STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ANN STORCK CENTER, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 92-5479
	)	
DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to Notice, this cause was heard by Linda M. Rigot, the assigned Hearing Officer of the Division of Administrative Hearings, on February 4, 1993, in Fort Lauderdale, Florida.

APPEARANCES

For Petitioner: Steven M. Weinger, Esquire
Kurzban, Kurzban & Weinger, P.A.
2650 Southwest 27th Avenue, Second Floor
Miami, Florida 33133

For Respondent: Karel Baarslag, Esquire
HRS Medicaid Office
Building Six, Room 234
1317 Winewood Boulevard
Tallahassee, Florida 32399-0700

STATEMENT OF THE ISSUE

The issue presented is whether Respondent's audit adjustments to Petitioner's June 30, 1990, cost report are proper.

PRELIMINARY STATEMENT

By letter dated June 12, 1992, the Department of Health and Rehabilitative Services notified itself that, pursuant to a desk audit, it was disallowing certain costs contained in the cost report for the Pembroke Pines Cluster facility for the fiscal year ending June 30, 1990, that the audit adjustments made had changed the facility's Medicaid reimbursement per diem rate, and that the Department could request a formal hearing if the Department disagreed with any of the audit adjustments made by the Department. A copy of that letter was also sent to Petitioner, the operator of the Pembroke Pines cluster facility, and Petitioner timely requested a formal hearing regarding those audit adjustments. This cause was thereafter transferred by the Department to the Division of Administrative Hearings for the conduct of a formal proceeding.

Petitioner presented the testimony of Kurt Hoppe, Jacob C. Richter, James G. Weeks, and James McGuire. Joyce Barrington testified on behalf of the Respondent, the Department of Health and Rehabilitative Services. Additionally, Petitioner's Exhibits numbered 1-7 and Respondent's Exhibits numbered 1-4 were admitted in evidence.

Both parties submitted post-hearing proposed findings of fact in the form of proposed recommended orders. A specific ruling on each proposed finding of fact can be found in the Appendix to this Recommended Order.

FINDINGS OF FACT

1. Petitioner Ann Storck Center, Inc., is a non-profit agency with a volunteer Board of Directors which began in 1956 when Ann Storck opened her first group home in Broward County to assist children with mental retardation. Petitioner serves children and young adults with developmental disabilities by providing preschool, developmental training, prevocational training, and residential services in several intermediate care facilities for the mentally retarded (ICF/MR).

2. The individuals served by Petitioner at the Pembroke Pines cluster are within the severe to profound range of mental retardation and have significant secondary disabilities, such as cerebral palsy, autism, and epilepsy. There are 24 medically fragile and developmentally disabled individuals at the Pembroke Pines cluster facility. Several of them are tube fed and have significant seizure problems or renal problems.

3. Other than reimbursement under the Medicaid laws and other funds from government agencies, Petitioner obtains its funds from charitable endeavors such as the operation of a thrift shop six days per week, every week for the past seventeen years, together with numerous other fund raising efforts. Petitioner's budget for providing services to individuals with developmental disabilities is $300,000 to $400,000 in excess of the Medicaid and other government funding which is provided each year.

4. In the fiscal year ending June 30, 1990, which is the subject of the cost report and desk audit involved in this proceeding, Petitioner had a deficit of almost $120,000 dollars at the Pembroke Pines cluster. Petitioner does not have cash reserves. If, in addition to that deficit, Petitioner is required to pay back money to the Department and have a reduced Medicaid reimbursement rate at the present time, Petitioner cannot survive the consequences.

5. Although Petitioner is the provider of all ICF/MR services at the Pembroke Pines cluster facility, the Department holds the Medicaid provider number. Medicaid cost reports are filed by Petitioner every year, using the Department's provider number. In those cost reports, Petitioner includes cost figures provided to it by the Department for the Department's costs related to the Pembroke Pines cluster facility.

6. The same certified public accountant has been filing the Medicaid cost reports for the Pembroke Pines facility on Petitioner's behalf since 1984. Although he performs the facility's monthly accountings and performs an annual audit, that C.P.A. is not in a position to verify the figures provided to Petitioner by the Department. Accordingly, each year's cost report contains a disclaimer letter from him, and the Department has never raised any concerns regarding that letter.

