STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SCHOOL BOARD OF OSCEOLA COUNTY AND G.F., ON BEHALF OF MINOR CHILD G.F.,	)	
Petitioner,	)	
vs.	)	Case No. 04-0879RU
DEPARTMENT OF CHILDREN AND FAMILY SERVICES,	)	
Respondent.	)	

FINAL ORDER

This cause came on for formal hearing before Daniel M. Kilbride, Administrative Law Judge of the Division of Administrative Hearings, on March 31, 2005, and completed on April 7, 2005, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Usher L. Brown, Esquire
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For Respondent: Lee Ann Gustafson, Esquire
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STATEMENT OF THE ISSUES

Whether a provision contained in a Settlement Agreement of a federal lawsuit is the statement the Department of Children

and Family Services (Respondent) relied upon to deny Petitioner, G.F., on behalf of minor child G.F. (Student G.F.), Medicaid waiver benefits and constitutes an invalid exercise of delegated legislative authority on the grounds that the statement in question was not promulgated as a rule; and

Whether Petitioners can challenge a provision which is contained in the Developmental Services Waiver Services Florida Medicaid Coverage and Limitations Handbook, October 2003, in Florida Administrative Code Rule 59G-8.200(12), as an invalid exercise of delegated legislative authority when the agency which adopted the rule is not a party to this proceeding.

PRELIMINARY STATEMENT

On March 15, 2004, Petitioners filed their Petition Seeking Review and Determinations pursuant to Subsection 120.56(4), Florida Statutes (2004). On March 26, 2004, Petitioners filed an Amended Petition Seeking Review and Determinations Pursuant to Subsection 120.56(4), Florida Statutes (2004), which deleted paragraph 11[1/] of the original Petition.

The hearing was scheduled for April 7, 2004. Petitioners filed a Motion for Continuance on March 25, 2004, which was granted, and the hearing was rescheduled for April 27, 2004. Petitioners filed an Amended Motion for Continuance, and the hearing was rescheduled for June 11, 2004. Respondent filed a Motion for Summary Final Order on April 30, 2004. On May 25,

2004, an Order was filed rescheduling the hearing for August 10, 2004. Following a response by Petitioner and oral argument on the motion, an Order was entered which denied Respondent's Motion for Summary Final Order on July 19, 2004. On July 27, 2004, the parties filed a Joint Motion for Continuance, and the hearing was rescheduled for October 12, 2004. On September 27, 2004, Respondent filed its Renewed Motion for Summary Final Order, which was denied by this tribunal's Order dated October 11, 2004. On November 12, 2004, Respondent filed a Petition to Review Non-Final Agency Action Under the Administrative Procedures Act in the First District Court of Appeal of Florida ("First DCA") and a Motion to Abate. This case was abated during the pendency of Respondent's Petition. Upon notification that Respondent's Petition was denied by the First DCA, this case was rescheduled for hearing on March 31, 2005. The hearing was completed on April 7, 2005.

At the hearing, Petitioners presented the testimony of four witnesses, who appeared in person at the hearing: Penny Collins, director of Exceptional Student Education for Petitioner; Petitioner, G.F., the mother of Student G.F.; Dr. Alan Cohen, M.D., expert witness; and Karen Henderson, program analyst with the Agency for Healthcare Administration (AHCA), and eight deposition witnesses; and introduced 29 exhibits into evidence. Of those exhibits, 11 exhibits were

introduced with a reserved ruling on Respondent's objection to the relevancy and materiality of those exhibits. Those exhibits were numbered 2, 6, 9, 11, 15, 20, 22, 23, 46A, 46B, and 46C. Respondent presented the testimony of one witness, Karen Henderson, and entered one exhibit into evidence, the deposition testimony of G.F. At Respondent's request, official recognition was taken of the Developmental Services Waiver Services Florida Medicaid Handbook, October 2003 ("the Medicaid Handbook"), and the following pages from the Florida Administrative Weekly: Volume 27, No. 52 dated December 28, 2001, consisting of four pages; Volume 28, No. 4 dated January 25, 2002, consisting of four pages; Volume 28, No. 18 dated May 3, 2002, consisting of four pages; and Volume 28, No. 30 dated July 26, 2002, also consisting of four pages.

