STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MANOR PINES CONVALESCENT CENTER, LLC,	)	
Petitioner,	)	
vs.	)	Case No. 06-3489RX
AGENCY FOR HEALTH CARE ADMINISTRATION,	)	
Respondent.	)	

FINAL ORDER

Pursuant to notice, this cause was heard by Linda M. Rigot, the assigned Administrative Law Judge of the Division of Administrative Hearings, on February 28, 2007, in Tallahassee, Florida.

APPEARANCES

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For Respondent: Brevin Brown, Esquire
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STATEMENT OF THE ISSUE

The issue presented is whether Section V. B. 7. of the Florida Title XIX Long-Term Care Reimbursement Plan which is

incorporated in Florida Administrative Code Rule 59G-6.010 is an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

Petitioner, Manor Pines Convalescent Center, LLC, filed its Petition Challenging the Validity of Existing Rule on September 15, 2006, challenging the validity of Section V. B. 7. of the Florida Title XIX Long-Term Care Reimbursement Plan which is incorporated in Florida Administrative Code Rule 59G-6.010. On November 8, 2006, Petitioner's Amended Petition Challenging the Validity of Existing Rule was filed pursuant to the agreed Motion to Amend Petition.

Petitioner presented the testimony of Sharon Gordon-Girvin, Scott Lipman, and Stanley W. Swindling, Jr. The Agency presented the testimony of Ross Nobles. Additionally, Petitioner's Exhibits numbered 1-6 were admitted in evidence.

The Transcript of the final hearing was filed on March 12, 2007. Petitioner's Proposed Final Order was filed on April 11, 2007, and Respondent's Proposed Final Order was filed on April 11 and again on April 12. Those documents have been considered in the entry of this Final Order.

FINDINGS OF FACT

1. Petitioner, Manor Pines Convalescent Center, LLC, operates a skilled nursing home located in Ft. Lauderdale, Broward County, Florida, known as Manor Pines Convalescent

Center. Manor Pines currently participates in the Medicaid program and has been issued provider number 25417700.

2. Respondent, Agency for Health Care Administration, administers the Florida Title XIX Long-Term Care Reimbursement Plan (hereinafter "the Plan") which is incorporated by reference into Florida Administrative Code Rule 59G-6.010 and which establishes the methodology for determining reimbursement to nursing homes for the care provided to Medicaid beneficiaries.

3. In accordance with the Plan, nursing homes participating in the Medicaid program are reimbursed by Medicaid on a per diem basis. The Medicaid per diem rate consists of four cost components: the operating costs component, the indirect patient care component, the direct patient care component, and a property component.

4. Rates are calculated by following the provisions of the Plan and are cost-based in nature. Medicaid rates are normally set twice per year, once in January and again in July.

5. The Plan contains numerous cost-saving mechanisms that are employed to limit a provider's actual costs. Examples of the cost-saving measures are class ceilings, cost ceilings, and targets. Each of those cost-saving measures uses a "lesser of" mechanism to ensure that a provider's Medicaid rate does not exceed the various mechanisms regardless of the actual costs to the provider.

6. The class ceiling limits the amount that any facility in a particular class of providers can be reimbursed in an affected cost component. The class ceilings are based upon the size of the facility and the facility's geographic location.

7. The cost ceiling caps the amount of costs that Medicaid will reimburse in any given component.

8. The target limits check the amount of growth that Medicaid will reimburse a provider in any one component between rate semesters.

9. Additionally, the Plan also contains a provision that is commonly referred to as the "low occupancy adjustment." According to Section V. B. 7. of the Plan, nursing homes are penalized in their reimbursement rates if they do not meet occupancy thresholds.

10. In the version of the Plan in effect on January 1, 2006 (Version XXIX), the low occupancy adjustment provision reduced the reimbursement rate established for nursing homes for each of the reimbursement components (except the property component under the fair rental value system) that make up the nursing homes' Medicaid reimbursement rate. The Agency amended the low occupancy adjustment on July 1, 2006 (Version XXX). The effect of the amendment was that the adjustment no longer affected the direct patient care component and only affected the

operating and indirect patient care components of the Medicaid per diem.

11. The low occupancy adjustment is calculated by determining a low occupancy threshold and then reducing the established Medicaid per diem of any provider that does not meet that threshold.

12. The low occupancy adjustment is a statement of general applicability that applies to all nursing homes in Florida that participate in the Medicaid program.

13. In the January 1, 2006, rate-setting semester, Manor Pines' Medicaid per diem was limited by the low occupancy adjustment. Manor Pines was penalized $11.30 per patient day in the operating component, $25.40 per patient day in the direct patient care component, and $15.90 per patient day in the indirect patient care component.

