

Section IV Emergency Rules

AGENCY FOR HEALTH CARE ADMINISTRATION

Medicaid

RULE NOS.:	RULE TITLES:
59GER11-1	Developmental Disabilities Waiver Provider Rate Table
59GER11-2	Developmental Disabilities Waiver Services Procedure Codes
59GER11-3	Developmental Disabilities Waiver Residential Habilitation Services in a Licensed Facility Provider Rate Table
59GER11-4	Family and Supported Living Waiver Provider Rate Table
59GER11-5	Family and Supported Living Waiver Services Procedure Codes

SPECIFIC REASONS FOR FINDING AN IMMEDIATE DANGER TO THE PUBLIC HEALTH, SAFETY OR WELFARE: The Secretary of the Agency for Health Care Administration, after consultation with the Agency for Persons with Disabilities, hereby issues the following statement of facts and reasons, pursuant to Section 120.54(4)(a)3., Florida Statutes, in support of a finding that Emergency Rules 59GER11-1, 2, 3, 4, and 5 are justified by an immediate danger to the public health, safety, and welfare.

1. The Agency for Health Care Administration (“AHCA”) is the “single state agency” responsible for the administration of the Florida Medicaid program. Section 409.902, Fla. Stat.; 42 U.S.C. §1396a(a)(5). As the single state agency, AHCA has the authority to make rules, regulations, and policies that it follows in administering the state’s Medicaid program. §409.919, Fla. Stat; 42 U.S.C. §431.10(b)(2). No other state agency has the “authority to change or disapprove any administrative decision of [AHCA], or otherwise substitute its judgment for that of the Medicaid agency with respect to application of policies, rules, and regulations issued by the Medicaid agency.” 42 C.F.R. §431.10(e)(3).

2. The Agency for Persons with Disabilities (“APD”) is responsible for the administration of the Developmental Disabilities Home and Community Based Medicaid Waiver programs (the “waiver”). §393.0661, Fla. Stat. APD’s waiver serves over 30,000 people with developmental disabilities, which Florida law defines as persons diagnosed with intellectual disability (formerly known as mental retardation), cerebral palsy, autism, spinal bifida, or Prader-Willi syndrome. §393.063(9), Fla. Stat.

3. Section 393.062, Florida Statutes, provides that it is the intent of the Legislature that persons with developmental disabilities, when possible, remain in the community and out of institutions. APD’s waiver provides individuals with an opportunity to remain at home or in other non-institutional

community settings by funding a variety of home and community-based health-care and allied services, including but not limited to personal care assistance, nursing services, occupational therapy, physical therapy, speech therapy, in-home supports, adult day training, transportation, residential habilitation, and support coordination. Continued receipt of these services is necessary to ensure the health, safety, and welfare of persons enrolled in the waiver.

4. The developmentally disabled persons who receive waiver services are vulnerable, and in some cases, need the services because they pose a danger to themselves and/or others if left unserved and/or unattended.

5. APD has entered into voluntary contracts with service providers (“waiver providers”) to furnish health-care services and allied care to persons enrolled in the waiver. The contract that waiver providers enter into with APD includes the following clause:

The Provider agrees: ... [t]o accept payment for goods and services at rates periodically established by AHCA and APD. The most current rates are available on the APD website: www.apd.myflorida.com/providers. The signatories recognize that APD is limited by appropriation and acknowledge that Florida law requires AHCA and APD to make any adjustment necessary to comply with the availability of moneys and any limitations or directions provided for in the General Appropriations Act, including but not limited to adjusting fees, reimbursement rates, lengths of stay, number of visits, or number of services, or limiting enrollment.

6. AHCA establishes the reimbursement rates paid to waiver providers by rule. Fla. Admin. Code R. 59G-13.081, 82, 84, 91 and 92.

