

STATEMENT OF SPECIFIC FACTS AND REASONS FOR FINDING AN IMMEDIATE DANGER TO PUBLIC HEALTH, SAFETY, OR WELFARE

Rules 65GER09-7, 65GER09-8, 65GER09-9, 65GER09-10 and 65GER09-11, F.A.C.

1. The Agency provides essential medical, adaptive, and behavioral services through the Developmental Disabilities Home and Community Based (DD-HCBS) Medicaid waiver program to 31,000 individuals with developmental disabilities. Additionally, there are nearly 19,000 individuals who have been deemed eligible for DD-HCBS who currently are not receiving services due to budgetary limitations. These 19,000 are on a waitlist and must wait until either by attrition or by improvements in the budget there is new capacity for them to receive services.
2. All 31,000 individuals receiving services through the Agency, and the 19,000 on the waitlist, meet a level of need qualifying them for placement in an institution. The DD-HCBS waiver provides these individuals an opportunity to remain at home or other non-institutional community settings.
3. In addition to the 31,000 individuals served by the DD-HCBS waiver, there are almost 19,000 additional individuals who have been deemed eligible for waiver services but who are on a waiting list owing entirely to state budgetary constraints.
4. The number of individuals on the DD-HCBS Waitlist has fluctuated over the years. In July of 2004 there were over 15,000 individuals on the waiver Waitlist and at that time there were under 24,000 persons receiving services under the waiver. By 2006 the waitlist had been reduced to a little over 11,000 individuals while over 25,000 were receiving services. The waitlist has grown over time, and that rapid growth was part of the impetus of the Legislature's decision to redesign the DD-HCBS waiver program in 2007 to create service tiers.
5. No one will be removed from the DD-HCBS waiver program as a result of the Emergency Rule. Instead, in accordance with the Legislature's objective in mandatory tier assignments, the Emergency Rule will be used to ensure more individuals can be added to receive services under the program.
6. In 2007, the Legislature amended section 393.0661, F.S., to create a four-tiered waiver system to deliver the Medicaid waiver services provided through the DD-HCBS waiver by this Agency. There were two critical elements causing the creation of the tiers: (1) the home and community-based services delivery system, and (2) the availability of appropriated funds.
7. The situation was summarized in legislative staff analysis of the Tiers bill in 2007:

There are over 14,200 citizens on the waitlist for waiver services. In recent years, APD has instituted a number of fiscal and management controls to reduce costs and the waitlist for services. These include a standardized rate structure, prior service authorization, pre-payment billing review, and support coordination. In spite of these controls, the Office of Economic and Demographic Research and APD forecast total deficits in the HCBS waiver category for FY 2007-2008 from \$140 million (APD March 12, 2007) to \$190

million (EDR 12/06/2006). The general revenue portion of these deficits varies from \$63 million to \$85 million.

Staff Analysis of CS/SB 1124, Senate Committee on Health and Human Services Appropriations, March 28, 2007.

8. Section 393.0661(3)(e), F.S., directed the Agency and the Agency for Health Care Administration (“AHCA”), the State Medicaid Administrator, to implement the four-tiered system and provided authority to adopt any rules necessary to administer the four-tiered waiver system.

9. Section 393.0661(3)(e), F.S., also directed AHCA to seek federal waivers consistent with the four-tiered waiver system. The federal waivers consistent with the four-tiered system of section 393.0661 were approved by the Centers for Medicare and Medicaid Services (“CMS”). The waivers serve as the Agency’s authority to provide DD-HCBS waiver services to individuals with developmental disabilities.

10. The Legislature adopted the tier system into law effective July 1, 2007. Ch. 2007-64, § 1, Laws of Florida. The Agency began the rule development process by noticing the rule development on December 7, 2007. The Agency published proposed rules on March 28, 2008. Those proposed rules were challenged on May 5, 2008. During the pendency of the challenge the proposed rules could not be adopted. *See* Section 120.54(3)(e)(2), F.S. On August 8, 2008, the Administrative Law Judge at DOAH issued findings which rejected the rule challenge in its entirety and upheld the validity of the rules. The petitioners filed a notice of appeal on September 5, 2008. The Agency filed the rules for adoption on September 30, 2008, and they became effective on October 20, 2008.