14. In the July 1, 2006, rate-setting semester, Manor Pines' Medicaid per diem was also limited by the low occupancy adjustment. At that time, Manor Pines was penalized $7.61 per patient day in the operating component and $10.23 per patient day in the indirect patient care component.

15. It is illogical to adjust any component of the Medicaid nursing home per diem due to occupancy because the Medicaid per diem is determined based upon an allocation of costs that already factors Medicaid utilization in the

methodology. Simply put, Medicaid's share of costs is limited in the per diem rate by a facility's Medicaid utilization. Further limiting those costs based upon occupancy creates a penalty that has no basis in law or fact.

16. At the time of the final hearing in this cause, Manor Pines had been participating in the Medicaid program for four or five years after 35 years as a private-pay facility.

17. Nearly two-thirds of all residents in nursing homes in Florida and in Broward County are Medicaid recipients. However, the low occupancy adjustment creates a disincentive to accept Medicaid residents because a nursing home affected by the adjustment loses reimbursement on each Medicaid resident in its facility.

18. The low occupancy adjustment is illogical because it creates this disincentive to admit Medicaid residents. The adjustment is illogical because a facility attempting to increase its occupancy to escape the adjustment must admit two Medicaid-eligible individuals for every individual that is not Medicaid-eligible. Yet, each Medicaid-eligible patient causes the facility affected by this adjustment to lose more money. The effect, therefore, of this adjustment is that it actually and illogically hampers the facility's ability to increase its occupancy and ultimately escape the penalty.

19. The Legislature has created five different diversion programs that are designed to divert people eligible for nursing home care from nursing homes to home- and community-based services. One of the major diversion projects has helped to reduce nursing home occupancies in Broward County. It has created a reduction in the overall need for nursing home beds in Broward County despite increasing population and, therefore, has created increased competition for nursing home residents among the nursing home community.

20. The low occupancy adjustment forces nursing homes to recruit and retain residents in their facilities, contrary to the legislative intent enumerated in the various diversion statutes.

21. The low occupancy adjustment illogically imposes a penalty based upon occupancy when the Legislature is actively creating programs designed to reduce nursing home occupancies.

22. Nursing homes are required to provide minimum staffing hours to their residents.

23. During the January 1 and the July 1, 2006, rate semesters, Manor Pines complied with those minimum staffing requirements. The costs, as stated in the direct care component of the January 1, 2006, rate sheets, accurately reflect the costs associated with complying with the minimum staffing requirements.

24. The low occupancy adjustment has created a situation at Manor Pines where in order to meet the minimum staffing requirements, Manor Pines has had to reduce staff in other areas, has had to forego completing certain repairs brought on by recent hurricanes, and has cancelled numerous projects at the facility that were intended to improve and enhance the facility in the eyes of prospective nursing home residents, such as replacing crank beds with electric beds.

25. The addition of new nursing home beds in Florida has been under a moratorium for years and will be for, minimally, four more years unless modified by law. Despite increasing population, there has been no corollary increase in nursing home residents. The statistics demonstrate the success of the legislative programs to divert residents from nursing homes, and they render the Agency's low occupancy adjustment a penalty, unsupported by reason.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the subject matter hereof and the parties hereto. §§ 120.56(3), 120.569, and 120.57(1), Fla. Stat.

27. The parties have stipulated that Petitioner has standing to bring this challenge to the Agency's Rule.

28. Section 120.56(3), Florida Statutes, provides that Petitioner has the burden of proving by a preponderance of the

evidence that the low occupancy adjustment is an invalid exercise of delegated legislative authority. Petitioner has met its burden as to each of the bases for invalidity alleged in its Amended Petition Challenging the Validity of Existing Rule.

29. Section 120.52(8), Florida Statutes, defines "invalid exercise of delegated legislative authority." Those bases which Petitioner contends makes the low occupancy adjustment invalid are set forth in that Subsection as follows:

* * *

> (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.;
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> * * *
>
> (e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational. . . .

