

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,)
BOARD OF DENTISTRY,)
)
Petitioner,)
)
vs.) Case No. 98-2404
)
MARTA NIETO, D.D.S.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on September 18 and 19, 2000, in Miami, Florida, before Errol H. Powell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Michael J. Cohen, Esquire
517 Southwest First Avenue
Fort Lauderdale, Florida 33301

For Respondent: Anthony C. Vitale, Esquire
799 Brickell Plaza, Suite 700
Miami, Florida 33131

STATEMENT OF THE ISSUE

Whether Respondent committed the offenses set forth in the Administrative Complaint and the amendment thereto, which added an additional count, and, if so, what action should be taken.

PRELIMINARY STATEMENT

On May 5, 1998, the Department of Health, Board of Dentistry, filed a seven-count Administrative Complaint against Marta Nieto, D.D.S. (Respondent), charging her with the following violations: Count I--violating Subsection 466.028(1)(x), Florida Statutes, by being guilty of incompetence or negligence by failing to meet the minimum standards of performance in diagnosis and treatment when measured against generally prevailing peer performance, including, but not limited to, the undertaking of diagnosis and treatment for which the dentist is not qualified by training or experience or being guilty of dental malpractice for extracting teeth without first obtaining pre-operative X-rays; Count II--violating Subsection 466.028(1)(m), Florida Statutes, by failing to keep written dental records and medical history records justifying the course of treatment of the patient including, but not limited to, patient histories, examination results, test results and X-rays if taken. Count III--violating Subsection 466.028(1)(aa), Florida Statutes, by violating a rule promulgated pursuant to Chapter 466, Florida Statutes, through the violation of Rule 59Q-17.002, Florida Administrative Code, for failing to properly maintain dental records; Count IV--violating Subsection 466.028(1)(l), Florida Statutes, by making deceptive, untrue, or fraudulent representations in or related to the practice of dentistry for billing Medicaid for services and

treatments not rendered to the patient; Count V--violating Subsection 466.028(1)(t), Florida Statutes, by engaging in fraud, deceit, or misconduct in the practice of dentistry for billing Medicaid for services and treatments not rendered to the patient; Count VI--violating Subsection 466.028(1)(j), Florida Statutes, by making or filing a report which the licensee knows to be false, failing to file a report or records required by state or federal law, knowingly impeding or obstructing such filing or inducing another person to do so for billing Medicaid for services and treatments not rendered to the patient; and Count VII--violating Subsection 466.028(1)(z), Florida Statutes, by delegating professional responsibilities to a person who is not qualified by training, experience, or licensure to perform them. Respondent disputed the allegations of fact contained in the Administrative Complaint and requested a hearing. On May 21, 1998, this matter was referred to the Division of Administrative Hearings.

A final hearing was scheduled in this matter for five days in September 1998. The hearing was continued and re-scheduled. Prior to the re-scheduled hearing date, Respondent's counsel was granted leave to withdraw. Respondent's co-counsel continued to represent Respondent. After another continuance, the parties reached a settlement which required approval by the Board of Dentistry. The instant case was held in abeyance pending the

approval of the settlement by the Board of Dentistry. On February 1, 2000, Petitioner filed an order rejecting the settlement. Subsequently, Respondent obtained new counsel, and the final hearing in this matter was re-scheduled for five days in September 2000. By Order dated April 21, 2000, Petitioner was granted leave to amend the Administrative Complaint, adding Count VIII which charged Respondent with violating Subsection 466.028(1)(c), Florida Statutes, by being convicted or found guilty of or entering a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction which relates to the practice of dentistry.

At hearing, Petitioner presented the testimony of five witnesses and entered 14 exhibits (Petitioner's Exhibits numbered 1-14) into evidence.¹ Respondent testified in her own behalf, presented the testimony of three witnesses² and entered 19 exhibits (Respondent's Exhibits numbered 1-5, 8, and 10-22) into evidence.³

A transcript of the hearing was ordered. At the request of the parties, the time for filing post-hearing submissions was set for more than ten days following the filing of the transcript. The Transcript, consisting of two volumes, was filed on October 2, 2000. The parties timely filed their post-hearing submissions, which were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is the state agency charged with regulating the practice of dentistry pursuant to Chapters 455 and 466, Florida Statutes, and Section 20.43, Florida Statutes.