7. The Legislature appropriated funding for the waiver totaling \$805,826,618 for the state fiscal year starting July 1, 2010. APD, however, has expended roughly \$77,500,000 per month during the state fiscal year, and at that pace is projected to expend \$980,000,000 during the fiscal year-for a total budget overrun of approximately \$174,000,000. Accordingly, APD is projected to exceed its appropriation on or about May 12, 2011. See Report of the Chief Inspector General, Executive Office of the Governor (March 31, 2011) (attached hereto as Ex. I).

APD has taken steps across several appropriations cycles to reduce expenditures in the waiver program. These include: revision of service-level tier caps by 2.5% (estimated to provide cost avoidance of \$70,731,120); cost-plan rebasing effective January 31, 2011 (estimated to avoid \$5,000,000 in current-year expenditures); consolidation of durable medical equipment services (projected to save \$932,093 in current-year expenditures). These actions, however, have not realized the savings that were originally anticipated, particularly because of (i) protracted litigation over the implementation of the tier caps and (ii) the automatic stay that issues upon a request for a hearing by a waiver client who alleges that he or she has been negatively affected by agency action. Moreover, projected

actual expenditures for this fiscal year exceed previous expected expenditures because the dollar amount of APD client cost plans increased between FY 09/10 and FY 10/11 at a rate greater than the rate of increase between FY 08/09 and FY 09/10 (due to findings of medical necessity for additional services for APD clients). From FY 08/09 to FY 09/10, client cost plans increased by \$28.819 million, or 2.7%. From FY 09/10 to FY 10/11 (to date), client cost plans increased by \$45.904 million, or 4.2%.

8. Florida law prohibits APD from authorizing expenditures in excess of its appropriation: “[n]o agency or branch of state government shall contract to spend, or enter into any agreement to spend, any monies in excess of the amount appropriated to such agency or branch unless specifically authorized by law, and any contract or agreement in violation of this chapter shall be null and void.” §216.311, Fla. Stat. See also art. VII, § 1(c), Fla. Const. (“No money shall be drawn from the treasury except in pursuance of appropriation made by law.”).

While APD has had projected appropriations overruns in past fiscal years, the FY 10/11 projected overrun is several orders of magnitude greater than any past projection. In past years, APD has been able to address projected overruns through various reallocations of resources and other temporary measures that did not require emergency action. As discussed below, this fiscal year APD is again utilizing some of these measures to help reduce the projected overrun. But given the magnitude of this year’s projected overrun, further steps – namely, these Emergency Rules – are necessary.

9. APD authorizes individual services for clients through the Allocation Budget and Control data system (the “ABC” data system”). Individual service authorizations in the ABC data system are used by waiver providers to bill Medicaid for services rendered to APD clients. Because APD’s expenditures will be in excess of its appropriation on or about May 12, 2011, APD will, as of that date, lack the authority, pursuant to Section 216.311, Florida Statutes, to authorize payment, through the ABC data system, for any services provided subsequent to that date.

10. If providers cannot receive payment for any services provided, it is likely they will cease providing those services. Cessation of services to APD clients will endanger their health, safety, and welfare, and may cause permanent and irreparable injury to these persons.

11. This emergency, if left unaddressed, will result in a grave situation: either the developmentally disabled will lose access to essential health care and allied services entirely, or they will be forced en masse to search for new providers when their prior providers refuse to continue providing services without compensation. This emergency will continue through June 30, 2011, after which the new state fiscal year begins and APD has an appropriation from the Legislature for the new fiscal year.

12. AHCA therefore deems APD’s impending budget overrun to pose an immediate danger to a vulnerable population of Florida citizens. This immediate danger justifies the issuance of emergency rules to address the situation.

13. Indeed, Section 393.0661 (7), Florida Statutes, states that: [n]othing 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... reimbursement rates...or making any other adjustment necessary to comply with the availability of moneys and any limitations or directions provided in the General Appropriations Act.

