waiver recipients will immediately lose services determined to be medically necessary and essential for their health, safety and continued community placements.

110. The loss of services will subject waiver recipients to go without assistance with toileting, meal preparation, bathing, transport, behavior therapies, occupational therapies, consumable supplies such as formula or adult diapers, specialized mental health services, dental care, meaningful day treatment activities, socialization activities, supported



employment, residential habilitation, behavior assistance, supported living services, job coaching and other essential services to prevent deterioration, achieve new or continue skills, meet medical and adaptive needs and protect them from harm. None of these services are available from any other source or in the community.

111. Waiver recipients are at imminent risk of institutionalization as a result of the denials of hearing. This is particularly true for waiver recipients in group homes with no family or community supports, waiver recipients who have intense behavioral issues such as aggression, waiver recipients living in their own home and waiver recipients living at home with single working parents or elderly parents who can no longer take care of them without assistance.

112. As a result of the denial of their right to hearing, waiver recipients and Plaintiffs will suffer permanent irreparable harm.

113. Plaintiffs and other waiver recipients who are institutionalized as a result of the Final Orders Denying Hearing will suffer permanent irreparable harm.

114. The loss of services to 3500 waiver recipients will cause group homes to close, and other waiver service providers to go out of business or cease providing services to waiver recipients. The imminent loss of providers should services not be reinstated or continued pending resolution of this action will cause irreparable harm to waiver recipients and Plaintiffs.

115. A temporary injunction is necessary to preserve the status quo pending resolution of this action.

116. There is a substantial likelihood of success on the merits. Waiver recipients whose services are reduced or denied are entitled to a fair hearing under sections

393.0661, 393.065, 120.569 and 120.57, Florida Statutes, and 42 U.S.C. § 1396a(a)(3), 42 C.F.R. 431.200 (2).

117. Florida statute 393.0661 specifically instructs APD to conduct individual evaluation of a recipient's needs in making tier assignments. APD's implementation of the statute substantially affects the medically necessary services a waiver recipient receives and amounts to a valid allegation of an erroneous action. Thus, any challenge to the tier assignment disputes the material fact that the tier assignment is in error and subject to be resolved through the fair hearing process.

118. The interests of the waiver recipients in continuing to receive services outweigh the interests of APD in reducing its budget deficit. There is no guarantee that all the hearings requested will result in change of tier assignment, so the potential loss of funds to the state is not ascertainable until hearings are concluded. Additionally, community services are substantially less expensive than services in an ICF/DD, to which waiver recipients are entitled. In these times of budgetary constraints, more expensive options in service provision should be avoided.

119. The interests of the State of Florida will be adversely affected by the failure of the State to protect its most fragile of citizens from neglect and harm.

**Wherefore** Plaintiffs respectfully request that this court:

1. Find that Defendant APD violated the waiver recipients' and plaintiffs' right to administrative hearings
2. Issue a temporary injunction maintaining the status quo and ordering Defendant APD to continue or reinstate services during the pendency of these proceedings to all waiver recipients who received or were issued a final order denying hearing request.

3. Issue a temporary injunction ordering Defendant APD to immediately cease and desist from issuing final orders denying hearing requests to waiver recipients during the pendency of this action.
4. Issue a permanent injunction requiring defendant APD to refer all hearing requests to the Division of Administrative Hearings (DOAH) for full evidentiary hearings and to continue or reinstate services to all persons who filed hearing requests within 10 days of receipt of the Notice and were denied a hearing.
5. Award attorneys' fees and costs to Plaintiffs' counsel.
6. Provide such other relief as may be proper.

Dated in Tallahassee, Florida this \_\_\_\_ day of January 2009.

Respectfully submitted,

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