2. At all times material hereto, Respondent was a licensed dentist in the State of Florida, having been issued license number DN 0013137. Respondent has been licensed to practice dentistry since July 1992, over eight years.

3. Prior to being licensed in Florida, Respondent was a licensed dentist in Cuba, having been licensed in 1986. Respondent has also completed a post-graduate course in oral surgery, maxillary facial surgery, and oral and facial reconstructive surgery.

4. Respondent is a single parent. She has a 15-year-old son.

5. In 1993, Respondent opened her first dental office. Her patients were Hispanic and were mostly private patients.

6. In her dental practice, Respondent performed general dentistry, as well as specialty areas of dentistry, such as root canals and surgery. As a result, she did not refer her patients to dentists who practiced in the specialty areas.

7. From 1995 to 1996, Respondent's practice significantly changed in patient base and volume. As a result of the Cuban rafter crisis in South Florida in August 1994, her patient base

changed from mostly private patients and became mostly Medicaid patients, who were Cuban refugees, and the number of her Hispanic clients greatly increased.

8. Between 1995 and 1996, most of Respondent's patients possessed common characteristics. Most of her patients were Cuban refugees, who did not speak English, were poor, had teeth in generally poor condition, which needed a substantial amount of dental work, had gum disease, and were qualified for Medicaid.

9. During the relevant time period in the instant case, for patients over the age of 21 years, Medicaid paid for only three services: oral exams, dentures, and extractions. Medicaid did not cover services or treatments for a filling, cleaning, root canal, crown, or gum disease.

10. Many of the Respondent's Cuban refugee patients had chronic gum disease. Respondent rendered many needed dental services that were not covered by Medicaid.

11. Respondent was known to the Cuban refugees as a dentist who did not refuse to provide dental treatment. Many of the Cuban refugees were aware that Respondent would provide dental treatment for those who were over 21 years of age. In some instances, Respondent provided dental treatment without cost. Many Cuban refugees were referred to Respondent by a well-known Hispanic newspaper in Miami-Dade County.

12. Respondent's practice increased dramatically. Her patient base increased from 10 to 15 patients a day to nearly 40 patients a day. Her practice experienced a substantial increase in dental treatment; hours of operation (11 to 12-hour days); the cost of treating the volume of patients; lab supplies; paper work; staff; overhead; and administrative costs.

13. As a result of the increase in her practice, Respondent hired Augustine Gonzalez, as a dental assistant. Mr. Gonzalez was employed with Respondent for approximately six months, beginning on or around May 1995. Respondent knew Mr. Gonzalez as he had graduated from dental school with her in Cuba and they interned together in Cuba. Respondent considered Mr. Gonzalez to be a competent dentist due to his education, training, and experience even though he was not a licensed dentist in the State of Florida.

14. Mr. Gonzalez performed dental services or treatments, which were originally designed to be under Respondent's supervision. Respondent was not always in the same room with Mr. Gonzalez when he performed the dental services or treatments.

15. Due to the escalation in her practice, Respondent permitted Mr. Gonzalez to examine patients, drill, and install permanent fillings. In many instances, because of the escalation of her practice, Respondent was not able to check a patient after

Mr. Gonzalez examined the patient and to review dental work performed by Mr. Gonzalez.

16. In the State of Florida, Mr. Gonzalez was not qualified by training, experience, or licensure to examine patients, drill, and install permanent fillings. Mr. Gonzalez was not a licensed dentist in the State of Florida. He was not authorized in the State of Florida to examine patients or drill or install permanent fillings. Additionally, Mr. Gonzalez had not completed any course recognized by the American Dental Association which would have expanded his duties as a dental assistant.