§393.0661(7), Fla. Stat. The Legislature has directed that, “[i]f at any time an analysis by the [APD], in consultation with [AHCA], indicates that the cost of services is expected to exceed the amount appropriated, the [APD] 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 to remain with the amount appropriated. The [APD] shall work with [AHCA] to implement the plan so as to remain within the appropriation.” §393.0661(8), Fla. Stat.

14. APD, in consultation with AHCA, has now completed the analysis required by Section 393.0661(7), Florida Statutes. Furthermore, the Executive Office of the Governor took decisive action by ordering an audit of APD. The Office of the Chief Inspector General issued its report on the audit on March 31, 2011. See Ex. 1. This audit recognizes a far more serious budget shortfall than previously calculated, and confirms the need for immediate emergency action.

15. In determining how to resolve this emergency, AHCA concluded that it must maintain essential services to the developmentally disabled to protect their health, safety, and welfare, and to protect the public. Accordingly, AHCA has concluded that this emergency should not be addressed by a cut in the waiver service package available to developmentally disabled persons. AHCA has also concluded that it should address this emergency in a manner that minimizes the potential diminution of service providers due to the decrease in compensation.

16. To achieve these goals, AHCA therefore has concluded that it must reduce reimbursement rates to waiver providers by 15% across the board, and that this reduction should remain in effect through June 30, 2011, after which the new state fiscal year begins. AHCA has also concluded that the rate differential between solo and agency providers must be eliminated.

Elimination of the rate differential between independent and agency (usually large, for-profit or 501 (c) corporations) providers will result in cost savings of approximately \$3 million for the three remaining months of the fiscal year. AHCA and APD believe that paying a single, uniform rate for a single defined service is fairer than paying disparate rates for the same service based upon the corporate structure of the

provider. This change will not negatively impact the smallest “Mom & Pop” providers, who have the least financial capacity to absorb a rate reduction. Moreover, synergies in operating a large agency should provide economies of scale to reduce the cost of service to larger providers, making the differential unnecessary.

17. Section 120.54(4)(a)3., Florida Statutes, requires that an agency, in addressing an immediate danger through emergency rulemaking, “take only that action necessary to protect the public interest.” These emergency rules are so tailored.

18. First, the emergency rules are only one element of a larger plan to reduce expenditures for the remainder of this fiscal year.

No changes to cost plans for additional services through Prior Service Authorizations or annual reviews will be made without review and approval of the Agency Director. In the case of an emergency affecting an individual’s health and safety, APD will review a request for additional services using the criteria applied to crisis determinations. Additionally, APD is preparing a budget amendment to file with the Legislative Budget Committee to transfer certain monies in the APD’s appropriation to waiver funds.

19. Second, the rate changes are specifically tailored to keep APD within its budgetary appropriation for the state fiscal year, and will not result in a budgetary surplus for APD. In other words, AHCA is not reducing reimbursement rates by an amount greater than necessary to bring the projected appropriation overrun to within a reasonable probability of achieving budget neutrality.

20. Third, the emergency rate cut is temporary and only affects three months of this fiscal year, meaning that, on an annualized basis, it amounts to less than a 4% rate cut for FY 10/11. Moreover, the waiver providers can – and – many of them do – provide services to non-waiver clients, and this means that the providers have other payers contributing to their revenue stream.

Take, for example, a waiver provider who only earns 25% of its revenue from services rendered via the waiver, with the rest of the provider’s revenue coming from private-insurance patients, Medicare patients, or non-waiver Medicaid patients. Because these Emergency Rules do not affect the reimbursement rate offered by any of these other revenue sources, this provider will experience less than a 1% rate cut on an annualized basis as a result of these Emergency Rules.

21. Fourth, these Emergency Rules – in conjunction with other actions taken by APD to address the projected budget overrun – ensure that no individual will be removed from the waiver program, nor will any services be suspended, terminated, or reduced. Instead, in accordance with the Legislature’s objective of ensuring continued service to a vulnerable population of Florida citizens, the Emergency Rules make it possible for all individuals on the waiver to continue receiving their authorized services through the end of FY 10/11. Absent

adoption of these Emergency Rules and the other elements of APD’s plan, all waiver services will cease on or about May 12, 2011 – an imminent emergency that AHCA and APD cannot permit.