11. On August 21, 2009, the First District Court of Appeal issued its decision determining that the Agency’s Rules 65G-4.0021, 65G-4.0022, 65G-4.0023, 65G-4.0024, and 65G-4.0025, Florida Administrative Code, were invalid in *Moreland v. Agency for Persons with Disabilities*, 19 So. 3d 1009 (Fla. 1st DCA Aug. 21, 2009). Although the District Court affirmed the Administrative Law Judge’s findings in most respects, the Court held that rules 65G-4.0021, 65G-4.0024, and 65G-4.0025 were invalid because “(1) the Agency failed to demonstrate it adopted a valid, reliable assessment instrument; (2) the rules place an age limit on eligibility for Tier 3; and (3) the rules automatically place some former waiver recipients into Tier 4 without an assessment.” The Court found the rules were so inextricably linked that these problems required it to hold the remaining tier rules to be invalid. Rehearing was denied on October 8, 2009. The mandate issued on October 26, 2009.

12. On November 16, 2009, the Agency filed emergency rules 65G-ER09-2, 65G-ER09-3, 65G-ER09-4, 65G-ER09-5, and 65G-ER09-6 (the “Emergency Rules”) with the Department of State. These emergency rules were intended to recommence the Agency’s implementation of the tier system as required by the 2007 amendments to section 393.0661, F.S., which was delayed as a result of the *Moreland* decision.

13. Section 120.54(a)(2), F.S., requires that an agency, in filing an emergency rule, “take[] only that action necessary to protect the public interest” In the spirit of this provision, the Agency’s Emergency Rules were very narrow in that they substantially incorporated the rules previously adopted by the Agency that had been invalidated by the *Moreland* decision and amended only those portions of the rule which were the specific basis for the First District’s holding in *Moreland*. The Agency did not change other provisions of the rules because the First District in *Moreland* explicitly affirmed the findings of the ALJ that upheld the validity of the rules as to all issues the First District did not specifically address. *Moreland*, 19 So. 3d at 1013.

14. In implementing the emergency rules, however, the Agency has found that the Emergency Rules as adopted on November 16, 2009 do not contain sufficient detail for staff to make appropriate tier determinations. The amendments to the Emergency Rules adopted today provide this necessary detail. These amendments are of critical importance because, without them, the Agency is unable to revise tier assignments for existing clients or to make initial tier assignments. Accordingly, without the revised and expanded emergency rules adopted today, the emergency described in the Agency’s Statement of Specific Facts and Reasons for Finding an Immediate Danger to Public Health, Safety, or Welfare, filed on November 16, 2009, continues to exist.

15. The population APD serves through its DD-HCBS program includes some of Florida’s most vulnerable citizens. The service needs of these individuals change over time, often increasing, and the service needs can change rapidly. The Emergency Rules adopted on November 16, 2009, and as amended today by APD, are critical for the preservation of the health, safety, and welfare of this vulnerable population because, without them, APD lacks the capability and legal authority to adequately respond to changes in service needs. As a result, APD is unable to provide certain services that have been established to be medically necessary, and that would otherwise be available through the DD-HCBS Waiver.

16. As mandated by section 393.0661(3), Florida Statutes, the majority of the individuals served by the waiver program have been assigned to tiers. Three of the tiers have spending limitations. Although APD’s tier rules were invalidated by the First District in *Moreland*, the statutory tier system remains in place. Thus, prior to November 16, 2009, APD had no rules for the day-to-day operations that are affected by the tier system as a result of the *Moreland* decision. The amendments adopted today are necessary because the Emergency Rules as originally adopted provided insufficient guidelines for Agency staff to make accurate tier placement decisions.

17. APD has an emergency protocol for delivery of services, but this protocol cannot be used until an emergency for the client exists. Thus, APD cannot act until a client’s health, safety or welfare is in jeopardy. It is the waiting until a client is in an emergency situation to deliver essential services that creates a danger to the health, safety and welfare of the vulnerable clients served by APD. This is a significant problem. To access additional waiver services, an APD client must apply for Prior Service Authorization, which determines that (1) the service is medically necessary and (2) the cost of the service is within the client’s budget allocated within the tier system. If the service cannot be added within the budget of the client’s present tier assignment, that client’s tier assignment must be reevaluated to determine whether that service

can be added within the parameters of the tier system.