17. From 1995 to 1996, the following 15 Cuban refugee patients were among the refugee patients who received dental services and treatments from Respondent: M.A.A.; A.F.; A.A.; M.A.; C.G.; D.A.G.; E.A.; I.A.; M.C.A.; E.B.; R.D.; C.V.; R.B.; M.I.; and A.B.⁴

18. At the time that Respondent rendered the dental services or treatments, all of Respondent's dental records were written in Spanish.

19. Extractions and fillings were performed on the patients without first obtaining X-rays. The minimum standard of care requires the taking of X-rays in diagnosis and treatment prior to extracting or filling teeth.

20. The Patients' records do not reflect that X-rays were taken or contain the results of any X-rays. Respondent contends

that X-rays were taken of all patients who were receiving dentures and routinely of first-time patients. The minimum standard of care requires the recording in a patient's record of X-rays being taken and the results therefrom.

21. Respondent failed to take X-rays of the Patients. If X-rays were taken, the Patients' records would have reflected it.

22. Respondent rendered dental services or treatments which were not recorded in the Patients' records and rendered more dental services than reflected in the records. Additionally, some services or treatments recorded as being performed were not performed. As a result, Respondent generally failed to maintain accurate patient records. For example, (1) as to Patient E.B., (a) three Spanish charts existed, with each reflecting a different number of visits and (b) one of the Spanish records reflected the filling of two teeth (Nos. 18 and 20), one other such record reflected one filling (No. 18) and sealants; (2) as to Patient D.A.G., the Spanish chart reflected nine fillings but Patient D.A.G. maintains that there were probably only two fillings; (3) as to Patient C.V., the Spanish record failed to reflect services rendered on a tooth in the patient's lower jaw; (4) as to Patient M.A., two Spanish charts existed and Respondent could not definitively state whether the recorded services were the services rendered to the patient; and (5) as to Patient A.B., the recorded entries were out of sequence and Respondent could

not definitively state whether the recorded services were the services rendered.

23. Respondent's dental records reflect that an oral exam was performed on the first visits but failed to reflect existing disease or pathology, or lack thereof, of the patients. Further, Respondent's dental records reflect the terminology "medical history" but fail to recite the Patients' medical history. Consequently, no disease or pathology, or the lack thereof, or medical history was recorded in the Patients' records.

24. Respondent contends that her dental practice was too busy and overwhelmed to maintain complete dental records for the Cuban refugee patients. However, Respondent agrees that a busy practice does not relieve a dentist from complying with minimum standards of record keeping.

25. Respondent instructed her office manager, Maria Otero, to handle the Medicaid billing for the dental office. Respondent directed Ms. Otero to falsify Medicaid billings and Medicaid billing records. Ms. Otero was directed by Respondent to change the dates of services rendered, as necessary, in order for the services billed to qualify for Medicaid; and to bill Medicaid for X-rays, extractions, alveoplasties, and dentures.

26. Ms. Otero had no knowledge of which services or treatments were actually being performed and which were not. Because of this lack of knowledge, in her billing, Ms. Otero saw

no relationship between the dental work actually performed and the dental work which was billed. Although dental services and treatments were rendered for each Patient, Ms. Otero billed for services or treatments rendered and services or treatments not rendered.

27. Respondent did not review or check the billing to Medicaid. She signed the Medicaid billing requests without reading them.

28. To prepare for the possibility an investigation, Respondent directed Ms. Otero to create dental records in English to match the false Medicaid billing. As a result, Respondent had two sets of dental records for the Patients, one in Spanish (the correct records) and one in English (the false records).

29. Florida's Office of the Attorney General, Medicaid Fraud Control Unit (Fraud Unit) conducted an investigation of possible fraud by Respondent. During the investigation, the Fraud Unit requested the Patients' records from Respondent. Respondent provided the actual questionnaire completed by Patients and also provided the English records, instead of the Spanish records, as the authentic records. Even when the dental records were subpoenaed, the English records were provided.

30. During the investigation by the Fraud Unit, Respondent approached Patient M.A.A. and attempted to persuade him to join in the untruths presented regarding services or treatments

rendered by Respondent to the Patients. She requested Patient M.A.A. to lie about the services that had been rendered to him if he was questioned regarding the services that he had received. Respondent requested that Patient M.A.A. tell the Fraud Unit that her office had performed his extractions even though the extractions were performed in Cuba.