7. Each year's cost report has been completed in accordance with the Department's directions to Petitioner. Specifically, Petitioner includes all costs of rendering ICF/MR services at the Pembroke Pines cluster. The Department then uses each June 30 cost report to obtain Medicaid funds from the federal government. Those funds have been paid to the Department and not to Petitioner since the Department considers itself to be the provider of ICF/MR services at the Pembroke Pines cluster.

8. Prior to 1991, the Department did not reimburse Petitioner pursuant to the Medicaid cost reports filed by Petitioner representing the actual costs which Petitioner had expended in providing ICF/MR services. Rather, the Department established Petitioner's Medicaid per diem reimbursement rate pursuant to a fixed rate contract. By doing so, the Department reimbursed Petitioner for services rendered at a rate less than Petitioner's actual costs and less than the money the Department received from the federal government utilizing Petitioner's cost report. The Department retained those additional monies.

9. Although audit reports were drafted by the Department as far back as 1987 and as far back as for the fiscal 1985 cost report for the Pembroke Pines cluster, the Department held back those audit reports until June of 1991 because the Department had not established procedures for conducting audits of the cluster facilities and had not trained staff to perform those audits until that time. The Department's policies on how to process desk audits, even when finalized in 1991, were never published as a rule, were not generally made available to persons other than the Department employees who attended the training meetings, and were not explained during the final hearing in this cause.

10. In 1989, Petitioner, other providers of ICF/MR services, and a trade association representing ICF/MR providers filed a lawsuit against the Department and against two Department officials in the United States District Court for the Southern District of Florida, alleging that the manner in which the Department reimbursed providers of ICF/MR services did not comply with federal law. On June 17, 1991, the United States Magistrate Judge issued a report recommending that a preliminary injunction be entered against the Department. Based on that Report, oral argument, and an independent review of the file, the United States District Judge entered an Order Granting Preliminary Injunction on September 13, 1991.

11. The 17-page Order Granting Preliminary Injunction was both mandatory and prohibitory. It was held that the Department's method of reimbursing operators of cluster facilities such as Petitioner pursuant to a fixed-rate contract rather than pursuant to a reimbursement plan for providers of ICF/MR services violated Title 42 U.S.C. Section 1396(a)(13), known as the Boren Amendment to the Medicaid Act. Pursuant to the Boren Amendment, the Department was required to have established reimbursement rates which are "reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable state and federal laws, regulations, and quality and safety standards." The federal court ordered the Department to cease reimbursing its cluster providers pursuant to a fixed-rate contract and ordered the Department to formulate a new reimbursement plan which complied with the substantive requirements of the Boren Amendment. The federal court ordered the Department to file its new plan by October 4, 1991, with the rates of reimbursement established under that plan to be retroactive to September 4, 1991. The court specifically held that the Department's argument that it was

the provider of ICF/MR services because it held the provider number was ". . .false to the point of absurdity. . . ." The Department responded with an amended reimbursement plan for providers of ICF/MR services effective July 1, 1991.

12. Medicaid is a prospective cost reimbursement system. The reimbursement rate is set prospectively based upon historic data. In Florida there are two rate semesters each year. Therefore, April 1, 1991, would be the first rate period affected by the Department's audit of the Pembroke Pines cluster cost report for the fiscal year ending June 30, 1990.

13. The Department began its calculations relative to its audit of the Pembroke Pines cost report in approximately February of 1991. The calculations were not completed until June of 1992. The Department's June 12, 1992, letter memorializing the results of the Department's desk audit notified the Department and Petitioner as to the per diem reimbursement rate for the Prembroke Pines cluster facility effective with the April 1, 1991, rate semester; with a recalculation effective July 1, 1991, (the effective date of the new reimbursement plan ordered by the federal court); and with a recalculated rate effective September 1, 1991 (for some unexplained reason).

14. When those rates were calculated and disclosed pursuant to the June 12, 1992, letter some nine months after the federal judge had rejected the Department's position that the Department was the provider of ICF/MR services because it held the provider number, the calculations were done and the reimbursement rate was established as though the Department was the provider of ICF/MR services at the Pembroke Pines cluster. In conjunction with the Department continuing to maintain that position in spite of the federal injunction against it, the audit letter explaining the audit adjustments and establishing the new reimbursement rates was sent by the Department's Tallahassee office to the Department's Fort Lauderdale office.

