STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PAUL DAVID JOHNSON, Petitioner, vs. AGENCY FOR HEALTH CARE ADMINISTRATION, Respondent.	)	Case No. 98-3419RU

FINAL ORDER OF DISMISSAL

On July 24, 1998, Petitioner filed a petition (Petition) challenging, pursuant to Section 120.56, Florida Statutes, "the Agency for Health Care Administration's (ACHA or the Agency) rule as evidenced by or embodied in its four (4) page printed policy entitled 'Direct Reimbursement/Payment to Recipients'", which was attached to the petition and referred to therein (as it will be in this Order) as the "Rule." The Rule, as Petitioner indicated in his Petition, "limits reimbursement for out-of-pocket expenditures to only those bills incurred following an erroneous denial of benefits" and, in addition, "limits the amount of reimbursement to the Medicaid payment level- regardless of how much a recipient was forced to pay out-of-pocket." In his Petition, Petitioner challenges the Rule on the following grounds:

> A. The Agency has materially failed to follow the applicable rulemaking procedures required by the Administrative Procedures

Act. The "policy" meets the statutory definition of a "rule" and it was not promulgated. Section 120.52(15), Fla. Stat. It is the Agency's statement of general applicability implementing, interpreting or prescribing law or policy. The rule was not adopted under section 120.54, Florida Statutes, requiring that rules be properly promulgated.

B. The rule is arbitrary and capricious and denies petitioner reimbursement to which he is entitled. The rule violates section 120.52(8)(e), Florida Statutes.

C. The rule contravenes section 409.901(14),(15),(18), Florida Statutes in that it violates federal law.

During a telephone conference call held on August 3, 1998, both parties indicated that they would be available for hearing on October 8, 1998, and that they would have no objection to the hearing being held more than 30 days from the date of the undersigned's assignment to the instant case if the undersigned determined that good cause existed to extend the hearing date beyond this 30-day period. Based upon the information provided by the parties during the telephone conference call, the undersigned determined that there was good cause for such an extension and, accordingly, on August 5, 1998, he issued a notice advising the parties that the final hearing in this case would be held on October 8, 1998.

On September 11, 1998, Respondent filed a Motion for Summary Final Order Dismissing the Petition (Respondent's First Motion), in which it asserted that the issue raised by Petitioner in his Petition is now moot inasmuch as Respondent "has commenced

rulemaking by proposing a rule" addressing the agency policy set forth in the Rule. On September 15, 1998, the undersigned issued an Order directing Petitioner to file a written response to Respondent's First Motion. On September 25, 1998, Petitioner filed such a written response opposing Respondent's First Motion. On October 2, 1998, the undersigned issued an Order denying Respondent's First Motion. In his Order, the undersigned gave the following explanation for his ruling:

> It appears from a review of "Respondent's Exhibit 3," which was referenced in, and appended to, Respondent's [First] Motion, that, although Respondent has taken steps which may one day lead to the adoption of a rule codifying the agency statement which is the subject of Petitioner's rule challenge petition, Respondent, at present, is merely in the "rule development" stage of rulemaking and thus has not yet even published notice, pursuant to Section 120.54(3)(a), Florida Statutes, of its intention to adopt such a rule.[1] Under such circumstances, Respondent's request that Petitioner's petition be dismissed on the ground of mootness is premature.

On October 1, 1998, Petitioner filed a motion requesting that the final hearing in this case, scheduled for October 8, 1998, be continued. In his motion, Petitioner announced that he intended to file a motion for summary final order and requested permission to do so on or before October 23, 1998. On October 2, 1998, the undersigned issued an Order continuing the final hearing and giving Petitioner until October 23, 1998, to file his motion for summary final order. The Order provided, in pertinent part, as follows:

> 1. Good cause having been shown, Petitioner's Motion for Continuance is granted.
>
> 2. Petitioner's request that he be given until October 23, 1998, to file a motion for summary final order in this case is granted.
>
> 3. Petitioner's motion for summary final order shall comply with the requirements of Rule 28-106.204, Florida Administrative Code. In addition, the motion shall contain a statement of those undisputed material facts upon which he believes the undersigned should base his decision in the instant case.
>
> 4. Respondent shall file a response to Petitioner's motion for summary final order within 14 days of being served with the motion. In its response, in addition to presenting any legal argument it wishes to in support of its position on the motion, Respondent shall identify with specificity: (1) any fact contained in Petitioner's statement of undisputed material facts that it disputes; and (2) any fact not contained in Petitioner's statement of undisputed material facts on which it believes the decision in the instant case should be based.