31. Respondent did not admit her participation in the fraud being perpetuated until her deposition which was taken by Petitioner on July 11, 2000.

32. As a Medicaid provider, Respondent agreed to accept payments on Medicaid's scale of fees for Medicaid patients. Respondent's charges for the same services or treatments rendered by her to her private patients were more than the reimbursement fees reflected on Medicaid's scale of fees.

33. Respondent does not dispute that she billed for the services or treatments rendered in the Administrative Complaint filed against her by Petitioner. Furthermore, Respondent does not dispute the dollar amount that she received from Medicaid.⁵

34. For Patient M.A.A., Respondent billed for services rendered on five visits from a period of February 9, 1996, through March 12, 1996. Respondent billed Medicaid \$1,175.00 and was paid \$273.85 by Medicaid. However, had the appropriate service been billed by Respondent, the payment by Medicaid would

have been \$12.00, resulting in an overpayment by Medicaid of \$261.85.

35. For Patient A.F., Respondent billed for services rendered on 12 visits from a period of May 31, 1995, through July 28, 1995. Respondent billed Medicaid \$819.00 and was paid \$778.05 by Medicaid. However, had the appropriate service been billed by Respondent, the payment by Medicaid would have been \$12.00, resulting in an overpayment by Medicaid of \$766.05.

36. For Patient A.A., Respondent billed for services rendered on eight visits from a period of December 14, 1995, through February 4, 1996. Respondent billed Medicaid \$1,990.00 and was paid \$581.80 by Medicaid. However, had the appropriate service been billed by Respondent, the payment by Medicaid would have been \$12.00, resulting in an overpayment by Medicaid of \$569.80.

37. For Patient M.A., Respondent billed for services rendered on four visits from a period of June 6, 1996, through June 27, 1996. Respondent billed Medicaid \$1,035.00 and was paid \$267.15 by Medicaid. However, had the appropriate service been billed by Respondent, the payment by Medicaid would have been \$12.00, resulting in an overpayment by Medicaid of \$255.15.

38. For Patient C.G., Respondent billed for services rendered on six visits from a period of April 29, 1995, through June 7, 1995. Respondent billed Medicaid \$908.00 and was paid

\$808.45 by Medicaid. However, had the appropriate service been billed by Respondent, the payment by Medicaid would have been \$12.00, resulting in an overpayment by Medicaid of \$796.45.

39. For Patient D.A.G., Respondent billed for services rendered on five visits from a period of April 27, 1995, through May 25, 1995. Respondent billed Medicaid \$774.00 and was paid \$697.30 by Medicaid. However, had the appropriate service been billed by Respondent, the payment by Medicaid would have been \$12.00, resulting in an overpayment by Medicaid of \$685.30.

40. For Patient E.A., Respondent billed for services rendered on six visits from a period of January 19, 1996, through February 20, 1996. Respondent billed Medicaid \$1,410.00 and was paid \$341.00 by Medicaid. Patient E.A. was under the age of 21 years, and, therefore, all services were covered by Medicaid. Had the appropriate service been billed by Respondent, the payment by Medicaid would have been \$1,215.00, resulting in an underpayment by Medicaid of \$874.00.

41. For Patient I.A., Respondent billed for services rendered on four visits from a period of May 2, 1996, through May 23, 1996. Respondent billed Medicaid \$835.00 and was paid \$229.18 by Medicaid. However, had the appropriate service been billed by Respondent, the payment by Medicaid would have been \$12.00, resulting in an overpayment of \$217.18.

42. For Patient M.C.A., Respondent billed for services rendered on 11 visits from a period of June 3, 1995, through December 26, 1995. Respondent billed Medicaid \$1,570.00 and was paid \$1,067.70 by Medicaid. However, had the appropriate service been billed by Respondent, the payment by Medicaid would have been \$12.00, resulting in an overpayment by Medicaid of \$1,055.70.