18. As of November 16, 2009, DD-HCBS clients had requested more than 1,000 Prior Service Authorizations for new or additional services, which could not be provided without reevaluating their tier assignments. Many of these services had been determined to be medically necessary. However, due to the absence of sufficiently detailed tier assignment rules in place, APD has been unable to consider whether to approve any of these services until the lack of their provision develops into an emergency situation, triggering APD's emergency 30-day protocol. This population of waiver clients with outstanding Prior Service Authorization requests has been growing by approximately 30 clients each day. As of December 21, 2009, the number of outstanding Prior Service Authorization requests with tier assignment implications had grown to 1663.

19. Further, if the emergency protocol is triggered, a client cannot retain those services if no emergency situation continues to exist at the end of the 30-days. APD will then have to wait for a new crisis or emergency situation to develop before those services can again be provided.

20. In sum, absent tier rules that are sufficiently detailed for Agency staff to make accurate tier placement decisions, those tier placement decisions cannot be made, and these clients cannot get medically necessary services implemented. Those services are not available through the tier system unless and until the lack of provision of these services develops into a crisis requiring the agency to respond on an emergency basis. This means that individuals' needs are not met and this creates a significant and immediate danger to their health and safety. The individuals whose needs are not served will have deterioration in their health and safety. Further, the inability of APD to respond to changes in circumstances poses an immediate danger to the welfare of every member of the population subject to expenditure or service limitations. Thus, APD's present inability to make changes to a client's services results in clients not receiving medically necessary services that would otherwise be available through the DD-HCBS Waiver program and has therefore created a significant and immediate danger to the health, safety, and welfare of this vulnerable population that will continue until rules are in place.

21. As a specific example, one client served by the waiver recently lost his provision of personal care assistance ("PCA"), which had been provided to him through the state Medicaid program, as a result of his attaining the age of 21. He requires this service because he is totally disabled and is unable to bathe, toilet, or feed himself. Because the client was living at home and receiving PCA services through the state Medicaid plan, he was assigned to Tier 4. Because of the service limitations in Tier 4, this individual can no longer receive his necessary PCA services. Without sufficiently detailed tier rules in place, APD lacks an adequate framework to reevaluate the appropriate tier assignment for this individual in response to his change of circumstances. Thus, although he now has a life-long need for service, APD only has rules in place that authorize this service to the extent that it can be approved on a thirty-day emergency basis - - i.e., as acute health crises develop and reappear over time.

22. Similarly, another young individual became extremely physically aggressive at home. As a result, he cannot return home. Intensive behavior residential habilitation was recommended as

the appropriate housing to address his behavior needs. This individual is currently assigned to Tier 3. Because of the spending limitation of Tier 3, he cannot receive the needed intensive behavioral residential habilitation. Without sufficiently detailed tier rules in place, he cannot be reassigned and thus is only able to receive his necessary housing to the extent it can be approved on a thirty-day emergency basis - - i.e., as acute health crises develop and reappear over time.

23. Another specific example is an individual who recently had surgery. Her recovery for surgery is taking longer than expected. She cannot leave her home. She needs additional personal care assistance for this recovery period. Her health and safety are compromised without this additional service. However, her current tier assignment cannot accommodate this additional need. Without sufficiently detailed tier rules in place, she cannot be reassigned and thus can only get this additional service to the extent it can be approved on a thirty-day emergency basis - - i.e., as acute health crises develop and reappear over time. The inability to approve medically necessary services in the regular course of APD's operations threatens the health, safety and welfare of every one of the more than 20,000 individuals receiving services through the DD-HCBS Waiver who have been assigned to tiers with spending limitations, as required by Section 393.0661(3). As explained above, individuals within this vulnerable population experience changing needs, and the absence of sufficiently detailed tier rules in place leaves APD helpless to respond to those changes unless and until changes in circumstances attain emergency status. APD's inability to respond to changing circumstances for many members of this population endangers the health, welfare, and safety of every member of the population subject to limitations resulting from APD's implementation of Section 393.0661(3).

24. There is a danger to the public welfare related to the appropriations for the operation of the DD-HCBS Waiver services. APD has been charged by state law with the duty to implement the Medicaid Waiver agreement between the state and CMS on behalf of the federal government. APD was directed by the Legislature to "mak[e] any other adjustment necessary to comply with the availability of moneys and any limitations or directions provided for in the General Appropriations Act." Section 393.0661(7), F.S. Without sufficiently detailed tier rules the Agency cannot perform its statutory duties and its inability to act on any basis other than an emergency endangers the public welfare as described above.