15. When the Department's Residential Services Director for District 10 received the audit letter, he contacted the Tallahassee office of the Department. He requested, as he had done on a number of occasions previously, that Petitioner be reimbursed for excess costs above what the Department was allowing or that Petitioner receive an interim rate increase. That renewed request was denied by the Tallahassee office. The Residential Services Director was aware that Petitioner had been losing money operating the Pembroke Pines facility, that Petitioner was not being reimbursed for expenditures above the amount paid under the old fixed-rate contract system, and that Petitioner supplemented its reimbursement from the Department through fund raising activities by necessity. Since he, as part of his duties, attended admission and discharge meetings, attended licensure surveys, and had been involved with physical plant repairs and maintenance to the Pembroke Pines facility since 1987, he was familiar with the excellent survey reports which Petitioner receives regarding its operation of the facility, was familiar with Petitioner's excellent quality of care, and with Petitioner's efficient manner of providing services.

16. The desk audit contained one positive adjustment. It increased Petitioner's operating expenses by $29,841. The reason for that positive adjustment was that the Department had provided to Petitioner an incorrect figure for the Department's costs related to the facility during the fiscal year ending June 30, 1990. That positive adjustment is a correct figure and increases the total allowable operating expenses for the Pembroke Pines cluster facility for the fiscal year to $1,619,888.

17. Each cost item within the total allowable operating expenses of $1,619,888 is a reasonable, necessary, and ordinary cost incurred and expended for the operation of the Pembroke Pines cluster facility in an efficient and economical manner.

18. The audit letter contained 9 negative adjustments for a total negative adjustment of $50,979. Each of those 9 negative adjustments is incorrect and is without basis. Each negative adjustment simply reduces the total cost in that particular category by an arbitrary percentage, and none of those negative adjustments is in accordance with the reimbursement plan governing providers of ICF/MR services.

19. The erroneous negative adjustments made during the desk audit of the June 30, 1990, cost report resulted in a Medicaid reimbursement per diem rate of $184.91 for the rate period effective April 1, 1991, for level 8 and level 9 patients, which are the most severely disabled patients and are the only types of patients who receive ICF/MR services at the Pembroke Pines cluster facility. That per diem rate is incorrect. The correct Medicaid reimbursement per diem rate based upon proper auditing procedures and based upon the reimbursement rate plan is $191.36. Those proper auditing procedures include, for example, using the reimbursement plan in effect at the time the rates are to be calculated, something not done by the Department which used the reimbursement plan effective July 1, 1991, to compute the rates effective April 1, 1991.

20. The errors made in the desk audit of the June 30, 1990, cost report are still causing Petitioner to be underpaid for its ICF/MR services. The June 30, 1990, cost report determines the base rate, for example, for the October 1, 1992, rate semester, during which semester the final hearing in this cause was conducted. The Department has been reimbursing Petitioner during the October 1, 1992, rate semester using a per diem rate of $212.05 rather than the correct figure of $216.12 per day per patient.

21. The erroneous negative adjustments made during the desk audit were caused by the Department's use of the fixed-price contract rather than the ICF/MR rate plan to establish Petitioner's reimbursement rate. The desk audit report itself refers to the 9 negative adjustments as being contract adjustments. Further, the person who performed the audit testified at the final hearing that although all of the expenses would have been allowed under the published rate plan, without the negative adjustments, the audit was performed pursuant to instructions given to her by other Department employees to make adjustments pursuant to the fixed-rate contract because the per diem rate was to be established based on the Department's total costs as a District.

CONCLUSIONS OF LAW

22. By letter written to itself on June 12, 1992, with a copy to Petitioner, the Department advised its Residential Services Director as to the results of the Department's desk audit of the Pembroke Pines cluster facility's cost report for the fiscal year ending June 30, 1990. That letter specifically advised both the Department's Residential Services Director and Petitioner that the recipients of the letter had a right to a formal hearing pursuant to Section 120.57, Florida Statutes. Petitioner timely requested a formal hearing by filing with the Department a Petition Initiating Formal Proceedings. On September 3, 1992, the Department transmitted that Petition to the Division of Administrative Hearings pursuant to a Notice which requested the Division to assign the request for a formal hearing to a Hearing Officer to conduct

necessary proceedings and to submit a Recommended Order. As the scheduled formal hearing approached, the Department filed a series of motions to obtain cancellation of the formal hearing, arguing that since both the Division of Administrative Hearings and the United States District Court for the Southern District of Florida have jurisdiction over this matter, then the administrative proceeding should be stayed. The Department's position was rejected. In its proposed recommended order filed May 5, 1993, the Department alleges for the first time that the Division of Administrative Hearings lacks jurisdiction over the subject matter due to the prior commencement of a federal lawsuit between the same parties involving the same issues.