43. For Patient E.B., Respondent billed for services rendered on 11 visits from a period of May 16, 1995, through July 15, 1995. Respondent billed Medicaid \$908.00 and was paid \$862.60 by Medicaid. However, had the appropriate service been billed by Respondent, the payment by Medicaid would have been \$12.00, resulting in an overpayment by Medicaid of \$850.60.

44. For Patient R.D., Respondent billed for services rendered on nine visits from a period of June 30, 1995, through August 24, 1995. Respondent billed Medicaid \$1,116.00 and was paid \$1,060.20 by Medicaid. However, had the appropriate service been billed by Respondent, the payment by Medicaid would have been \$12.00, resulting in an overpayment by Medicaid of \$1,048.20.

45. For Patient C.V., Respondent billed for services rendered on nine visits from a period of June 6, 1995, through August 4, 1995. Respondent billed Medicaid \$1,121.00 and was paid \$1,064.95 by Medicaid. However, had the appropriate service

been billed by Respondent, the payment by Medicaid would have been \$881.00, resulting in an overpayment by Medicaid of \$183.95. Also, included in the services rendered and billed to and paid by Medicaid was the preparation of dentures to Patient C.V., however, no extractions were performed on Patient C.V., so he did not obtain the dentures from Respondent.

46. For Patient R.B., Respondent billed for services rendered on eight visits from a period of March 8, 1995, through April 21, 1995. Patient R.B. also received dentures from Respondent. Respondent billed Medicaid \$1,063.00 and was paid \$971.85 by Medicaid. However, had the appropriate service been billed by Respondent, the payment by Medicaid would have been \$500.30, resulting in an overpayment by Medicaid of \$471.55.

47. For Patient M.I., Respondent billed for services rendered on 11 visits from a period of April 1, 1995, through May 30, 1995. Respondent billed Medicaid \$1,231.00 and was paid \$1,169.45 by Medicaid. However, had the appropriate service been billed by Respondent, the payment by Medicaid would have been \$12.00, resulting in an overpayment by Medicaid of \$1,157.45.

48. For Patient A.B., Respondent billed for services rendered on 10 visits from a period of November 2, 1995, through January 12, 1996. Respondent billed Medicaid \$1,231.00 and was paid \$1,169.45 by Medicaid. Also, included in the services rendered and billed to and paid by Medicaid were the preparation

and delivery of dentures to Patient A.B. It could not be determined what services were actually performed for Patient A.B. and, therefore, it cannot be determined what the payment by Medicaid would have been if the appropriate services had been billed and what the overpayment, if any, is.

49. As a result, for the 15 Patients, Respondent billed \$18,467.00 to Medicaid, was paid \$11,126.88 by Medicaid, and received \$7,445.23 in overpayment from Medicaid. None of the 15 Patients were aware that Respondent was billing Medicaid for dental services not rendered.

50. Medicaid pays for dentures only once. For patients who did not actually receive dentures from Respondent, but the providing of dentures was billed to Medicaid, those patients may possibly have a problem in the future in securing dentures paid for by Medicaid.

51. As to services or treatments rendered by Mr. Gonzalez, he performed the examination and cleaning and checked fillings of Patient C.G.; performed the examination and cleaning and installed fillings of Patient D.A.G.; and performed the examination and cleaning, installed fillings, and took impressions for dentures of Patient C.V. Patients C.G., D.A.G., and C.V. were satisfied with the services that they received.

52. The services and treatments performed by Respondent for the 15 Patients were necessary services. Petitioner does not

contend that Respondent failed to practice dentistry with reasonable skill and safety.

53. By Order of Emergency Suspension of License, filed April 17, 1998, Respondent's license to practice dentistry was suspended on an emergency basis by the Board of Dentistry.

54. On October 15, 1999, Respondent was charged with one count of Medicaid fraud by the Statewide Prosecutor for the State of Florida in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, Case No. 99-35476. The charge of Medicaid fraud was a result of her false Medicaid billing arising from her practice of dentistry.