(The Executive Office of the Governor Office of the Chief Inspector General Review of the Home and Community-Based Care Waiver Program, March 31, 2011 and all materials incorporated by reference including rate tables, procedures codes, and maximum units of services are on file with the Department of State, Administrative Code and Weekly Section. Copies of all materials may be obtained directly from the Agency for Health Care Administration contact identified in this notice)

REASON FOR CONCLUDING THAT THE PROCEDURE IS FAIR UNDER THE CIRCUMSTANCES:

1. The Emergency Rules take only the actions necessary to ensure that essential services will be continuously provided for the remainder of the fiscal year to protect the vulnerable individuals with developmental disabilities served by the Agency for Persons with Disabilities (“APD”), as mandated by the Legislature.

2. The Emergency Rules include only those actions necessary to bring APD’s costs down to accommodate its current appropriation.

3. No individual will be removed from the waiver program, nor will any services be suspended, terminated, or reduced, as a result of the Emergency Rules. Instead, in accordance with the Legislature’s objective, the Emergency Rules will be used to ensure all individuals on the waiver can continue to receive their current authorized services through the end of FY 2010/11.

4. Every waiver provider has entered into a contract with APD. Waiver-service providers supply services to clients according to this contract.

5. Every contract between a waiver service provider and APD contains the following clause:

The Provider agrees: ... [t]o accept payment for goods and services at rates periodically established by [the Agency for Healthcare Administration “AHCA”] and APD. The most current rates are available on APD web site: www.apd.myflorida.com/providers. The signatories recognize that APD is limited by appropriation and acknowledge that Florida law requires AHCA and APD to make any adjustment necessary to comply with the availability of moneys and any limitations or directions provided for in the General Appropriations Act, including but not limited to adjusting fees, reimbursement rates, lengths of stay, number of visits, or number of services, or limiting enrollment.

6. Waiver providers voluntarily entered into their contracts with APD and have acknowledged in each contract that the Agency for Health Care Administration and APD may make adjustments to rates to comply with the availability of monies.

7. AHCA and APD have acted expeditiously to address the emergency described in the Statement of Specific Facts and Reasons for Finding an Immediate Danger to Public Health, Safety, or Welfare, and have afforded fair notice and process to interested parties.

8. Prior to February 2011, APD reported a projected deficit for FY 2010/11 to be between \$30 and \$40 million. A fiscal year deficit in the \$30 to \$40 million range could have been addressed by APD without the need for emergency action, and had been so addressed in previous fiscal years.

9. A subsequent audit of APD's financial position revealed that APD was facing a much larger deficit than had been previously reported. On February 22, 2011, Governor Scott announced in a press conference that APD's projected deficit was at least \$100 million and called on the Office of the Chief Inspector General (the "CIG") to conduct a comprehensive investigation of the agency's finances to determine the true extent of the projected deficit. The CIG report, released on March 31, 2011 ultimately concluded that APD's FY 2010/11 deficit is greater than \$170 million.

10. Subsequent to the Governor's public announcement of APD's current-year fiscal crisis, APD and the Governor's staff have met with provider groups, family members, and advocates for the disability community to discuss the seriousness of APD's financial condition and the need to reduce spending on waiver services.

11. Several provider groups have provided APD and Governor's office personnel with recommendations to reduce waiver spending for FY 2010/11 and FY 2011/12.

12. On March 16, 2011, APD and AHCA received and considered a plan from the Florida Association of Rehabilitation Facilities ("FARF"), a trade organization that represents many waiver-service providers. This plan outlined FARF's recommendations on how to solve the problems created by the budget shortfall.

13. On March 24, 2011, APD conducted a meeting and conference call with the waiver service providers, including waiver-support coordinators who represent the interests of APD clients. During this meeting APD received input from the waiver-service providers, including waiver-support coordinators, on how best to solve the problems created by the budget shortfall. AHCA considered the input from the waiver-service providers and waiver-support coordinators in the promulgation of these Emergency Rules.