23. Despite its allegation that the federal litigation and this proceeding involve the same issues, the Department has not shown that to be so. The status of the federal litigation has not been disclosed in the record in this cause. Similarly, the issues still pending in that litigation have not been disclosed in the record in this cause. The sprinkling of allegations concerning the subject matter of the federal litigation indicates that it may be a civil rights action seeking damages from the Department and certain of its key officials for willful and knowing violations of federal law and of the Petitioner's rights. Those issues are not involved in this proceeding. This proceeding only involves a determination as to whether the Department's desk audit of one specific cost report resulted in appropriate audit adjustments. The Department has not argued and has not proven that the limited issue involved in this administrative proceeding is or could be involved in the federal litigation. In short, the Department's argument requires a factual basis, and the Department has failed to establish one. Accordingly, the Division of Administrative Hearings has jurisdiction over the parties hereto and the subject matter hereof. Section 120.57(1), Florida Statutes.

24. The parties agree that the Boren Amendment to the Medicaid Act requires the Department to establish a plan offering reimbursement for the provision of services in an ICF/MR facility and that the rates established pursuant to that rate plan must be reasonable and adequate to meet the costs incurred by efficiently and economically operated facilities. The desk audit adjustments the Department made to the Pembroke Pines cluster facility's June 30, 1990, cost report do not comply with the requirements of federal law and do not comply with the requirements of the Department's own rate reimbursement plan.

25. All witnesses in this proceeding testified that the cost report contained only costs which were reasonable and necessary for the provision of services, that all reported costs were incurred and expended, that there are no regulations or public documents explaining how the audit adjustments were made, and that all of Petitioner's expenses would have been allowed under the Department's published rate plan. The evidence is uncontroverted that the negative audit adjustments were made pursuant to a fixed-rate contract and not pursuant to the reimbursement rate plan and are, therefore, not in compliance with federal law. Lastly, the evidence is uncontroverted that the Department continues to reimburse Petitioner pursuant to a fixed-rate contract and that the negative audit adjustments were simply arbitrary percentage adjustments to align the Pembroke Pines facility's total allowable operating expenses with the contract rate.

26. In its proposed recommended order the Department takes out of context one answer of the C.P.A. who has prepared the cost reports for the Pembroke Pines cluster facility since 1984 and now argues that Petitioner is being paid "the full Medicaid rate." The witness' testimony was that the Department was not making proper payments to Petitioner, that the cost reports were properly

completed and submitted, and that the Department's negative audit adjustments were indefensible. What the witness did testify to was that Petitioner received the full Medicaid rate in the Order entered by the federal judge, not that Petitioner has ever received from the Department the actual money that would result in Petitioner receiving the full Medicaid rate.

27. The burden of proof in this proceeding was on Petitioner, and the evidence is overwhelming that Petitioner has met that burden. Petitioner has shown that the costs contained in the cost report in question were reasonable, ordinary, and necessary and that the Department has failed to reimburse Petitioner for those costs pursuant to a rate which is reasonable and adequate to meet those costs. No evidence was offered that Petitioner was not operating the Pembroke Pines cluster facility in an efficient and economical manner. The Department's only explanation of its negative audit adjustments was that the person who performed the audit did so pursuant to instructions from other Department employees, which instructions were not elucidated on the record in this proceeding. Further, the Department's auditor testified that she was not giving an opinion that the Department's desk audit complied with the law or that she even knew what the law required.

28. On the other hand, the positive audit adjustment of $29,841 is appropriate. The uncontroverted evidence is that that audit adjustment was based upon the Department providing to Petitioner erroneous information as to the Department's costs. That audit adjustment corrects the total allowable operating expenses for the fiscal year. The correct figure is $1,619,888. Based upon that corrected figure, the proper per diem rate for Petitioner's level 8 and level 9 services at the Pembroke Pines cluster facility for the April 1, 1991, rate semester is $191.36 per patient per day and for the October 1, 1992, rate semester is $216.12 per patient per day.