55. On June 28, 1999, Respondent entered into a plea agreement. The terms of the plea agreement included, among other things, a plea of guilty with the understanding that Respondent would request that adjudication be withheld; three-year probation with 2600 hours of community service, \$100,000.00 reimbursement to the Florida Medicaid Program, pay \$5,000.00 to the Office of the Attorney General, Medicaid Fraud Control Unit for costs of the investigation, and \$3,500.00 to the Office of the Statewide Prosecutor for costs of prosecution; and full cooperation by Respondent with the State of Florida in its investigation.

56. On November 9, 1999, Respondent plead guilty to the one count of Medicaid fraud. Adjudication was withheld and Respondent was placed on probation for three years with 2600

hours of community service. Furthermore, on November 9, 1999, the Court entered judgments against Respondent for \$100,000.00, payable to the Agency for Health Care Administration for restitution; for \$5,000.00, payable to the Office of the Attorney General, Medicaid Fraud Control Unit for investigative costs; and for \$3,500.00, payable to the Office of the Statewide Prosecutor for costs of prosecution.

57. On November 18, 1999, the terms of Respondent's probation were modified by the Court to permit Respondent to perform her community service hours in a dental facility.

58. On January 3, 2000, Respondent's counsel and counsel for the Statewide Prosecutor entered into a stipulation amending Respondent's plea agreement. The amended stipulation was filed with the Court in Respondent's Medicaid fraud case. The amended stipulation provided in pertinent part as follows:

In order to serve the public in a more appropriate manner and commensurate with her professional abilities, Dr. Nieto may fulfill her obligation providing services as a dentist or a dentist assistant in any governmental or public health facility (including a correctional facility), during the three year period, which will include the period during which she is suspended from private practice, if approved by the Department of Health, Board of Dentistry, at a rate of no less than twenty (20) hours weekly as community service.

59. An inference is drawn, from the actions of the Statewide Prosecutor and the Court, that Respondent's conduct should not prevent her from practicing dentistry.

60. In February 2000, Respondent was notified by the U.S. Department of Health and Human Services that, as a result of her conviction for Medicaid fraud, she was excluded from participating in the Medicare, Medicaid, and all federal health care programs for a minimum of five years.

61. Respondent has not practiced since the emergency suspension of her license on April 17, 1998, almost three years ago.

62. Not being able to practice has exacted a toll on Respondent's life. She experienced a state of depression and is under psychological treatment and taking medication for her depression. Her finances have suffered severely, and in addition to losing her dental practice and office, she has lost her home.

63. Respondent has no prior disciplinary action by Petitioner.

64. Character witnesses testified on behalf of Respondent. One such witness was Eladio Armesto who publishes the oldest Cuban-American weekly newspaper in the State of Florida and publishes a magazine which is a feature of the newspaper. Mr. Armesto referred many Cuban refugees to Respondent, advising Respondent that the potential patients could not pay her for her

services. He also referred non-Medicaid eligible persons, as well as Medicaid-eligible persons, to Respondent. Respondent never refused services or treatments to any of the referrals. Mr. Armesto praised Respondent's willingness to help and the dental work provided to Cuban refugees by Respondent.

65. Many letters in support of Respondent were also submitted.

66. The undersigned is persuaded that Respondent's actions in falsifying the dental records and the Medicaid billing claims were not for financial gain, although one cannot dismiss that Respondent did receive monies from Medicaid, but were to assist Cuban refugees with the dental work needed by them. Respondent rendered dental services, for the 15 Patients and other patients, beyond that for which Medicaid would pay and for which the patients could pay themselves.

CONCLUSIONS OF LAW

67. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes.

68. License revocation proceedings are penal in nature. The burden of proof is on the Petitioner to establish by clear and convincing evidence the truthfulness of the allegations in the Administrative Complaint and the amendment thereto.

Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

69. Respondent is charged with violating Subsection 466.028, Florida Statutes, which provides in pertinent part:

(1) The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:

* * *

(c) Being convicted or found guilty of or entering a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction which relates to the practice of dentistry

* * *

(j) Making or filing a report which the licensee knows to be false, failing to file a report or record required by state or federal law, knowingly impeding or obstructing such filing or inducing another person to do so. Such reports or records shall include only those which are signed in the capacity as a licensee.