The Transcript was filed on April 25, 2005, and the parties timely submitted Proposed Final Orders. In addition, Petitioners filed a Motion to File Supplemental Authority on July 22, 2005. All of which were considered in the preparation of this Final Order.

Rulings on Evidentiary Objections

Based on the findings below, the following rulings on evidentiary objections are made:

A. Respondent's objection to the testimony of Dr. Alan Cohen, on the grounds that his testimony is irrelevant and

immaterial as to the allegations in the Petition, is granted, in part, on the grounds that the efficacy of Student G.F.'s treatment at the National Deaf Academy (NDA) is not relevant to the issue of whether Respondent had an agency statement which has not been adopted as a rule or whether Respondent has any duty to adopt a rule on the matter challenged. With the exception of his testimony concerning Student G.F.'s diagnosis appearing at pages 40 through 42, line 1, and the facilities of the NDA appearing at pages 50 through 57, line 7, the remainder of Dr. Cohen's testimony has not been considered.

B. Respondent's objection to the testimony of Penny Collins on the grounds that her testimony is irrelevant and immaterial as to the allegations in the Petition, is granted. The testimony of Ms. Collins has not been considered.

C. Respondent's objection to the testimony of Karen Henderson regarding the rationale for the Medicaid Handbook that appears on pages 173 through 177 on the grounds that the testimony is irrelevant and immaterial to the allegations in the Petition, is denied.

D. Respondent's objection to Petitioner's Exhibits 2, 6, 9, 11, 15, 20, 22, 23, 46A, 46B, and 46C on the grounds that the exhibits are irrelevant and immaterial as to the allegations in the Petition, is granted. Pictures of Student G.F. are not probative of the matter challenged. The various documents

relating specifically to Student G.F.'s application and Respondent's evaluation of her service needs are not probative of the matter challenged. These exhibits have not been considered. Respondent's objections to Petitioners' Exhibits 6, 8, 9, and 11 are denied.

FINDINGS OF FACT

1. Medicaid is a cooperative federal/state program in which Florida participates in partnership with the national government. Medicaid provides medically necessary health care. In addition to shouldering administrative and regulatory responsibilities, Florida partially funds the Florida Medicaid Program, contributing about 42 percent of the money budgeted for the program's operation. Federal funds make up the balance. The Florida Retail Federation, Inc. v. Agency for Health Care Administration, Case No. 04-1828RX (DOAH July 19, 2004).

2. Under the statutory scheme, states who participate in Medicaid are required to have a state plan. See 42 C.F.R. § 430.10. A participating state may also grant waivers to their state plan pursuant to Section 1915(c) of the Social Security Act. See 42 C.F.R. § 430.25. Each participating state must designate a single-state agency to administer or supervise administration of the state plan. The state plan must also specify whether the agency that determines eligibility is the Medicaid agency or the single-state agency for the financial

assistance program under Title IV-A. See 42 C.F.R. § 431.10. The State of Florida has identified AHCA as the single-state agency to administer the plan and the previously identified Respondent to determine eligibility. § 409.902, Fla. Stat. (2002).[2/]

3. AHCA is required to enter an interagency agreement with Respondent and other agencies "to assure coordination and cooperation in serving special needs citizens." § 408.302(1), Fla. Stat. It is required that Respondent approve and have input with regard to AHCA's rules when the rules directly impact the mission of Respondent. Access to quality healthcare is "an important goal" for all citizens in Florida. § 408.301, Fla. Stat. Persons served by Respondent are citizens with special needs, and it is the policy of Florida that persons with special needs are adequately and appropriately served. The Florida Legislature recognizes that the Medicaid program is "an intricate part of the service delivery system for the special needs citizens" in Florida.

4. AHCA is not a service provider and does not develop or direct programs for special needs citizens, such as Student G.F. § 408.301, Fla. Stat. In fact, it is Respondent that plays the vital role to assure that "the needs of special citizens are met."

