

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION

JOANNA DYKES, et al.

Plaintiffs,

v.

Case No.4:11-CV-116-RS-CAS

ELIZABETH DUDEK, et al.

Defendants.

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**DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT  
OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

The Defendants, Elizabeth Dudek, in her official capacity as Secretary of the Agency for Health Care Administration (AHCA), and Michael Hansen, in his official capacity as Director of the Florida Agency for Persons with Disabilities (APD), by and through undersigned counsel, file this Statement of Undisputed Material Facts In Support of Defendants' Motion for Summary Judgment pursuant to Rule 56.1 of the Local Rules for the United States District Court for the Northern District of Florida.

**UNDISPUTED MATERIAL FACTS**

1. Plaintiff Michelle Congden was enrolled on the DD Waiver<sup>1</sup> through the Crisis Rule<sup>2</sup> (Rules 65G-1.046 and 65G-1.047, Florida Administrative Code) and is currently enrolled on the DD Waiver. (Exhibit A).

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<sup>1</sup> In this Statement of Undisputed Material Facts, the term "DD Waiver" or "Waiver" will refer collectively to all the Home and Community Based Services Medicaid Waivers administered by APD. APD currently administers five waivers: Tier 1, Tier 2, Tier 3, Tier 4 and iBudget Florida. Sections 393.0661(3) and 393.0662 Fla. Stat. Florida is currently in the process of transitioning all waiver clients from the Tier waivers to iBudget Florida.

2. Plaintiff Michelle Congden was determined to be in crisis by APD on the basis that she was a danger to herself or others. (Exhibit A).
3. Plaintiff Joanna Dykes was enrolled on the DD Waiver from an Intermediate Care Facility for the Developmentally Disabled (ICF/DD) through the authority provided to AHCA and APD in the proviso language of Laws of Florida 2011-69, Specific Appropriation 206. (Exhibit B).
4. Plaintiff Loretta Davis was enrolled on the DD Waiver from an Intermediate Care Facility for the Developmentally Disabled (ICF/DD) through the authority provided to AHCA and APD in the proviso language of Laws of Florida 2011-69, Specific Appropriation 206. (Exhibit B).
5. APD, in consultation with AHCA, has developed and implemented a plan to move all eligible individuals currently residing in ICF/DDs to the DD Waiver by the end of Fiscal Year 2012/2013. To date, APD has identified 14 eligible individuals who wish to move. APD has so far transferred 3 of them, including Plaintiffs Dykes and Davis. APD plans to transition the remaining eligible individuals who wish to move before June 30, 2013. (Exhibit C).
6. APD has never failed to provide services to, or assist with acquiring services for, a person determined to be in “crisis” according to the Crisis Rule. (Exhibit D).
7. The majority of individuals enrolled on the DD Waiver remain on the Waiver for the duration of their lives. (Exhibit D).

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<sup>2</sup> In this Statement of Undisputed Material Facts, the term “Crisis Rule” will refer to Rules 65G-1.046 and 65G-1.047, Florida Administrative Code.

8. There are no vacancies on the DD Waiver except for those persons deemed to be in crisis according to the Crisis Rule, foster children turning eighteen (18) years of age, and persons ordered on to the DD Waiver by a court. (Exhibit E).
9. In 2011, the Florida Legislature provided AHCA for Fiscal Year 2011/2012 an administrative mechanism to move to the DD waiver any eligible individuals residing in ICF/DDs and transfer the associated funds to APD's appropriation for the DD Waiver. Laws of Florida 2011-69, Specific Appropriation 206.
10. In 2012, the Florida Legislature provided AHCA for Fiscal Year 2012/2013 an administrative mechanism to move to the DD waiver any eligible individuals residing in ICF/DDs and transfer the associated funds to APD's appropriation for the DD Waiver. Laws of Florida 2012-118, Specific Appropriation 222.
11. In each of the DD Waivers, except for the Tier 4 Waiver, Appendix B-3, Section f. is titled "Selection of Entrants on the Waiver" and describes the process by which vacancies are determined on these waivers. (Exhibits I and J). It provides in relevant part:

When the level of funding appropriated by the Florida Legislature provides funding for additional vacancies on the waiver, individuals shall be added to the waiver in the following order unless otherwise specified in the Appropriations Act for the current fiscal year.