29. Petitioner's argument that equitable estoppel applies in this proceeding is without merit. Petitioner has not proven as the threshold element the representation of the Department upon which it relied. Similarly, the Department's arguments regarding a target rate are without merit since neither party offered any evidence as to Petitioner's target rate.

30. Petitioner requests that this Recommended Order also contain instructions to the Department to pay Petitioner all monies which the Department has wrongfully withheld over the years. It is clear that such has occurred. However, the scope of this proceeding is limited to the propriety of the Department's desk audit of the Pembroke Pines cluster facility's cost report for the fiscal year ending June 30, 1990. The Department's correspondence setting forth the adjustments to be made to the cost report and establishing the reimbursement rate commencing with the April 1, 1991, rate semester is the preliminary agency action which was challenged in this proceeding and for which a formal hearing was sought.

31. The base rate established in the 1990 cost report for the Pembroke Pines cluster facility reveals that Petitioner has been underpaid by the Department, and the Department's suggestion that Petitioner may owe monies to the Department is without merit. Determining the underpayment based upon the correct per diem rates established in this Recommended Order is simply a mathematical calculation which can be performed by the parties hereto.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a Final Order be entered:

1. Finding the positive audit adjustment to have been properly made;

2. Finding the negative audit adjustments to have been improperly made;

3. Determining the total allowable operating expenses for the Pembroke Pines cluster facility for the fiscal year ending June 30, 1990, to be $1,619,888;

4. Establishing the reimbursement rate for the facility's level 8 and level 9 care for the April 1, 1991, rate semester to be $191.36 per patient per day;

5. Establishing the reimbursement rate for the facility's level 8 and level 9 care for the October 1, 1992, rate semester to be $216.12; and

6. Recalculating the reimbursement rate for the other rate semesters subsequent to April 1, 1991, in accordance with this Recommended Order.

DONE and ENTERED this 16th day of April, 1993, at Tallahassee, Florida.

LINDA M. RIGOT
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of April, 1993.

APPENDIX TO RECOMMENDED ORDER

1. Petitioner's proposed findings of fact numbered A, C, D, F-O, Q, R, T-W, Y-AH, AK, AN, AQ, AR, AT-AW, AZ, BC-BE, BG-BI, BM, BP-BS, BU-BX, BZ, CA, CC-CF, CH-CJ, CM-CO, CQ, and CS-DA have been adopted either verbatim or in substance in this Recommended Order.

2. Petitioner's proposed findings of fact numbered B, E, P, S, X, AM, AO, AS, AX, BF, BJ, BL, BO, BY, CG, CK, CL, CR, and DC-DE have been rejected as not constituting findings of fact but rather as constituting argument of counsel, conclusions of law, or recitation of the testimony.

3. Petitioner's proposed findings of fact numbered AY, BA, BB, and CP have been rejected as not being supported by the weight of the competent evidence in this cause.

4. Petitioner's proposed findings of fact numbered AI, AJ, BN, BT, and DB have been rejected as being irrelevant to the issues under consideration in this cause.

5. Petitioner's proposed findings of fact numbered AL, AP, BK, and CB have been rejected as being subordinate to the issues herein.

6. Respondent's proposed findings of fact numbered 1, 10, and 13 have been adopted either verbatim or in substance in this Recommended Order.

7. Respondent's proposed findings of fact numbered 2, 9, and 11 have been rejected as not being supported by the weight of the competent evidence in this cause.

8. Respondent's proposed findings of fact numbered 3-5, 12, 14-20, 24, and 25 have been rejected as being subordinate to the issues herein.

9. Respondent's proposed finding of fact numbered 6 has been rejected as being irrelevant to the issues under consideration in this cause.

10. Respondent's proposed findings of fact numbered 7, 8, and 21-23 have been rejected as not constituting findings of fact but rather as constituting argument of counsel, conclusions of law, or recitation of the testimony.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.

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AGENCY FINAL ORDER

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STATE OF FLORIDA
DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES

ANN STORCK CENTER, INC.,

Petitioner,

vs.

CASE NO.: 92-5479
RENDITION NO.: HRS-92-244-FOF-MDC

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,

Respondent.
_____/

FINAL ORDER

This cause came on before me for the purpose of issuing a final agency order. The Hearing Officer assigned by the Division of Administrative Hearings (DOAH) in the above-styled case submitted a Recommended Order to the Department of Health and Rehabilitative Services (HRS). The Recommended Order entered April 16, 1993, by Hearing Officer Linda M. Rigot is incorporated by reference.