5. Under the Medicaid program in Florida, AHCA is the "single state agency authorized to make payments for medical assistance and related services." § 409.902, Fla. Stat. However, Respondent is responsible for "Medicaid eligibility determinations, including, but not limited to, policy, rules, . . . as well as the actual determination of eligibility." Specifically, Respondent administers the Developmental Disabilities Home and Community-Based Services Medicaid Waiver Program (HCBS Medicaid Waiver Program) in Florida, and under Section 409.919, Florida Statutes, is authorized and required to enact administrative rules, as necessary, to fulfill its obligation to comply with federal and state Medicaid law.

6. Student G.F. is a developmentally disabled child with multiple developmental disabilities, including autism, mental retardation, and profound deafness. Student G.F.'s combination of disabilities have resulted in significant cognitive impairment, social withdrawal, violence, and self-injurious behavior. This has resulted in extreme challenges in communication and acquisition of skills related to daily living.

7. In 2000, Student G.F. was placed at the NDA in Mount Dora, Lake County, Florida, as a day student under the treatment of Dr. Cohen, as part of Student G.F.'s Individual Education Plan under the Federal Individual with Disabilities Education

Act. Approximately five months later, Dr. Cohen determined that residential placement of Student G.F. was medically necessary.

8. Petitioner asserts that the NDA in Mount Dora, Florida, is the only facility that could provide residential habilitation services for Student G.F. and treat her complex array of disabilities. The NDA is a certified Medicaid waiver provider for Respondent in District 10.

9. On or about August 1, 2001, Deloris Battle, an independent contractor who provides support coordination services to recipients under the HCBS Medicaid Waiver Program, prepared the Florida Status Tracking Survey for Student G.F. Respondent's surveyor concluded that Student G.F. was in a state of crisis and required residential placement for habilitation services.

10. Petitioner School Board reached an understanding with Battle whereby the parties would share in the cost of services for Student G.F. at the NDA. Petitioner School Board would fund the cost of educational services, and Respondent would fund the cost of medical and residential habilitation services. Respondent's share of the cost of the services would be funded by the HCBS Medicaid Waiver Program.

11. Student G.F. qualifies as developmentally disabled and is eligible for Medicaid services pursuant to Chapter 409,

Florida Statutes. Student G.F. is also eligible for services under the HCBS Medicaid Waiver Program.

12. Battle submitted a cost plan to Respondent's district's office that requested HCBS Medicaid Waiver Program funding for Student G.F.'s residential placement at NDA. Battle had no authority to commit Respondent to expend any Medicaid waiver funds without approval. The cost plan submitted by Battle was not sent to Tallahassee for approval. Approval was delayed at the district level until it was learned that Petitioner School Board agreed to pay for the residential placement of Student G.F.

13. In May 2002, Petitioner School Board and G.F. were advised that Medicaid waiver funding for Student G.F.'s residential placement at the NDA was denied. Respondent offered no other options for service.

14. Petitioner School Board agreed to fund Student G.F.'s residential placement at the NDA for a trial period. Such funding by Petitioner School Board has continued, because Petitioners believed that the NDA is the only facility that can treat Student G.F.'s array of disabilities.

15. Petitioner School Board elected to fund the entire cost of Student G.F.'s residential placement under protest.

The Dispute

16. Petitioners brought this instant proceeding because they believe that Respondent's denial of Medicaid waiver funding for Student G.F.'s residential placement was (and continues to be) based on an agency statement by Respondent that was not adopted as a rule, in violation of Sections 120.54 and 120.56, Florida Statutes (2004).

17. In 1998, Prado-Steinman v. Bush, Case No. 98-6496-CIV-FERGUSON, was filed in the United States District Court for the Southern District of Florida. One of the defendants was the Florida Department of Children and Family Services. On June 27, 2000, a settlement agreement was signed by the parties to the Prado-Steinman litigation.

18. Petitioners allege that the initial basis for Respondent's denial of funding for Student G.F.'s placement was an agency statement purportedly based entirely upon Respondent's interpretation of the settlement agreement reached in Prado-Steinman, that Medicaid waiver funding is unavailable for facilities with a capacity to house more than 15 persons.

19. Specifically, page 16 of the Settlement Agreement dated June 29, 2000, paragraph (F)(1), "Group Home Placement" reads as follows:

> The parties agree that they prefer that individuals who are enrolled in the Waiver live and receive in smaller facilities.