On October 22, 1998, Petitioner filed a Motion for Summary Final Order Declaring Rule Invalid and Statement of Undisputed Material Facts (Petitioner's Motion),[2] in which he stated the following:

> Petitioner PAUL DAVID JOHNSON, pursuant to Fla. Admin. Code R. 60Q-2.030,[3] moves for Summary Final Order declaring that Respondent's Rule (attached as Exhibit "A" to the Petition to Determine Invalidity of Respondent's Rule) entitled "Direct Reimbursement/Payment of Recipients" is invalid. There are no material facts in dispute and only legal issues remain to be interpreted. A full statement of uncontested facts and citations to the record[4] is as follows:

1. Paul David Johnson resides at 1109 Fleming Street, Key West, Florida 33040.

2. He applied for Supplemental Security Income (SSI) and Medicaid on February 29, 1996.

3. This application was denied on July 19, 1996.

4. Following an administrative hearing, by decision dated March 13, 1998, petitioner was found eligible for SSI and Medicaid.

5. The decision found that he was disabled as of January 26, 1996.

6. By notice dated July 6, 1998, Petitioner was advised that Medicaid was approved effective July 1, 1998.

7. Prior to August 4, 1998, when his Medicaid card was issued, he was forced to pay the market rate for medically necessary prescription medications. The pharmacy would not extend credit or accept less than full payment. He had no health insurance to pay for the prescriptions.

8. Florida's Medicaid program covers medically necessary prescription medications. Section 409.906(19), Fla. Stat.

9. The Agency for Health Care Administration (AHCA) is the agency affected by this petition.

10. Exhibit A to the Petition (referred to as "the Rule" or "the Policy") embodies the Agency's policy regarding direct reimbursement to Medicaid recipients.

11. Under the Rule, Petitioner's out-of-pocket expenses for medically necessary medications are not fully reimbursable.

12. The rule states, "Any bills that were paid before the applicant/recipient received

an erroneous decision are not eligible for reimbursement." It is AHCA's policy not to reimburse for bills paid prior to an erroneous denial of benefits.

13. Further, the Rule provides that AHCA will reimburse Medicaid covered services provided on or after an erroneous denial of benefits only at the Medicaid rate.

14. Petitioner submitted medical bills totaling $1,080.92 for reimbursement and was reimbursed only $665.75.

15. AHCA determines reimbursement for Medicaid covered services on behalf of Medicaid recipients and promulgates rules regarding reimbursement.

16. The Rule is the Agency's statement of general applicability implementing, interpreting or prescribing law or policy.

17. Nevertheless, AHCA did not promulgate its Rule under section 120.54, Florida Statutes.

As a matter of law:

a. Petitioner has been substantially affected by the challenged rule and therefore has standing to bring this action.

b. The challenged rule is an invalid exercise of legislatively delegated authority pursuant to section 120.52(8), Florida Statutes because the rule conflicts with 42 U.S.C. Sections 1396(a)(10)(B) and (34), 42 U.S.C. Section 1396o(b)(3), 42 C.F.R. Section 431.426 and the cases of Kurnik v. Dept. of Health & Rehab. Serv., 661 So. 2d 914 (Fla. 1st DCA 1995), Greenstein v. Bane, 833 F. Supp. 1054 (S.D.N.Y 1993) and Blanchard v. Forrest, 71 F.3d 1163 (5th Cir. 1996), cert. denied 135 L.Ed. 2nd 1062 (1996).

WHEREFORE, petitioner requests that the [Administrative Law Judge] enter a Final Summary Order declaring that the Rule is an

> invalid exercise of delegated legislative authority.

