FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-3807

D.S.,

Appellant,

v.

AGENCY FOR PERSONS WITH DISABILITIES,

Appellee.

On appeal from the Department of Children and Families Office of Appeal Hearings.
Ashanti Jones, Hearing Officer.

November 16, 2020

PER CURIAM.

D.S. is eligible for services under the provisions of the Home and Community Based Medicaid Waiver Program for persons with developmental disabilities. *See* §§ 393.0661 & 393.0662, Fla. Stat. (2019). He was placed on a waiting list for services when he was three years of age. When D.S. turned thirteen, his parents applied on his behalf for crisis waiver enrollment—which would have prioritized him for available waiver placements ahead of other applicants—but their application was denied by the Agency for Persons with Disabilities, which is charged with oversight of the program. § 393.063(2), Fla. Stat. (2019). An appeal to the Office of Appeal Hearings, Department of Children and Families, resulted

in an evidentiary hearing and a final order affirming the denial. This appeal followed.

The hearing officer ultimately found that D.S. did not establish the crisis waiver criteria in any of the three "priority" categories set forth in Florida Administrative Code Rule 65G-1.047(4), (5), and (6). But at the start, the hearing officer made an especially critical finding of fact: D.S.'s "primary diagnosis is Autism." On the contrary, the record established that D.S. was diagnosed with spastic quadriplegic cerebral palsy and mitochondrial cytopathy, along with profound motor and developmental delays. There is no record support whatsoever for a finding that D.S. was diagnosed with autism. Yet, based on the evidence presented, the consequence of that finding was momentous. A diagnosis of autism was a gamechanger when it came to services available to D.S. The family's insurance plan expressly excluded from coverage expenses for "Applied Behavioral Analysis (ABA) therapy when [the] diagnosis is *other* than autism." (Emphasis added). On the other hand, a multitude of services were available to the family under their plan if D.S. fell within the autism spectrum of disorders. By finding that D.S was autistic, the hearing officer was free to conclude that no evidence had been presented showing any behavioral services had been denied by the family's insurer, only that they had not attempted to access said services. With potential private support sources available to him, D.S. would be ineligible for crisis waiver enrollment under the rule.

As the hearing officer's action depended on a finding of fact not based on competent, substantial evidence, we must set aside the final order and remand the case to the Office of Appeal Hearings, Department of Children and Families, for further proceedings consistent with this opinion. *See* § 120.68(7)(b), Fla. Stat. (2019); *see also Kennedy v. Agency for Health Care Admin.*, 954 So. 2d 710, 711 (Fla. 1st DCA 2007) (holding that this court reviews an agency's order "under the competent, substantial

evidence standard" and may set aside the order "when it is based on a fact not supported by competent, substantial evidence").*

REVERSED and REMANDED.

RAY, C.J., and JAY and LONG, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Rachel Siegel-McLaughlin of Disability Rights Florida, Tallahassee, for Appellant.

Cecilie Dale Sykes of Agency for Persons with Disabilities, Tallahassee, for Appellee.

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* Our disposition on this point obviates the need to address the first point raised in this appeal.