25. Further, the lack of sufficiently detailed tier rules impedes the Agency's ability to make initial tier assignments and reassignments and restricts the population that can be served through the DD-HCBS Waiver. There are almost 19,000 persons who have been deemed eligible for DD-HCBS Waiver services but who are on a waiting list owing entirely to state budgetary constraints. Many of these individuals on the waiting list have critical service needs. The Emergency Rules, as amended today, are necessary to provide an adequate framework to impose spending limitations on clients who would be appropriately placed in tiers two, three, or four due to duplication of services or other criteria, with the resulting savings used to move individuals with critical needs from the waiting list into the DD-HCBS Waiver program.

26. There are almost 24,000 clients receiving services who were assigned tiers and have expenditure caps as required by the tiers. There are approximately 4,500 clients who do not have an effective tier assignment and there are additional clients who have been added to the waiver who have never been assigned to a tier. These clients are considered to be in a "to be

determined” category (“TBD”) and they are not subject to budget caps. Owing to that lack of a limitation, they consume resources disproportionately.

27. There is nothing unique about the clients in the TBD category which would make them differ in condition from the clients who have been assigned tiers. Of the nearly 24,000 clients who are in tiers, their average monthly waiver service expenses are \$2465 per client per month. These clients do have budget caps in line with the statutory tier system. The 4,518 clients who are in the TBD category do not have budget caps and are running expenses of \$3,592 per client per month. In November 2009, these TBD clients had combined waiver services expenses of over \$16 million for that month alone. Were these TBD clients to be assigned to tiers, and their service expenses to be similar to the average of clients currently in tiers, the projected difference would be a \$5 million savings each month. The result of every client in the TBD category having no budget cap is it creates a \$60 million a year expense exceeding APD’s appropriated budget. If that \$5 million a month overage can be properly reduced by APD being enabled to apply the tiers to these clients, there would be a material improvement in the budgetary situation which would allow APD to serve more individuals currently on the waitlist.

28. The legislature’s concern with the DD-HCBS waiver has been to maintain the program within its yearly appropriation. That concern is reiterated throughout Chapter 393, F.S. Accordingly, provided there is budget capacity, APD will add clients from the waitlist to the group receiving services. By law there is a priority-system for adding clients from the waitlist, the first priority is clients in crisis who have been added on an ongoing basis as necessary when there was budgetary capacity within that year’s appropriation. The second priority, those who would directly benefit from an expansion, are children in the state’s child welfare system. Section 393.065(5), F.S. Children who are developmentally challenged and who have suffered from neglect or abuse would directly benefit from being enabled to receive services under the DD-HCBS program. There are approximately 250 children in this category, based upon the general trends and availability of other Medicaid state programs, these children likely would be placed in tier four which has average expenditures of roughly \$10,000 per client per year. If capacity of approximately \$2,500,000 were available these children could be added and receiving DD-HCBS services. It is an imperative to implement the tiers to control the budget to enable APD to serve these children.

29. The concept of this Medicaid Waiver is that it is to supply services which are not available from any other source or which could be paid for by any other source, including other state Medicaid programs. Clients are required to access available supports and services from other sources, including Medicaid state plan and other federal, state and local programs as well as natural and community supports. This funding restriction is part of the reason why the Legislature chose to implement the tier system with its budget caps. Everyone does not get everything which may be determined as “medically necessary” so that more people may get some benefit from the Waiver services. The current situation is that the few who have unrestrained budgets are effectively foreclosing the opportunity of many who are on the Waitlist from obtaining some services.

30. This projected cost savings to broaden the population the Agency could serve through the DD-HCBS Waiver program was one of the Legislature’s principal goals in amending section

393.0661 and creating the tier system. Section 393.0661, F.S. Without sufficiently detailed tier rules in place, the Agency lacks the ability to realize this legislative goal.

31. In summary, the Legislature has appropriated a finite pool of funds for delivery of services through the DD-HCBS Waiver program in the 2009/2010 fiscal year. Individuals currently on the waiting list cannot be moved into the waiver program as long as this finite appropriation is being exhausted by existing clients. The clients in the TBD category are creating a material deficit. Accordingly, the Emergency Rules as amended are of critical importance to the health, safety, and welfare of any individual currently on the waiting list who can be moved into the DD-HCBS Waiver program as a result of spending limitations imposed on these existing clients due to tier assignment or reassignment.

