STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF DENTISTRY, Petitioner, vs. JANE GEORGE BRAHMAKULAM, D.M.D., Respondent.	)	Case No. 99-4364

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, through its duly-designated Administrative Law Judge, Mary Clark, conducted a formal hearing in the above-styled case on February 16, 2000, in Melbourne (Viera), Florida.

APPEARANCES

For Petitioner: Howard M. Bernstein, Esquire
Rosanna Catalano, Esquire
Agency for Health Care Administration
2727 Mahan Drive, Building 3
Tallahassee, Florida 32308

For Respondent: Kathleen S. Cumming, Esquire
Rissman, Weisberg, Barrett, Hurt,
Donahue & McLain, P.A.
201 East Pine Street, 15th Floor
Orlando, Florida 32801

STATEMENT OF THE ISSUES

The issues for disposition are whether Respondent, Dr. Jane Brahmakulam, committed the violations alleged in the Administrative Complaint dated September 10, 1999, and if so, what discipline is appropriate.

PRELIMINARY STATEMENT

On September 21, 1999, the Department of Health filed its Administrative Complaint alleging that Jane George Brahmakulam, D.M.D., violated Chapter 466, Florida Statutes, governing the practice of dentistry in Florida, by failing to maintain adequate written records and by failing to bill a patient for a co-payment or balance of fees not covered by insurance.

In response, Dr. Brahmakulam requested a formal administrative hearing and the case was assigned, set, and heard as described above.

At the hearing, Petitioner presented the testimony of Ernest Loening and William Scott, D.D.S. (accepted as an expert in the practice of dentistry without objection). Petitioner's Exhibit no. 1 (insurance records) was received in evidence without objection.

Respondent testified in her own behalf and presented the additional testimony of Lewis Earle, D.D.S.(accepted as an expert in the practice of dentistry without objection) and Maria Colburn by deposition as stipulated. Respondent's Exhibits no. 1 (dental records) and no. 2 (Dr. Earle's curriculum vitae) were received in evidence without objection.

The Transcript of the hearing was filed on March 6, 2000; Petitioner filed its Proposed Recommended Order on March 17, 2000; by agreement Respondent filed her Proposed Recommended Order on March 27, 2000.

FINDINGS OF FACT

1. Respondent is currently licensed to practice dentistry in the State of Florida and was so licensed at all times relevant to this proceeding. She has practiced in her own office in Palm Bay, Florida, for approximately 15 years. She received her dental education and training in India and New York.

2. Ernest Loening, who had retired to Florida from New York in July 1997, appeared without an appointment in Respondent's office on August 25, 1997. At dinner the night before, he had broken a crown on his tooth and saved it in a tissue to show the dentist. His niece who worked with senior citizens in the area suggested he see Respondent. He did not have a regular dentist in Florida.

3. On the visit Mr. Loening completed an information cover sheet and responded to questions regarding his medical history. Those responses are included on a one-page check-list signed by Respondent and maintained in her file.

4. At the initial visit, Respondent examined Mr. Loening's teeth and charted on a form his fillings, missing teeth and existing bridge. She also performed an x-ray. She determined that the crown could be re-attached, but that Mr. Loening needed a root canal first, and she did not have time to do the procedure that same day. Instead, she referred him to an endodontist close to her office where Mr. Loening was able to get the work done.

5. When Mr. Loening returned to Respondent's office as directed on August 28, 1997, Respondent performed a post core buildup and attached the old crown. It fit well but Respondent could not get the crown to come off again so that she could check the margins. The crown would not move and Respondent did not want to chip it off and require Mr. Loening to get a new crown. Instead, she told him to return in a few days as it was only temporarily attached and would likely come out.

6. Mr. Loening returned several times to Respondent, generally unscheduled, but she was unable to loosen the crown. On one visit she attempted to remove the crown with a gummy substance commonly used for that purpose. It still did not work, and Mr. Loening complained on his next visit that the gummy substance had removed a filling. Respondent re-filled the tooth without charge.