14. Except as required by Section 120.54, Florida Statutes, the Emergency Rules are not intended to remove, nor do they remove, any procedural rights required by the Due Process Clause of the United States Constitution, the United States Code, the Code of Federal Regulations, or Chapter 120, Florida Statutes.

15. The procedure used in the Emergency Rules is fair under the circumstances because each waiver-service provider acknowledged at the outset of its relationship with APD that

AHCA or APD may make adjustments to reimbursement rates to comply with availability of monies, because APD conducted a meeting to gather input from waiver service providers and waiver-support coordinators on the issue of the budget shortfall, because APD received and considered a plan submitted by a trade group that represents many of the waiver-service providers, and because the Emergency Rules do not remove any procedural safeguards otherwise available to waiver-service providers except as provided by Section 120.54, Florida Statutes.

16. The Emergency Rules as adopted will be effective only through June 30, 2011, and will not be renewed.

SUMMARY: Rule 59GER11-1, incorporates by reference the Developmental Disabilities Home and Community-Based Services Waiver Provider Rate Table April 1, 2011; Rule 59GER11-2, incorporates by reference the Developmental Disabilities Home and Community-Based Services Waiver Procedure Codes and Maximum Units of Service, April 1, 2011; Rule 59GER11-3, incorporates by reference the Developmental Disabilities Waiver Residential Habilitation Services in a Licensed Facility Provider Rate Table, April 1, 2011; Rule 59GER11-4, incorporates by reference the Family and Supported Living Waiver Provider Rate Table, April 1, 2011; Rule 59GER11-5, incorporates by reference the Family and Supported Living Home and Community-Based Services Waiver Procedure Codes and Maximum Units of Service, April 1, 2011. These rules will protect the public health, safety, and welfare by making necessary reductions to Medicaid waiver service provider rates and thereby assuring that program expenditures remain within legislative appropriations for FY 2010/2011. The rules will allow waiver clients to continue receiving waiver services for the remainder of the FY 2010/2011, from April 1, 2011 – June 30, 2011, through continued implementation and administration of the Home and Community-Based Services Waiver, pursuant to Chapter 393, Florida Statutes.

THE PERSON TO BE CONTACTED REGARDING THE EMERGENCY RULES IS: Leigh Meadows, Medicaid Services, 2727 Mahan Drive, Mail Stop 20, Tallahassee, Florida 32308-5407, telephone: (850)412-4258, e-mail: leigh.meadows@ahca.myflorida.com

THE FULL TEXT OF THE EMERGENCY RULES IS:

59GER11-1 Developmental Disabilities Waiver Provider Rate Table.

(1) This rule applies to all developmental disabilities waiver services providers enrolled in the Medicaid program. This rule is effective from April 1, 2011 through June 30, 2011.

(2) All developmental disabilities waiver services providers enrolled in the Medicaid program must be in compliance with the Developmental Disabilities Home and Community-Based Services Waiver Provider Rate Table, April 1, 2011, which is incorporated by reference. The rate table is

available from the Medicaid fiscal agent's Web Portal at <http://mymedicaid-florida.com>. Click on Public Information for Providers, then on Provider Support, and then on Fee Schedules. Paper copies of the rate table may be obtained from the Agency for Health Care Administration, Bureau of Medicaid Services, 2727 Mahan Drive, M.S. 20, Tallahassee, Florida 32308.

Rulemaking Authority 409.919 FS. Law Implemented 393.0661, 409.906, 409.908 FS. History—New 4-1-11.

59GER11-2 Developmental Disabilities Waiver Services Procedure Codes.

(1) This rule applies to all developmental disabilities waiver services providers enrolled in the Medicaid program. This rule is effective from April 1, 2011 through June 30, 2011.