> Consistent with this preference, the parties agree to the following:
>
> (1) The Department will target choice counseling to those individuals, enrolled on the Waiver and who presently reside in residential habilitation centers (where more than 15 persons reside and receive services). The focus of this choice counseling will be to provide information about alternative residential placement options. The Department will begin this targeted choice counseling by December 1, 2000, and will substantially complete this choice counseling by December 1, 2001.

See generally Prado-Steinman v. Bush, 221 F.3d 1266 (11th Cir. 2000).

20. At paragraph 24 of the Amended Petition, Petitioners assert that the alleged agency statement, which has not been adopted as a rule, are the statements by Respondent that the agency will not authorize Medicaid waiver funding for facilities with a greater number of beds than specified in the agreement and that the NDA is not an eligible Medicaid waiver facility under the agreement.

21. The settlement agreement does not prohibit placement of individuals who are enrolled in the HCBS Medicaid Waiver Program with specific facility sizes. The portion of the agreement that refers to residential facilities concerns Group Home Placements, as quoted in paragraph 19 above, and provides that Respondent will (1) counsel residents of residential habilitation centers where more than 15 persons reside about

alternative residential placements; (2) will develop alternative residential placements; (3) will encourage the use of client advocates for residents of residential habilitation centers who have no family, friends, or guardian to advocate on their behalf; and (4) will not fill vacancies in residential habilitation centers with individuals enrolled on the waiver. Paragraph J of the Settlement Agreement, found on page 25, provides that Respondent will continue to develop residential program models that encourage an environment for self-determination. Further, Respondent will emphasize to support coordinators that the annual needs assessment for waiver recipients should include an assessment of the need for alternative placement.

22. The focus of the language is to move more clients into residences meeting the policy and philosophy of Chapter 393, Florida Statutes. Parents were given the opportunity to take their children out of institutions and into less restrictive environments.

23. At paragraph 27, the Amended Petition alleges that the use of the Settlement Agreement "to adversely affect the interests of the Petitioners is an invalid exercise of delegated legislative authority" as defined in Subsection 120.56(4), Florida Statutes (2004). The Amended Petition makes no allegation that the alleged agency statement, which has not been

adopted as a rule is arbitrary or capricious, even if that standard were applicable to a petition under Subsection 120.56(4), Florida Statutes (2004), nor does the Amended Petition allege that the alleged agency statement is in violation of federal law.

24. The Amended Petition does not include AHCA as a party and does not mention Florida Administrative Code Rule 59G-8.200, although, Petitioners have been aware of the rule since early in this rule-challenge proceeding.

25. The Amended Petition does not cite any proposed or existing rule or delineate a challenge to any proposed or existing rule, regardless of the promulgating agency. The Amended Petition does not allege that Florida Administrative Code Rule 59G-8.200 somehow violates federal law.

26. AHCA began rule-making to adopt a handbook for the HCBS Medicaid Waiver Program in October 2001. Rule-making was initiated to meet the requirements of the federal Center for Medicare and Medicaid Services. It requires the states who participate to promulgate handbooks.

27. AHCA published its notice of rule development in Volume 27, No. 52 of the Florida Administrative Weekly dated December 28, 2001. AHCA held seven rule workshops concerning the Medicaid Handbook: two in Tallahassee (January 14, 2002, and February 14, 2002); one in Pensacola (February 27, 2002);

one in Jacksonville (February 19, 2002); one in Tampa; one in Orlando (February 22, 2002); and one in Fort Lauderdale (February 15, 2002). The workshops were attended by a large number of persons and representatives of advocacy groups.

28. The rule notice was published in Volume 28, No. 18 of the Florida Administrative Weekly dated May 3, 2002. A public hearing was held on May 28, 2002. Subsequent to the public hearing, a notice of change was filed and a second public hearing was held on August 19, 2002.

29. Florida Administrative Code Rule 59G-8.200, and the Medicaid Handbook incorporated therein by reference, were originally adopted on October 27, 2002. It has since been amended.