7. Finally, on December 11, 1997, after Mr. Loening complained of some irritation between his teeth, Respondent chipped away the old crown and made a new impression. She replaced it with a new crown on January 14, 1998.

8. For her work Respondent told Mr. Loening that she would bill the insurance company and she would accept their payment; she felt that because of the inconvenience to the patient she would not require him to pay anything.

9. Mr. Loening did not return to Respondent's office after January 1998, when his initial problem was ultimately resolved.

10. After his retirement from American Airlines, Mr. Loening was covered for dental care under his wife's dental plan with Bell Atlantic. Metlife is the administrator of the dental plan. Under that plan no co-payments by the insured are required. Instead, the company pays 100 percent of "reasonable and customary" charges for preventive and diagnostic dental care and pays according to a set fee schedule for basic major restorative services such as crowns and bridges.

11. The usual practice is for a dentist to bill the patient for the difference between what the insurance company pays and what the dentist's fee is. This is called "balance billing" and is distinguished from requiring the patient to pay a "co-payment" under a dental plan or policy.

12. There is no ethical or legal impediment to a waiver of a bill balance by the dentist. Nor does the record in this proceeding clearly establish a duty of the dentist to collect a co-payment. Respondent's competent credible expert explained that the code of ethics of the American Dental Association is somewhat ambiguous on that issue, although it is not permissible to advertise that you will not charge a co-payment. The waiver by Respondent in this case was for the bill balance and not for a co-payment, as Mr. Loening's plan did not include a co-payment.

13. Respondent never completed a periodontal examination, nor the cleaning of Mr. Loening's teeth, but under the circumstances of his treatment these were not required. He

appeared without appointment with a common emergency and with no indication that he wished to establish a regular dentist/patient relationship. The treatment utilized by Respondent focused on his problem even though it took several months to resolve the problem. Neither party's expert criticized the quality of care rendered by Respondent.

14. Petitioner's expert, Dr. Scott, was critical of Respondent's records and waiver of co-payment. On cross-examination Dr. Scott stated that he did not realize the patient's dental plan did not require a co-payment. Nor did Dr. Scott see, in his review of records, the medical history taken by Respondent or the case plan or chart showing missing, filled, or bridged teeth. These items are all on the face of the document received in evidence as Respondent's Exhibit no. 1 and comprising the medical records maintained by Respondent for Mr. Loening. These items were also identified in Dr. Scott's cross-examination, as well as the direct examination of Respondent and her expert, Dr. Earle.

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction in this proceeding pursuant to Sections 120.569 and 57(1), Florida Statutes.

16. Petitioner has the burden of proving by clear and convincing evidence the violations it has alleged against

Respondent. See Department of Banking and Finance v. Osborne, Stern and Company, 670 So 2d. 932 (Fla. 1996).

17. Those violations, according to the administrative complaint, are that Respondent violated Section 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; and Section 466.028(1)(t), Florida Statutes, for fraud, deceit, or misconduct in the practice of dentistry.

18. Petitioner failed to meet its burden of proof. Instead, the evidence clearly and convincingly established that all of the requisite elements of the medical record were present. See Rule 64B5-17.002, Florida Administrative Code, which requires as a minimum the following information about a patient: appropriate medical history; results of clinical examination and tests conducted, including the identification, or lack thereof, of any oral pathology or diseases; a treatment plan; and treatment rendered to the patient. Moreover, no co-payment was required by the patient's insurer and Respondent's failure to collect was not fraud, deceit, or misconduct.

RECOMMENDATION

Based on the foregoing, it is hereby

RECOMMENDED:

That the agency enter its final order dismissing the complaint against Jane George Brahmakulam, D.M.D., in its entirety.

DONE AND ORDERED this 31st day of March, 2000, in Tallahassee, Leon County, Florida.

MARY CLARK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of March, 2000.

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.