* * *

(l) Making deceptive, untrue, or fraudulent representations in or related to the practice of dentistry.

* * *

(m) Failing to keep written dental records and medical history records justifying the course of treatment of the patient including, but not limited to, patient histories, examination results, test results, and X-rays, if taken.

* * *

(t) Fraud, deceit, or misconduct in the practice of dentistry

* * *

(x) Being guilty of incompetence or negligence by failing to meet the minimum standards of performance in diagnosis and treatment when measured against generally prevailing peer performance, including, but not limited to, the undertaking of diagnosis and treatment for which the dentist is not qualified by training or experience or being guilty of dental malpractice

* * *

(z) Delegating professional responsibilities to a person who is not qualified by training, experience, or licensure to perform them.

(aa) The violation . . . of . . . any rule promulgated pursuant to chapter 455 or this chapter

* * *

(2) When the board finds any applicant or licensee guilty of any of the grounds set forth in subsection (1), it may enter an order imposing one or more of the following penalties:

* * *

(b) Revocation or suspension of a license.

(c) Imposition of an administrative fine not to exceed \$3,000 for each count or separate offense.

(d) Issuance of a reprimand.

(e) Placement of the licensee on probation for a period of time and subject to such

conditions as the board may specify, including requiring the licensee to attend continuing education courses or demonstrate competency through a written or practical examination or to work under the supervision of another licensee.

(f) Restricting the authorized scope of practice.

(3) There shall be a minimum 6-month suspension of the license of a dentist who is convicted of a violation of paragraph (1)(z).

70. Section 409.920, Florida Statutes (1995), provides in pertinent part:

(1) For the purposes of this section, the term:

(a) "Fiscal agent" means any individual, firm, corporation, partnership, organization, or other legal entity that has contracted with the department [Department of Health and Rehabilitative Services] to receive, process, and adjudicate claims under the Medicaid program.

(b) "Item or service" includes:

1. Any particular item, device, medical supply, or service claimed to have been provided to a recipient and listed in an itemized claim for payment; or
2. In the case of a claim based on costs, any entry in the cost report, books of account, or other documents supporting such claim.

(c) "Knowingly" means done by a person who is aware or should be aware of the nature of his conduct and that his conduct is substantially certain to cause the intended result.

(2) Any person who:

(a) Knowingly make, cause to be made, or aid and abets in the making of any false statement or false representation of a material fact, by commission or omission, in any claim submitted to the department or its fiscal agent for payment is guilty of a felony of third degree. . . .

(b) Knowingly makes, causes to be made, or aids and abet in the making of a claim for items or services that are not authorized to be reimbursed by the Medicaid program is guilty of a felony of the third degree. . . .

71. Rule 59Q-17.002, Florida Administrative Code, now Rule 64B5-17.002, Florida Administrative Code, provides in pertinent part:

(1) For the purpose of implementing the provisions of subsection 466.028(1)(m), Florida Statutes, a dentist shall maintain written records on each patient which written records shall contain, at a minimum, the following information about the patient:

(a) appropriate medical history;

(b) results of clinical examination and tests conducted, including the identification, or lack thereof, of any oral pathology or diseases;

(c) any radiographs used for the diagnosis or treatment of the patient;

(d) treatment plan proposed by the dentist;
and

(e) treatment rendered to the patient.

72. Petitioner has demonstrated by clear and convincing evidence that Respondent violated Subsection 468.028(1)(x), Florida Statutes, by extracting teeth without first obtaining

pre-operative X-rays; Subsection 466.028(1)(m), Florida Statutes, by failing to maintain accurate dental records reflecting the treatment rendered to patients; Subsection 466.028(1)(aa), Florida Statutes, by failing to properly maintain dental records; Subsection 466.028(1)(l), Florida Statutes, by billing Medicaid for services or treatments not rendered to the patient; Subsection 466.028(1)(t), Florida Statutes, by billing Medicaid for services or treatments not rendered to the patient; Subsection 466.028(1)(j), Florida Statutes, by billing Medicaid for services or treatment not rendered to the patient; Subsection 466.028(1)(z), Florida Statutes, by delegating professional responsibilities to a Mr. Gonzalez who was not qualified by training, experience, or licensure to perform them; and Subsection 466.028(1)(c), Florida Statutes, by being found guilty of Medicaid fraud.