RULINGS ON EXCEPTIONS

Counsel for the department filed 6 exceptions to the findings of fact, 4 to the conclusions of law, and 4 to the appendix. Counsel first excepts to finding of fact 7. The exception is granted only for the last sentence of the finding of fact, and only to the extent the Hearing Officer means in the last sentence that the actual checks which should go to Ann Storck from Consultec continue to be paid instead to the department. There is no evidence in the record that checks do not now go directly from Consultec to Petitioner, rather than through the department.

Exception 2 excepts to finding of fact 9. The exception takes the quoted language out of context. There is competent substantial evidence to support the finding, which addresses the lack of policies on processing desk audits for cost reports for cost reporting periods dating back to 1985, while the quoted language is part of testimony which attempts to distinguish a desk audit from a field audit. The exception is denied.

Exception 3 disagrees with finding of fact 14 because "Joyce Barrington testified that the contract adjustments are made to determine what is to be paid to the vendor on pages 69-70." A review of the entire record discloses that finding of fact 14 is supported by competent, substantial evidence in the record. I cannot reweigh the evidence. The exception is denied. 1/

Exception 4 asserts that there is no competent substantial evidence in the record to support the following finding of fact:

> "Each cost item within the total allowable operating expenses of $1,619,888.00 is a reasonable, necessary, and ordinary cost incurred and expended for the operation of the Pembroke Pines cluster facility in an efficient and economical manner."

Counsel urges that there is no testimony by any witness that the costs were expended in an "efficient and economical manner." Here HRS' witness have admitted that the costs were "reasonable and necessary." In this context a finding that the costs were expended in an "efficient and economical manner" is a permissible inference by the Hearing Officer where HRS concedes that the costs expended were "reasonable and necessary." The exception is denied.

Exception 5 takes exception to finding of fact 18 which finds that each of the negative adjustments to the cost report reduces the total cost in that particular category by an arbitrary percentage, and none of the negative adjustments are in accordance with the reimbursement plan governing provider of ICF/MR services. Counsel offers portions of Joyce Barrington's testimony as support. My review of the entire record discloses evidence to support the finding of fact despite the testimony relied upon by counsel to support his exception. Weighing of conflicting evidence is the bailiwick of the Hearing Officer. The exception is denied.

Exception 6 takes the position that the Hearing Officer's finding in the last sentence of finding of fact 19 is improper. She found that the proper procedure would have been to use the reimbursement rate plan in effect on April 1, 1991, but that HRS instead used the July 1, 1991 reimbursement rate plan to compute the rates effective April 1, 1991. My review of the entire record reveals that there is competent substantial record evidence to support the finding excepted to. The exception is denied.

Turning now to the exceptions to the Hearing Officer's conclusions of law, counsel first excepts to the conclusion in paragraph 22 that the department alleges lack of DOAH jurisdiction for the first time in its proposed recommended order. The exception does not refute the conclusion of law and is accordingly denied.

Counsel also excepts to the conclusions in numbered paragraph 23 of the Recommended Order that the department did not make a sufficient showing in this cause that the instant proceeding involves the same issues as the pending federal litigation between the same parties; and that the status of said federal litigation has not been adequately disclosed herein; and that the issues still pending in the federal case have not been disclosed in the record herein; and that for all that has been shown, the federal case could be a civil rights action seeking damages from the department and certain of its key officials for the violation of petitioner's rights. In support of the exception, counsel states that a Motion for Stay was filed herein, which was denied by the Hearing Officer and upheld on appeal by the Florida First District Court of Appeal. Attached to the Motion for Stay were pleadings and orders filed in the federal litigation. These have been previously ruled on by the Hearing Officer and the First DCA as insufficient to support a conclusion that DOAH must grant a stay of this proceeding.

Merely pointing out at this juncture the pleadings and orders already deemed legally insufficient to support a stay without any other legal justification for a finding that DOAH lacks jurisdiction in insufficient.