30. Florida Administrative Code Rule 59G-8.200(12) currently provides in pertinent part:

> (12) Developmental Services Waiver – General. This rule applies to all Developmental Services Waiver Services providers enrolled in the Medicaid program. All Developmental Services Waiver Services providers enrolled in the Medicaid program must comply with the Developmental Services Waiver Services Florida Medicaid Coverage and Limitations Handbook, October 2003, incorporated by reference, and the Florida Medicaid Provider Reimbursement Handbook, Non-Institutional 081, October 2003. Both handbooks are available from the Medicaid fiscal agent. The Developmental Disabilities Waiver Services Provider Rate Table, November 2003, is incorporated by reference. The Developmental Disabilities

Waiver Services Provider Rate Table is available from the Medicaid fiscal agent.

31. Chapter 1 of the Handbook is entitled, "Purpose, Background and Program Specific Information," and contains general definitions. "Licensed Residential Facility" is defined at pages 1-3 as:

> Facilities providing room and board, and other services in accordance with the licensing requirements for the facility type. Community-based beneficiaries with developmental disabilities may receive DS waiver services while residing in:
>
> Group and foster homes licensed by the Department of Children and Families in accordance with Chapter 393, Florida Statutes, and Chapter 409, Florida Statutes.
>
> Comprehensive, transitional education program facilities, licensed by the Department of Children and Families in accordance with Chapter 393, Florida Statutes.
>
> Assisted Living Facilities, and Transitional Living Facilities, licensed by the Agency for Health Care Administration in accordance with Chapter 400, Florida Statutes.
>
> Residential Habilitation Centers and any other type of licensed facility not mentioned above, having a capacity of 16 or more persons, if the beneficiary has continuously resided at the facility since August 8, 2001, or prior to this date.

32. "Institution" is generally understood by persons in the disabilities profession as a facility with more than 15 beds that is self-contained, providing all the needs of its

residents, as opposed to a more home-like environment. The "best practice" model for developmental disabilities services is a group home with six beds.

33. Respondent interprets these provisions to mean that Medicaid waiver funding is unavailable for a residential placement if the facility has a capacity of 16 or more persons, unless the beneficiary has continually resided at the facility since August 8, 2001, or prior to that date.

34. The Medicaid Handbook is incorporated by reference in AHCA's rule. (Fla. Admin. Code R. 59G-8.200) Respondent has not promulgated a separate administrative rule pursuant to Chapter 120, Florida Statutes (2004), that incorporates the Medicaid Handbook or any part of it into its own rules. However, it did cooperate and coordinate with AHCA when the rule and Medical Handbook were adopted, as required by Subsection 408.302(1), Florida Statutes. AHCA and Respondent have entered into an agreement by which Respondent has agreed to implement the HCBS Medicaid Waiver Program. AHCA retains the authority and responsibility to issue policy, rules, and regulations concerning the HCBS Medicaid Waiver Program, and Respondent is required to operate the program in accordance with those policies, rules, and regulations.

35. Section 409.919, Florida Statutes, and AHCA's rule incorporating the Medicaid Handbook by reference, supplied

Respondent with the necessary rule authority to deny the funding.

36. Petitioners have failed to prove that page 96 of the Settlement Agreement dated June 29, 2000, paragraph (F)(1) in the Prado-Steinman case, was relied upon to deny Student G.F. Medicaid waiver benefits.

37. Petitioners have failed to prove that page 16 of the Settlement Agreement was an unpromulgated rule.

38. Petitioners cannot challenge a provision in the Medicaid Handbook, which has been adopted by reference in Florida Administrative Code Rule 59G-8.200(12), when the agency which adopted the rule is not a party to this proceeding.

CONCLUSIONS OF LAW

39. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Section 120.56, Florida Statutes (2004).

40. Subsection 120.56(4)(a), Florida Statutes (2004), provides that any person substantially affected by an agency statement, which has not been adopted as a rule, may seek an administrative determination that the statement violates Subsection 120.54(1)(a), Florida Statutes (2004).

41. Subsection 120.56(4)(c), Florida Statutes (2004), provides that an Administrative Law Judge may determine whether

all or part of a statement, which has not been adopted as a rule, violates Subsection 120.54(1)(a), Florida Statutes (2004).

42. Subsection 120.56(4)(d), Florida Statutes (2004), provides that if an Administrative Law Judge enters a final order that all or part of any agency statement, which has not been adopted as a rule, violates Subsection 120.54(1)(a), Florida Statutes (2004), the agency shall immediately discontinue all reliance upon the statement as a basis for agency action.