On November 2, 1998, Respondent filed a Second Motion to Dismiss the Petition and Response to Petitioner's Motion for Summary Final Order (Respondent's Second Motion), in which it stated the following:[5]

> Respondent, State of Florida, Agency for Health Care Administration (AHCA) moves again to dismiss this case as moot and responds to Petitioner's motion for summary judgment final order. In support of its motion, Respondent says as follows:
>
> 1. On October 2, 1998, the Administrative Law Judge ruled that:
>
> "... Respondent, at present is merely in the 'rule development' stage of rulemaking and thus has not yet even published notice, pursuant to Section 120.54(3)(a), Florida Statutes, of its intention to adopt such a rule. Under such circumstances, Respondent's request that Petitioner's petition be dismissed on the ground of mootness is premature."
>
> 2. Attached is AHCA's notice of proposed rulemaking.
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> 3. AHCA is the state agency authorized to administer the Medicaid program. Section 409.902, Fla. Stat. Petitioner has finally conceded this point.
>
> 4. AHCA's proposed rule addresses the allegations in the petition that a rule is needed to allow AHCA to reimburse Medicaid recipients, like Mr. Johnson. Section 120.56(4)(e), Fla. Stat.
>
> 5. Petitioner sought an administrative determination that AHCA's policy statement on direct reimbursement of Medicaid recipients violated Section 120.54(1)(a), Fla. Stat. Section 120.54(4)(a), Fla. Stat.

6. AHCA can make direct reimbursement to Medicaid recipients, like Mr. Johnson, who paid for covered services after the Social Security Administration's erroneous determination for ineligibility was reversed. 42 CFR Section 447.25(b).

7. Payment is made at the level of AHCA's fee schedule or the upper limits as specified in the State plan for the services in question, which was in effect at the time the service was provided, even though Mr. Johnson may have paid more than that amount. 42 CFR Section 447.25(d).

8. Petitioner's September 25, 1998 response to the motion to dismiss conceded that [the] AHCA policy statement is being adopted by the proper statutory rulemaking procedures. See Sections 120.54(1)(a) and 120.56(4)(e), Fla. Stat.

9. On September 29, 1998, Petitioner's own counsel participated in the hearing on the rule.

10. AHCA believes that the relevant and material facts viewed in a light most favorable to Petitioner now justify a dismissal of the petition in this case.

11. AHCA's proposed rule makes moot the issue raised by the Petitioner. See State v. Hazellief, 148 So. 2d 28 (2nd DCA 1962), where the question of the extent to which additional grounds for relief may be considered and reviewed became moot because the court found that the trial court did not err. See St. Pierre v. United States, 319 U.S. 41, 63 S.Ct. 910, 87 L.Ed. 1199 (1943) where the court dismissed a moot petition.

12. The amount reimbursed for services to Petitioner, [a] Medicaid recipient, must be the same as those paid on behalf of other medically needy recipients to the extent of actual funds expended. See 42 U.S.C. Section 1396(a)(10)(B) and 42 CFR Section 440.20.

> 13. Petitioner has been reimbursed on his claims for medical assistance under the Medicaid program.
>
> 14. The sole basis of Petitioner's standing to bring his challenge to the policy in this case was his request for reimbursement of medical expenses under the Medicaid program. See petition paragraphs 17-21. Minnehoma Auto Ass'n, Inc. v. Bill Seidle's Nissan, Inc., 560 So. 2d 385 (3rd DCA 1990), where a party was dismissed with the understanding it could file its action appropriately. Compare State ex rel. Sheven v. Morgan, 289 So. 2d 782 (2nd DCA 1974), where a party maintained standing.
>
> 15. If Petitioner is substantially affected by a change in the proposed rule, then he can seek a determination of the validity of such change. Section 120.56(2)(a), Fla. Stat. See Dep't of Business and Professional Regulation v. Calder Race Course, Inc., 23 Fla. L. Weekly D1795, 1998 WL 422515 (1st DCA 1998).
>
> Therefore, AHCA respectfully requests that the petition be dismissed and this case closed.

On November 3, 1998, the undersigned issued an Order directing Petitioner, by November 10, 1998, to file a written response to Respondent's Second Motion "identify[ing] those assertions in the Motion, factual or otherwise, with which he disagrees and explain[ing] the basis of his disagreement."