(2) All developmental disabilities waiver services providers enrolled in the Medicaid program must be in compliance with the Developmental Disabilities Home and Community-Based Services Waiver Procedure Codes and Maximum Units of Service, April 1, 2011, which is incorporated by reference. The Developmental Disabilities Home and Community-Based Services Waiver Procedure Codes and Maximum Units of Service is available from the Medicaid fiscal agent Web Portal at <http://mymedicaid-florida.com>. Click on Public Information for Providers, then on Provider Support, and then on Fee Schedules.

Rulemaking Authority 409.919 FS. Law Implemented 393.0661, 409.906, 409.908 FS. History—New 4-1-11.

59GER11-3 Developmental Disabilities Waiver Residential Habilitation Services in a Licensed Facility Provider Rate Table.

(1) This rule applies to all developmental disabilities waiver services providers enrolled in the Medicaid program. This rule is effective from April 1, 2011 through June 30, 2011.

(2) All developmental disabilities waiver services providers enrolled in the Medicaid program must be in compliance with the Developmental Disabilities Waiver Residential Habilitation Services in a Licensed Facility Provider Rate Table, April 1, 2011, which is incorporated by reference. The rate table is available from the Medicaid fiscal agent's Web Portal at <http://mymedicaid-florida.com>. Click on Public Information for Providers, then on Provider Support, and then on Fee Schedules. Paper copies of the rate table may be obtained from the Agency for Health Care Administration, Bureau of Medicaid Services, 2727 Mahan Drive, M.S. 20, Tallahassee, Florida 32308.

Rulemaking Authority 409.919 FS. Law Implemented 393.0661, 409.906, 409.908 FS. History—New 4-1-11.

59GER11-4 Family and Supported Living Waiver Provider Rate Table.

(1) This rule applies to all family and supported living waiver services providers enrolled in the Medicaid program. This rule is effective from April 1, 2011 through June 30, 2011.

(2) All family and supported living waiver services providers enrolled in the Medicaid program must be in compliance with the Family and Supported Living Waiver Provider Rate Table, April 1, 2011, which is incorporated by reference. The rate table is available from the Medicaid fiscal agent's website at <http://mymedicaid-florida.com>. Click on Provider Support, and then on Fee Schedules.

Rulemaking Authority 409.919 FS. Law Implemented 393.0661, 409.906, 409.908 FS. History—New 4-1-11.

59GER11-5 Family and Supported Living Waiver Services Procedure Codes.

(1) This rule applies to all family and supported living waiver services providers enrolled in the Medicaid program. This rule is effective from April 1, 2011 through June 30, 2011.

(2) All family and supported living waiver services providers enrolled in the Medicaid program must be in compliance with the Family and Supported Living Home and Community-Based Services Waiver Procedure Codes and Maximum Units of Service April 1, 2011, which is incorporated by reference. The Family and Supported Living Home and Community-Based Services Waiver Procedure Codes and Maximum Units of Service is available from the Medicaid fiscal agent's website at <http://floridamedicaid.acs-inc.com>. Click on Provider Support, and then on fees.

Rulemaking Authority 409.919 FS. Law Implemented 393.0661, 409.906, 409.908 FS. History—New 4-1-11.

THIS RULE TAKES EFFECT UPON BEING FILED WITH THE DEPARTMENT OF STATE UNLESS A LATER TIME AND DATE IS SPECIFIED IN THE RULE.

EFFECTIVE DATE: April 1, 2011

Section V Petitions and Dispositions Regarding Rule Variance or Waiver

WATER MANAGEMENT DISTRICTS

NOTICE IS HEREBY GIVEN that on March 25, 2011, the South Florida Water Management District (District), received a petition for waiver, amending a previous petition filed on March 7, 2011, from Florida Department of Transportation, Application No. 11-0307-2, for utilization of Works or Lands of the District known as the C-2 Canal, for installation of a concrete shared use path, safety railing, retaining wall, light poles, signs, landscaping and bank stabilization/revetment