43. The gravamen of a challenge under Subsection 120.56(4), Florida Statutes (2004), is that an agency has failed to exercise its delegated legislative authority.

44. Subsection 120.52(8), Florida Statutes (2004), reads in pertinent part, as follows:

> (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. . . .

Standing

45. Petitioner School Board bases its claim to standing upon the allegations contained in paragraph 10 of the Amended Petition. Petitioner G.F. assigned to Petitioner School Board her rights in the alleged "funding commitment and obligation" of Respondent and assignment of rights to enforce her daughter's "Medicaid waiver." Although documents were attached to the Amended Petition, no evidence, documents, or testimony was introduced by Petitioners to establish that such an assignment was made. Petitioner School Board does not otherwise have standing to challenge the alleged non-rule policy.

46. Petitioner School Board did not establish that Respondent made a "funding commitment" for Student G.F.'s placement at the NDA. Petitioner School Board was aware before it committed to fund the placement that Respondent would not agree to fund payment of Student G.F.'s placement through the HCBS Medicaid Waiver Program.[3/] Petitioner School Board is not entitled to receive HCBS Medicaid Waiver Program services. Petitioner School Board is not an enrolled Medicaid waiver

services provider nor is it eligible to be an enrolled as a waiver services provider.

47. A two-part test is applied in evaluating whether a person or entity has alleged a sufficient interest to entitle that person or entity to challenge a proposed rule. First, the individual or entity must suffer an injury in-fact, which is of sufficient immediacy to entitle the individual or entity to a Section 120.57, Florida Statutes, hearing. Second, the individual or entity's substantial injury must be of a type or nature the proceeding is designed to protect. See Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981).

48. Petitioner School Board has not demonstrated that it has suffered an injury in-fact, because it has an independent responsibility to provide appropriate residential services to Student G.F. pursuant to Subsection 393.0651(2)(a), Florida Statutes, and 20 U.S.C. Section 1400, et seq., if it is necessary that the client's placement in private residential program is "necessary to provide special education and related services to the client." Petitioner School Board has not established that it has an interest to be protected by the provisions of Chapters 393 and 409, Florida Statutes, and Florida Administrative Code Rule 59G-8.200 or any alleged agency statement by Respondent.

The Dispute

49. A grant of rule-making 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 or interpret the specific 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 or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rule-making authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statutes. § 120.52(8), Fla. Stat. (2004).

50. The language in Subsection 120.52(8), Florida Statutes (2004), thus, requires that a rule must be based on an explicit power or duty identified in the enabling statute -- either the enabling statute authorizes a rule or it does not. Southwest Florida Water Management District v. Save the Manatee Club, Inc., 773 So. 2d 594, 599 (Fla. 1st DCA 2000).

51. Under the Home and Community Based Services Waiver Act, Title XIX of the Social Security Act, 42 U.S.C. Section

1396n(c) ("the Act"), Congress has authorized certain persons with developmental disabilities to receive Medicaid services in a community setting, rather than in an institutional facility. The Act empowers the Secretary to grant a waiver to a state under which approved costs of home- and community-based services are reimbursed for eligible individuals who otherwise would require care in an institution-like facility, but who instead elect to remain in their homes. 42 U.S.C. § 1396(c). To qualify for a waiver, a state must develop alternative regulatory schemes aimed at lowering the cost of medical assistance while still maintaining the same level of care. Florida has chosen to participate in the HCBS Medicaid Waiver Program. See generally Prado-Steinman v. Bush, 221 F.3d at 1268 (11th Cir. 2000).

52. Section 409.919, Florida Statutes, reads as follow:

> Rules.--The agency shall adopt any rules necessary to comply with or administer ss. 409.901-409.920 and all rules necessary to comply with federal requirements. In addition, the Department of Children and Family Services shall adopt and accept transfer of any rules necessary to carry out its responsibilities for receiving and processing Medicaid applications and determining Medicaid eligibility, and for assuring compliance with and administering ss. 409.901-409.906, as they relate to these responsibilities, and any other provisions related to responsibility for the determination of Medicaid eligibility.