Petitioner filed such a response on November 10, 1998. In his response, Petitioner stated, among other things, the following:

> AHCA's Second Motion to Dismiss and Response to Petitioner's Motion for Summary Final Order, primarily reiterates the arguments made in its first Motion for Summary Final

> Order. (The first motion) The only new development is that Respondent has now published notice of a proposed rule. This proposed rule incorporates the same reimbursement policies which petitioner challenges. Publication of the proposed rule abates petitioner's procedural claim that AHCA's policies have not been properly promulgated as a rule.[6] However, such publication does not affect the continued viability of petitioner's other claims challenging the substance of these policies. . . .
>
> This case raises both procedural and substantive challenges to AHCA's unpublished rule. Section 120.56(4)(f), Fla. Stat. specifically authorizes this consolidation of substantive and procedural claims into the same action. Certainly, such consolidation is more efficient than dual litigation. Nevertheless, AHCA argues that it may moot substantive, as well as procedural, challenges simply by publishing a virtually identical proposed rule. If AHCA's interpretation is correct, the prudent petitioner would file separate cases raising his procedural and substantive claims or simply forgo raising procedural claims altogether.
>
> Either alternative frustrates the public policy of the Administrative Procedures Act. In one case, dual litigation impedes judicial economy. In the second case, the Agency's failure to duly promulgate rules is never brought to judicial scrutiny. Indeed, if AHCA can prevent litigation of substantive claims merely by publishing a rule identical in substance to the challenged rule, its initial reliance on an unpromulgated policy is rewarded. AHCA cites no authority which compels such ludicrous results. Petitioner substantive claims remain viable. . . .

Oral argument on Petitioner's Motion and Respondent's Second Motion was heard on November 16, 1998. On November 17, 1999, the

undersigned issued an Order, which provided, in pertinent part, as follows:

> In the instant case, Petitioner is challenging a policy statement made by Respondent that he claims constitutes a "rule," within the meaning of Section 120.52(15), Florida Statutes,[7] but has not yet been adopted by Respondent in accordance with the rulemaking provisions of Chapter 120, Florida Statutes. He initiated his challenge by filing a petition directly with Division of Administrative Hearings (Division) pursuant to Section 120.56, Florida Statutes.
>
> Any person substantially affected by an unpromulgated rule may challenge that rule pursuant to Section 120.56, Florida Statutes. Such a challenge must be brought pursuant to subsection (4) of Section 120.56, Florida Statutes. See Section 120.56(4)(f), Florida Statutes ("All proceedings to determine a violation of s. 120.54(1)(a) shall be brought pursuant to this subsection.").
>
> It is apparent from a reading of subsection (4) of Section 120.56, Florida Statutes, that the only issue to be decided by the administrative law judge in a proceeding brought under this subsection is "whether all or part of [the agency] statement [in question] violates s. 120.54(1)(a)," Florida Statutes, which provides as follows:
>
> "(a) Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable.
>
> 1. Rulemaking shall be presumed feasible unless the agency proves that:
>
> a. The agency has not had sufficient time to acquire the knowledge and experience reasonably necessary to address a statement by rulemaking;

b. Related matters are not sufficiently resolved to enable the agency to address a statement by rulemaking; or

c. The agency is currently using the rulemaking procedure expeditiously and in good faith to adopt rules which address the statement.

2. Rulemaking shall be presumed practicable to the extent necessary to provide fair notice to affected persons of relevant agency procedures and applicable principles, criteria, or standards for agency decisions unless the agency proves that:

a. Detail or precision in the establishment of principles, criteria, or standards for agency decisions is not reasonable under the circumstances; or

b. The particular questions addressed are of such a narrow scope that more specific resolution of the matter is impractical outside of an adjudication to determine the substantial interests of a party based on individual circumstances."

If the administrative law judge rules in favor of the challenger on this issue, the agency must "immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action." Section 120.56(4)(d), Florida Statutes. Furthermore, upon the entry of an order finding in favor of the challenger, the administrative law judge must "award reasonable costs and reasonable attorney's fees to the [challenger], unless the agency demonstrates that the statement is required by the Federal Government to implement or retain a delegated or approved program or to meet a condition to receipt of federal funds."