73. Petitioner has promulgated rules addressing the penalty for violations of the dentistry practice act. The disciplinary guidelines are found at Rule 59Q-13.005, Florida Administrative Code, now Rule 64B5-13.005, Florida Administrative Code. For a licensee committing violations enumerated in Section 466.028, Florida Statutes, a reprimand and an administrative fine not exceeding \$3,000.00 per count or offense shall always be imposed unless mitigating factors are demonstrated; and such reprimand and fine are in addition to the other penalties imposed for the

individual violations of Section 466.028, Florida Statutes. For a violation of Subsections 466.028(1)(c), (j), (l), (m), (t), (x), and (aa), Florida Statutes, the penalty ranges from probation to revocation of license; and a violation of Subsection 466.028(1)(z), Florida Statutes, a minimum 6-month suspension, with the option to also impose probation or restriction of practice.

74. In accordance with the disciplinary guidelines, several mitigating factors should be considered by Petitioner. Respondent has no prior disciplinary action against her. The offenses occurred from March 1995 through June 1996, over four years ago. The actual dental work performed on the patients has not been shown to be incompetent. Respondent has not practiced dentistry for almost three years since the Emergency Suspension Order was issued in April 1998. As a result of her conviction of Medicaid fraud, Respondent was ordered by the court to, among other things, reimburse the Agency for Health Care Administration in the amount of \$100,000.00.

75. Furthermore, Respondent was not motivated by money but by the desire to assist Cuban refugees who were not able to receive all of the dental assistance through Medicaid that they needed. However, in taking the course of action that she took, Respondent violated the dentistry practice act and criminal laws, and she knew that she was committing such violations.

RECOMMENDATION

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

RECOMMENDED that the Department of Health, Board of Dentistry, enter a final order:

1. Finding that Marta Nieto, D.D.S., violated Subsections 466.028(1)(c), (j), (l), (m), (t), (x), (z), and (aa), Florida Statutes.

2. Suspending Dr. Nieto's license for five years, with the time period during the emergency suspension being applied towards the five-year suspension.

3. Placing Dr. Nieto on probation for three years under the terms and conditions deemed appropriate.

4. Imposing an administrative fine of \$24,000.00.

DONE AND ENTERED this 1st day of February, 2001, in Tallahassee, Leon County, Florida.

ERROL H. POWELL
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of February, 2001.

ENDNOTES

1/ Five of the exhibits were deposition testimony.

2/ Due to unusual circumstances, Respondent proffered the testimony of one witness, Rita Ballester. Petitioner agreed to accept the proffered testimony as the actual testimony of the witness.

3/ Respondent's Exhibits numbered 6 and 7 were duplicates of exhibits already entered into evidence by Petitioner. Respondent's Exhibit numbered 9 was withdrawn.

4/ Only three of the 15 Patients, Patients C.V., D.A.G., and C.G., testified at hearing; and only one patient's testimony, Patient E.A., was presented by deposition and entered into evidence. Petitioner entered into evidence sworn statements of the Patients taken by an investigator. The sworn statements are statements of third parties and are, therefore, hearsay. The sworn statements are not subject to an exception of the hearsay rule. However, hearsay evidence may be subject to Subsection 120.57(1)(c), Florida Statutes.

5/ Respondent submitted dollar values for the dental services or treatments that she rendered to the 15 Patients based upon what a private patient would have paid for her services. The amounts submitted by Respondent are not considered. The claims for services rendered were submitted to Medicaid for payment by Medicaid based upon Medicaid's fee schedule, not the fee schedule that a dentist would charge private patients.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.