53. Section 409.919, Florida Statutes, provides that the "agency" shall adopt any rules necessary to comply with or administer Sections 409.901 through 409.920, Florida Statutes. "Agency" is defined in Section 409.901, Florida Statutes, as AHCA. The language of the statute goes on to state that Respondent "shall adopt and accept transfer of any rules" regarding its responsibilities for receiving and processing Medicaid applications "and determining Medicaid eligibility, and for assuring compliance with and administering Sections 409.901 through 409.906, as they relate to these responsibilities and any other provisions" regarding Medicaid eligibility. § 409.919, Fla. Stat.

54. Section 409.902, Florida Statutes, provides that AHCA is designated as the single-state agency authorized to make payments for medical assistance and related services under the Act. That statute further states Respondent is responsible for Medicaid eligibility determinations.

55. The grant of rule-making authority in Section 409.919, Florida Statutes, is consistent with the responsibilities and the specific grants of rule-making authority conferred by Chapter 393, Florida Statutes. See §§ 393.065, 393.067(8), 393.067(5)(a)1. and 393.125(2), Fla. Stat.[4/]

56. The evidence demonstrates that both AHCA and Respondent had the appropriate rule-making authority to engage

in rule-making, and did so properly, resulting in the enactment of Florida Administrative Code Rule 58G-8.200(12) and the Medical Handbook. Further, the parties coordinated and cooperated in serving special needs citizens, as directed by Subsection 408.302(1), Florida Statutes, in making Medicaid waiver determination decisions. Therefore, Petitioners cannot challenge this rule since the agency which adopted and enforces the rule has not been made a party to this proceeding. § 120.56(1)(e), Fla. Stat. (2004).

57. Further, the only relief Petitioners could receive would be a ruling that Respondent cannot prospectively rely on its "agency statement which has not been adopted as a rule" unless or until it adopted a rule. See, e.g., Florida Retail Federation v. Agency for Health Care Administration, Case No. 04-1828RX (DOAH July 19, 2004) (For a party to be granted effective relief in a rule challenge, that party must be in a position to benefit from prospective (future) agency or judicial action taken without resort to the disputed rule, which prospective action cannot include the reversal of past final agency action.)

58. In addition, pursuant to Section 409.285, Florida Statutes, and Subsection 120.80(7), Florida Statutes (2004), hearings on denials of the Medicaid waiver services are under the jurisdiction of hearing officers within Respondent, not the

Division of Administrative Hearings. Thus, this tribunal has no authority to determine whether the decision of Respondent to decline to fund residential placement of Student G.F. at the NDA was appropriate.

59. The alleged agency statement, which has not been adopted as a rule, that forms the basis of this action, has not been proven to be outside of the stated legislative policy for the expenditure of Medicaid waiver funds pursuant to Chapter 393, Florida Statutes, and the Code of Federal Regulations.

60. Petitioners have failed to prove that the alleged agency statement is a rule requiring compliance with Chapter 120, Florida Statutes (2004).

61. Petitioners cannot challenge a provision in Medicaid Handbook, as incorporated in Florida Administrative Code Rule 58G-8.200(12), since the agency which adopted the rule is not a party to this proceeding.

ORDER

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

ORDERED that:

1. Petitioner, School Board of Osceola County, is dismissed for lack of standing.

2. The Amended Petition is dismissed on the merits.

DONE AND ORDERED this 15th day of August, 2005, in Tallahassee, Leon County, Florida.

DANIEL M. KILBRIDE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of August, 2005.

ENDNOTES

[1/] The deleted paragraph alleged as follows: "The School Board has an obligation to provide educational services and related services as necessary to deliver an appropriate educational program pursuant to the requirements of the Individuals with Disabilities in Education Act, 20 U.S.C. Section 1400, et. seq."

[2/] Unless otherwise indicated, all citations are to Florida Statutes (2002).

[3/] While it claims to have approved the funding for residential expenses with a "reservation of rights," Petitioner School Board has no "rights" to reserve for the same reason it does not have standing to bring this action.

[4/] Effective October 2004, Respondent's responsibilities under Chapters 393 and 409, Florida Statutes, were transferred to the Agency for Persons with Disabilities. Chap. 04-267, § 71, Laws of Florida.

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 the original Notice of Appeal with the agency Clerk of the Division of Administrative Hearings and a 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.