The agency can avoid an adverse ruling in a Section 120.56(4) proceeding (and the aforementioned consequences of such a ruling) if, prior to the entry of a final order in the case, it publishes, pursuant to Section

120.54(3), Florida Statutes, a proposed rule "which address[es] the statement" and acts "expeditiously and in good faith" to adopt the rule in accordance with the rulemaking requirements of Chapter 120, Florida Statutes.[8] Sections 120.54(1)(a)1.c and 120.56(4)(e), Florida Statutes; Savona v. Agency for Health Care Administration, 23 Fla. L. Weekly D2246a (Fla. 1st DCA September 28, 1998). The taking of these steps by the agency, however, does not leave those substantially affected by the agency's policy statement without a means to challenge the substance of the agency policy on the ground that it is a "invalid exercise of delegated legislative authority," within the meaning of Section 120.52(8), Florida Statutes, which provides as follows:

"As used in this act [Chapter 120, Florida Statutes]:

(8) 'Invalid exercise of delegated legislative authority' means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:

(a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;

(b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;

(c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;

(d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;

(e) The rule is arbitrary or capricious;

(f) The rule is not supported by competent substantial evidence; or

(g) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than the particular powers and duties conferred by the same statute."

Such a challenge may be made pursuant to subsection (2) of Section 120,56, Florida Statutes, by filing a petition with the Division "within 21 days after the date of publication of the notice [of the proposed rule] required by s. 120.54(3)(a), within 10 days after the final public hearing is held on the proposed rule as provided by s. 120.54(3)(c), within 20 days after the preparation of a statement of estimated regulatory costs required pursuant to s. 120.541, if applicable, or within 20 days after the date of publication of the notice required by s. 120.54(3)(d)," Florida Statutes. In addition, if, prior to the adoption of the proposed rule, the agency seeks to rely on the policy statement in a Section 120.57(1) proceeding, the statement is "subject to [at the request of the aggrieved party] de novo review by [the] administrative law judge" conducting the

proceeding pursuant to Section 120.57(1)(e), Florida Statutes, which provides as follows:

"(1) ADDITIONAL PROCEDURES APPLICABLE TO HEARINGS INVOLVING DISPUTED ISSUES OF MATERIAL FACT.-

(e)1. Any agency action that determines the substantial interests of a party and that is based on an unadopted rule is subject to de novo review by an administrative law judge.

2. The agency action shall not be presumed valid or invalid. The agency must demonstrate that the unadopted rule:

a. Is within the powers, functions, and duties delegated by the Legislature or, if the agency is operating pursuant to authority derived from the State Constitution, is within that authority;

b. Does not enlarge, modify, or contravene the specific provisions of law implemented;

c. Is not vague, establishes adequate standards for agency decisions, or does not vest unbridled discretion in the agency;

d. Is not arbitrary or capricious;

e. Is not being applied to the substantially affected party without due notice;

f. Is supported by competent and substantial evidence; and

g. Does not impose excessive regulatory costs on the regulated person, county, or city.

3. The recommended and final orders in any proceeding shall be governed by the provisions of paragraphs (i) and (j), except that the administrative law judge's determination regarding the unadopted rule shall not be rejected by the agency unless the agency first determines from a review of the complete record, and states with particularity in the order, that such

determination is clearly erroneous or does not comply with essential requirements of law. In any proceeding for review under s. 120.68, if the court finds that the agency's rejection of the determination regarding the unadopted rule does not comport with the provisions of this subparagraph, the agency action shall be set aside and the court shall award to the prevailing party the reasonable costs and a reasonable attorney's fee for the initial proceeding and the proceeding for review."

In the instant case, both parties agree that Respondent has published a proposed rule which "address[es]" the Rule. It does not appear, however, that the rulemaking process has concluded, and it therefore remains to be seen whether Respondent will act "expeditiously and in good faith" to adopt the proposed rule.

In view of the foregoing, it is hereby ORDERED:

1. Respondent's request that the undersigned enter a summary final order of dismissal on the ground of mootness is denied.
2. The more appropriate course of action is to hold the matter in abeyance pending the outcome of the rulemaking process.
3. No later than 60 days from the date of this Order, Respondent shall advise the undersigned in writing of the status of the rulemaking process.
4. If it appears that Respondent is not acting "expeditiously and in good faith" to adopt the policy statement which is the subject of the instant Section 120.56(4) proceeding, or if Respondent fails to timely file the written advisement required by the preceding paragraph, the abeyance ordered herein will be vacated.
5. Petitioner's request that the undersigned "enter a Final Summary Order declaring that the Rule is an invalid exercise of delegated legislative authority" is denied. Petitioner's "claims challenging