Neither the Motion for Stay, the Motion for Civil Contempt and Sanctions, nor the Amended Complaint were submitted as exhibits in this case. Counsel does not explain the reasons why his mere reference to pleadings and orders already deemed insufficient by the First DCA should be sufficient for a finding of lack of jurisdiction in DOAH at this time. Counsel did not renew his Motion for Stay, already denied by the Hearing Officer (with the denial upheld by the First DCA), at the formal hearing. Counsel points out no reasons to expect the department to reverse the appeals court. The exception is denied.

Lack of subject matter jurisdiction may be raised at this time. To the extent the last paragraph of HRS' exception number 1 to the Hearing Officer's conclusions of law may rise to the level of a Motion to Dismiss for lack of subject matter jurisdiction, said motion is denied.

Counsel next excepts to that portion of conclusion of law number 25 which concludes that the negative audit adjustments were made pursuant to a fixed-rate contract and not pursuant to the reimbursement rate plan and are therefore not in compliance with federal law; and that this impropriety continues. The Hearing Officer's conclusion that a fixed rate contract was used instead of the proper reimbursement rate is correct. The exception is denied.

The exception to conclusion of law numbered 26 is denied because it merely disagrees with the conclusion without an explanation of why the conclusion is erroneous. The Hearing Officer concludes that counsel has taken the testimony out of context. The exception merely quotes relevant portions of the testimony in a conclusory manner.

The first exception to the appendix is denied. The weighing of the evidence is exclusively the province of the Hearing Officer.

In his second exception to the appendix, counsel excepts to the Hearing Officer's ruling that his proposed findings of fact 3-5, 12, 14-20, 24 and 25 are subordinate. He merely asserts, without explaining, that his proposed findings were relevant and should have been accepted. Without further specific explanation, I cannot try to guess why he disagrees that said proposed findings were subordinate. The exception is denied.

In the third exception to the appendix counsel for the department disagrees that his proposed finding of fact numbered 6 is irrelevant. Counsel merely states "[i]t is relevant to show how monies are paid to providers." This is an insufficient legal reason to grant the exception, therefore it is denied.

Finally, counsel for the department excepts to paragraph 10 of the appendix in which the Hearing Officer rejected proposed findings 7, 8, and 21-23 as not constituting findings of fact but rather as constituting argument of counsel, conclusions of law, or recitation of the testimony. The Hearing Officer is correct. The exhibits speak for themselves. Dr. Weeks's testimony is contained in the transcript of hearing. It was not error for the Hearing Officer to reject the proposed findings of fact.

FINDINGS OF FACT

The department hereby adopts and incorporates by reference the findings of fact set forth in the Recommended Order except where inconsistent with the above rulings on exceptions.

CONCLUSIONS OF LAW

The department hereby adopts and incorporates by reference the conclusions of law set forth in the Recommended Order.

Based upon the foregoing, it is

ADJUDGED, that

1. The positive audit adjustment has been properly made;

2. The negative audit adjustments have been improperly made;

3. The total allowable operating expenses for the Pembroke Pines cluster facility for the fiscal year ending June 30, 1990, is $1,619,888.00;

4. The reimbursement rate for the facility's level 8 and level 9 care for the April 1, 1991, rate semester should be $191.36 per patient per day;

5. The reimbursement rate for the facility's level 8 and level 9 care for the October 1, 1992, rate semester should be $216.12; and

6. The reimbursement rate for the other rate semesters subsequent to April 1, 1991, shall be recalculated in accordance with the Recommended Order.

DONE and ORDERED this 14th day of June, 1993, in Tallahassee, Florida.

Buddy MacKay
Acting Secretary
Department of Health and
Rehabilitative Services

_____
Deputy Secretary for Human Services

ENDNOTE

1/ Counsel's quoted testimony of Joyce Barrington states in part that "...in comparing the cost for it or doing the cost report for this cluster facility, when we get ready to set their rate, because HRS is the provider, then the total dollar amount of money that was paid by HRS would be what we were looking at in trying to decide what the rate would be calculated on.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was sent to the above named people by U.S. Mail this 18th day of June, 1993.

_____

Robert L. Powell, Sr.
Agency Clerk
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NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO A JUDICIAL REVIEW WHICH SHALL BE INSTITUTED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF HRS, AND A SECOND COPY ALONG WITH FILING FEE AS PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE AGENCY MAINTAINS ITS HEADQUARTERS OR WHERE A PARTY RESIDES. REVIEW PROCEEDINGS SHALL BE CONDUCTED IN ACCORDANCE WITH THE FLORIDA APPELLATE RULES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.