1. Individuals determined by assessment using the Crisis Identification Tool to be in crisis shall have first priority for services.
2. Individuals with valid Court Orders or diversions from programs for persons adjudged incompetent to stand trial.
3. Children on the wait list who are from the child welfare system with an open case in the Department of Children and Family Services' statewide automated child welfare information system.

4. All other individuals shall be considered for enrollment on the waiver in the date order in which they are listed on the statewide waitlist, beginning with the earliest dates.<sup>3</sup>
12. In the Tier 4 Waiver, Appendix B-3, Section f. is titled "Selection of Entrants on the Waiver" and describes the process by which vacancies are determined on the Tier 4 Waiver. (Exhibits I and J). It provides in relevant part:

In accordance with legislative language, individuals on the waiting list may be enrolled on the FSL Waiver through Crisis determination due to funding limitations.
13. Amanda Pivinski has not applied for enrollment on the DD Waiver through the Crisis Rule. Amanda Pivinski's Response to Interrogatories (Exhibit F), Answer #4.
14. Amanda Pivinski is not able to specify a time when her caregivers are expected to no longer be able or willing to care for her. Amanda Pivinski's Response to Interrogatories (Exhibit F), Answer #14.
15. Amanda Pivinski intends to apply for crisis enrollment on the DD Waiver when her caregivers are no longer available or expected to be unavailable to care for her. Amanda Pivinski's Response to Interrogatories (Exhibit F), Answer #15.
16. Joshua Woodward has not applied for enrollment on the DD Waiver through the Crisis Rule. Joshua Woodward's Response to Interrogatories (Exhibit G), Answer #3.
17. Joshua Woodward is not able to specify a time when his caregivers are expected to no longer be able or willing to care for him. Joshua Woodward's Response to Interrogatories (Exhibit G), Answer #13.

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<sup>3</sup> This procedure has since been modified by the Waitlist Priority Schedule provided by Section 393.065, Florida Statutes.

18. Joshua Woodward intends to apply for crisis enrollment on the DD Waiver when his caregivers are no longer available or expected to be unavailable to care for him. Joshua Woodward's Response to Interrogatories (Exhibit G), Answer #14.
19. AHCA has the authority to transfer funds from the Medicaid nursing home line item appropriation to the several home and community-based waivers which are based upon a nursing facility level of care, including the Aged and Disabled Adult Waiver, "to transition the greatest number of appropriate eligible beneficiaries from skilled nursing facilities to community-based alternatives in order to maximize the reduction in Medicaid nursing home occupancy." Chapter 2011-69, Laws of Florida, Specific Appropriation 208.
20. Heather Young resides in a nursing home. Amended Complaint, ¶ 43.
21. To be eligible for the Aged and Disabled Adult Waiver, one must be eligible for a nursing facility level of care. Florida Medicaid Aged and Disabled Adult Waiver Service Coverage and Limitations Handbook ("A/DA Handbook"), at 2-2 – 203, incorporated by reference in Rule 59G-13.030, Florida Administrative Code.
22. Heather Young meets the eligibility requirements for the Aged and Disabled Adult Waiver because she resides in a nursing home and therefore qualifies to meet a nursing facility level of care. See 20 and 21 above.
23. AS of September 9, 2011, Heather Young was not receiving any behavioral health services in the nursing home. Heather Young's Response to Interrogatories (Exhibit H), Answer #14.

Respectfully submitted this 2nd day of May 2012.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by the Notice of Electronic Filing, and was electronically filed with the Clerk of the Court via the CM/ECF system, which generates a notice of the filing to all attorneys of record, on this the 2nd day of May 2012.

/s/ Marc Ito

Marc Ito