the substance of the [Rule]" raise issues that are beyond the scope of this Section 120.56(4) proceeding. These claims are properly raised in a Section 120.56(2) proceeding or a Section 120.57(1) proceeding. While subsection (4)(f) of Section 120.56, Florida Statutes, would authorize (but not require) the consolidation of the instant Section 120.56(4) proceeding with any Section 120.56 proceeding or Section 120.57(1) proceeding in which these "substantive" claims were made, Petitioner has not identified, nor is the undersigned aware of, any such Section 120.56 proceeding or Section 120.57(1) proceeding that is presently pending before the Division. Accordingly, Petitioner's suggestion that subsection (4)(f) of Section 120.56, Florida Statutes, gives the undersigned the authority to hear and decide his "substantive" claims is without merit. Cf, Wetherington v. State Farm Mutual Automobile Insurance Company, 661 So. 2d 1276 (Fla. 2d DCA 1995)("[A] court may only order consolidation of actions that are 'pending before the court.' Only one of the cases ordered to be consolidated was 'pending before the court,' that being the case filed in the circuit court of the Thirteenth Judicial Circuit in Hillsborough County. The second case was pending in the circuit court of the Eighth Judicial Circuit in Gilchrist County. More importantly, the trial court was without authority to exercise any jurisdiction over the case pending in the Eighth Judicial Circuit. . . . The chief justice of the supreme court may assign a judge to temporary duty in any court for which the judge is qualified. Article V, Sec. 2(b), Fla. Const. No order of temporary assignment was entered in this case. Therefore, the trial court acted in excess of its jurisdiction by ordering that a case pending outside the confines of its territorial jurisdiction be consolidated with a case over which it did have jurisdiction. As such, the order granting the motion to consolidate is a nullity.").

On January 15, 1999, Respondent filed a response to the undersigned's November 17, 1998, Order, in which it stated the following:

> 1. AHCA held a public hearing in this matter on December 7, 1998, at which public input was gathered on this proposed rule.
>
> 2. Due to the input from the public and the intervening holidays, AHCA has not published a rule as of the date of this response.
>
> 3. AHCA is working diligently, expeditiously and in good faith to consider and act on the public comment received regarding the policy statement, which is the subject of this case.
>
> THEREFORE, AHCA would request that this action be held in abeyance for an additional 90 days to complete the rule promulgation process.

On January 27, 1999, the undersigned issued an Order granting Respondent's request and directing the parties to advise the undersigned in writing, no later than April 15, 1999, "of the status of the rulemaking process and whether further proceedings in this case are necessary." On April 12, 1999, and again on April 22, 1999, Respondent filed such written advisements. In its April 22, 1999, written advisement, Respondent informed the undersigned that "AHCA ha[d] filed for final adoption FAC Rule 59G-5.110, Claims Payment." In response to his receipt of this written advisement, the undersigned, on April 27, 1999, issued an Order directing the parties to advise him in writing, no later than 21 days from the date of the Order, "what action they believe[d] the undersigned should take now that Rule 59G-5.110,

Florida Administrative Code, has been filed with the Department of State for final adoption."

Respondent, on April 29, 1999, filed motion requesting that the undersigned "dismiss this case as moot." On May 4, 1999, Petitioner filed the following response to Respondent's Motion to Dismiss (and to the undersigned's April 27, 1999, Order):

> Pursuant to section 120.54(3)(e)6, Fla. Stat., newly filed rule 59G-5.110 will become effective on May 10, 1999. As of the that date, abatement is no longer appropriate.
>
> As previously urged, this case should not then be dismissed as moot. Rather, this tribunal should proceed to adjudicate the issues raised in the original petition challenging the Agency's policy of limiting reimbursement of out-of-pocket medical expenses to the Medicaid payment rate. (Petition, Par. 11) The newly filed Rule 59G-110 likewise provides, "All payments shall be made at the Medicaid established payment rate in effect at the time the services were rendered."
>
> If this case is dismissed the Agency will successfully evade judicial scrutiny of this policy. It will, in effect, be rewarded for its initial failure to duly promulgate a rule.