32. The legislature has directed APD to act as necessary to restrict the waiver program's expenses to stay within its appropriated budget. Specifically, APD is required under Section 393.0661, F.S. (*e.s.*):

(7) Nothing in this section or in any administrative rule shall be construed to prevent or limit the Agency for Health Care Administration, in consultation with the Agency for Persons with Disabilities, from adjusting fees, reimbursement rates, lengths of stay, number of visits, or number of services, or from limiting enrollment, or making any other adjustment necessary **to comply with the availability of moneys and any limitations or directions provided for in the General Appropriations Act.**

(8) ... If at any time an analysis by the agency, in consultation with the Agency for Health Care Administration, indicates that **the cost of services is expected to exceed the amount appropriated**, the agency shall submit a plan in accordance with subsection (7) to the Executive Office of the Governor, the chair of the Senate Ways and Means Committee or its successor, and the chair of the House Fiscal Council or its successor **to remain within the amount appropriated**. The agency shall work with the Agency for Health Care Administration to implement the plan **so as to remain within the appropriation**.

33. The Florida Constitution requires that APD cannot exceed its budgeted appropriation. Article VII, Section I, Fla. Const. Additionally, the statute directs and requires APD to take any action necessary to ensure the DD-HCBS program serves clients. To stay within the limits of its legislative appropriation, APD could reduce provider rates, but the unintended consequence could be a loss of providers and thus an interruption in services for clients. APD could institute across the board client services budget cuts, it could target particular services to reduce or eliminate. However, the legislative directive is to provide support as possible to as many people as possible under the DD-HCBS appropriation. It was not designed to provide a few with virtually unlimited services while a sizeable eligible population receives none.

34. Absent the ability to implement the four-tiered waiver system, the State of Florida may have to provide institutional beds for thousands of individuals. As provided above, all of the 19,000 individuals of the waitlist meet a level of need qualifying them for placement in a nursing home. That individuals with developmental disabilities who have needs which could be met through diversion are nonetheless institutionalized contravenes the Legislative intent of Chapter 393, F.S.:

393.62 Legislative findings and declaration of intent.--The Legislature finds and declares that existing state programs for the treatment of individuals with developmental disabilities, which often unnecessarily place clients in institutions, are unreasonably costly, are ineffective in bringing the individual client to his or her maximum potential, and are in fact debilitating to many clients. A re-direction in state treatment programs for individuals with developmental disabilities is necessary if any significant amelioration of the problems faced by such individuals is ever to take place. Such redirection should place primary emphasis on programs that prevent or reduce the severity of developmental disabilities. Further, the greatest priority shall be given to the development and implementation of community-based services that will enable individuals with developmental disabilities to achieve their greatest potential for independent and productive living, enable them to live in their own homes or in residences located in their own communities, and permit them to be diverted or removed from unnecessary institutional placements. . .

For the reasons stated above, the Agency finds that an immediate danger to the public health, safety, and welfare exists and requires immediate action.

STATEMENT OF REASONS PROCEDURE USED IS FAIR UNDER THE CIRCUMSTANCES

1. The emergency action taken by the Agency on November 16, 2009 amended only those portions of rule specifically addressed by the *Moreland* case.
2. The emergency rules as amended today take only the action necessary to ensure that necessary services may be authorized to protect the vulnerable individuals with developmental disabilities served by the Agency, and to increase the availability of services to vulnerable individuals with developmental disabilities not presently served by the Agency, within existing resources, as mandated by the Legislature.
3. These emergency rules include only those changes necessary to address the *Moreland* decision, and those changes necessary to make effective tier assignments or reassignments.
4. Any client who will be assigned or reassigned to a tier as a result of further agency action implementing these emergency rules will be accorded direct notice and an opportunity for a

hearing meeting the requirements of chapter 120, Florida Statutes, Title 42 Part 431 of the Code of Federal Regulations, and other applicable state and federal law.

5. The emergency rules as adopted will be effective only until February 14, 2010 and will not be renewed, except during the pendency of a challenge to proposed rules addressing the subject of the emergency rules.