The undersigned agrees with Respondent that, inasmuch as there is no dispute that the agency "policy" that Petitioner seeks to challenge in the instant case pursuant to Section 120.56(4), Florida Statutes (which authorizes a challenge to an agency statement on the ground that it "constitutes a rule under s. 120.52," but "has not [been] adopted . . . by the rulemaking procedures provided by s. 120.54," Florida Statutes), is

contained in a rule (Rule 59G-5.110, Florida Administrative Code) that Respondent has adopted during the pendency of this proceeding, Petitioner's challenge is now moot. See Savona v. Agency for Health Care Administration, 717 So. 2d 1129 (Fla. 1st DCA 1998); Lund v. Department of Health, 708 So. 2d 645 (Fla. 1st DCA 1998); Martin Memorial Medical Center, Inc., v. Agency for Health Care Administration, 1995 WL 1052596 (Fla. DOAH 1995)(Final Order).

Accordingly, Petitioner's challenge is hereby DISMISSED.[9]

DONE AND ORDERED this 18th day of May, 1999, in Tallahassee, Leon County, Florida.

STUART M. LERNER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of May, 1999.

ENDNOTES

1/ Pursuant to Section 120.56(4)(e), Florida Statutes:

> Prior to entry of a final order that all or part of an agency statement violates s. 120.54(1)(a), if an agency publishes, pursuant to s. 120.54(3)(a), proposed rules which address the statement and proceeds expeditiously and in good faith to adopt rules which address the statement, the agency

> shall be permitted to rely upon the statement or a substantially similar statement as a basis for agency action if the statement meets the requirements of s. 120.57(1)(e). If an agency fails to adopt rules which address the statement within 180 days after publishing proposed rules, for purposes of this subsection, a presumption is created that the agency is not acting expeditiously and in good faith to adopt rules. If the agency's proposed rules are challenged pursuant to subsection (2), the 180-day period for adoption of rules is tolled until a final order is entered in that proceeding.

2/ The motion was accompanied by a memorandum of law.

3/ Chapter 60Q-2, Florida Administrative Code, was repealed, effective October 7, 1998. Rule 28-106.204(4), Florida Administrative Code, now governs the filing of motions for summary final orders in cases where the administrative law judge has final order authority.

4/ In reciting the contents of this pleading, the undersigned has omitted the "citations to the record" included in the pleading.

5/ In reciting the contents of this pleading, the undersigned has omitted references made therein to attachments to the pleading.

6/ In a footnote, Petitioner added the following:

> AHCA argues that the rule publication moots the procedural challenge. In fact, technically this claim would be abated but not mooted. The procedural claim would be mooted only by adoption of a rule. Mere publication of a proposed rule only abates the challenge while the agency "proceeds expeditiously and in good faith to adopt rules." Section 120.56(4)(e), Fla. Stat.

7/ Section 120.52(15), Florida Statutes, provides as follows:

> "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information

not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule. The term does not include:

(a) Internal management memoranda which do not affect either the private interests of any person or any plan or procedure important to the public and which have no application outside the agency issuing the memorandum.

(b) Legal memoranda or opinions issued to an agency by the Attorney General or agency legal opinions prior to their use in connection with an agency action.

(c) The preparation or modification of:

1. Agency budgets.

2. Statements, memoranda, or instructions to state agencies issued by the Comptroller as chief fiscal officer of the state and relating or pertaining to claims for payment submitted by state agencies to the Comptroller.

3. Contractual provisions reached as a result of collective bargaining.

4. Memoranda issued by the Executive Office of the Governor relating to information resources management.

8/ If an agency fails to adopt rules which address the statement within 180 days after publishing proposed rules, for purposes of this subsection [subsection (4) of Section 120.56, Florida Statutes], a presumption is created that the agency is not acting expeditiously and in good faith to adopt rules. If the agency's proposed rules are challenged pursuant to subsection (2) [of Section 120.56, Florida Statutes], the 180-day period for adoption of rules is tolled until a final order is entered in that proceeding." Section 120.56(4)(e), Florida Statutes.

9/ If Petitioner wishes to pursue the "substantive" claims concerning the challenged "policy," he must seek to do so pursuant to Section 120.56(3), Florida Statutes (which deals with "challeng[es to] existing rules").

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this final order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a notice of appeal with the Agency Clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the district court of appeal in the appellate district where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.