30. Medicaid reimbursement for nursing homes is established in accordance with the principles set forth in the Florida Title XIX Long-Term Care Reimbursement Plan. The Plan is incorporated by reference in Florida Administrative Code Rule 59G-6.010. The statutory authority for the development of the

Plan is found in Section 409.908(2)(b), Florida Statutes. That Section provides, in pertinent part, as follows:

> (b) Subject to any limitations or directions provided for in the General Appropriations Act, the agency shall establish and implement a Florida Title XIX Long-Term Care Reimbursement Plan (Medicaid) for nursing home care in order to provide care and services in conformance with the applicable state and federal laws, rules, regulations, and quality and safety standards. . . .
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> * * *
>
> 2. The agency shall amend the long-term care reimbursement plan and cost reporting system to create direct care and indirect care subcomponents of the patient care component of the per diem rate. These two subcomponents together shall equal the patient care component of the per diem rate. Separate cost-based ceilings shall be calculated for each patient care subcomponent. The direct care subcomponent of the per diem rate shall be limited by the cost-based class ceiling, and the indirect care subcomponent may be limited by the lower of the cost-based class ceiling, the target rate class ceiling, or the individual provider target.
>
> * * *
>
> It is the intent of the Legislature that the reimbursement plan achieve the goal of providing access to health care for nursing home residents who require large amounts of care while encouraging diversion services as an alternative to nursing home care for residents who can be served within the community. The agency shall base the establishment of any maximum rate of payment, whether overall or component, on the available moneys as provided for in the

> General Appropriations Act. The agency may base the maximum rate of payment on the results of scientifically valid analysis and conclusions derived from objective statistical data pertinent to the particular maximum rate of payment.

31. Thus, the Legislature has directed the Agency to develop a Plan for reimbursement to nursing homes for Medicaid patients. Further, the Legislature has directed the Agency that the Plan take into account not only applicable state and federal laws and rules but also quality and safety standards. Lastly, the Legislature has directed the Agency that the Plan encourage the diversion of patients who can be served in the community rather than in skilled nursing homes.

32. The Agency has adopted the Plan by reference in Florida Administrative Code Rule 59G-6.010. The formula for computing the low occupancy adjustment is found in Section V. B. 7. of the Plan. Version XXIX of the Plan was effective on July 1, 2005, and affected Petitioner's Medicaid per diem rate commencing January 1, 2006. Version XXX of the Plan was effective on July 1, 2006, and affected Petitioner's Medicaid per diem rate commencing July 1, 2006. The former version resulted in a reduction in the reimbursement to Petitioner for the operating component, direct patient care component, and the indirect patient care component. The latter version resulted in a reduction in the reimbursement to Petitioner for the operating

component and the indirect patient care component. Thus, the Agency simply stopped applying the low occupancy adjustment to the direct patient care component of Petitioner's cost report.

33. The Agency has exceeded its grant of rulemaking authority in its promulgation of the low occupancy adjustment. The Rule itself represents that the specific authority for the Rule is Section 409.919, Florida Statutes. That Section does not contain specific authority for the reimbursement methodology for nursing home services, but rather is only a general grant of rulemaking authority for both the Agency and the Department of Children and Family Services. A general grant of rulemaking authority is insufficient to allow the Agency to adopt the Rule. §§ 120.52(8) and 120.536(1), Fla. Stat. Accordingly, no specific authority for the Rule has been cited by the Agency, and none has been found.

34. The Rule itself further recites that the law implemented is Section 409.908, Florida Statutes. That statutory Section covers many aspects of reimbursement to many types of Medicaid providers, including hospitals, ambulatory surgical centers, family planning services, hospices and many other providers. Only Subsection (2)(b) of the statute pertains to nursing homes. It is assumed, therefore, that only that Subsection is the law being implemented and under consideration herein.

35. In that Subsection the Legislature has set forth statutory limits on reimbursement for both the direct and the indirect patient care components. That Subsection provides that the direct patient care component may only be limited by "the cost-based class ceiling." In addition, the same Subsection provides that the indirect patient care component may only be limited "by the lower of the cost-based class ceiling, the target rate class ceiling, or the individual provider target." There is no other language relating to other adjustments or limitations with respect to those components. Further, the Legislature has made no mention of any permitted cost limitation to the operating component.

36. At issue in this case is the validity of a provision of the Plan known as the low occupancy adjustment. According to the Plan, if a Medicaid provider does not meet a certain level of occupancy, the provider's Medicaid per diem rate is reduced by this adjustment. This adjustment is in addition to any other limitation that might occur due to statutorily-recognized cost-saving mechanisms. The Plan contains numerous statutorily-recognized cost-saving limitations, such as a class ceiling, a target class ceiling, and a provider-specific target rate. Each of those mechanisms limit the amount of costs that Medicaid will reimburse and are designed to either cap the maximum amount of reimbursement allowed or to limit the amount of cost growth

between rate semesters. The low occupancy adjustment further reduces a provider's reimbursement and is based solely on occupancy regardless of actual cost or growth of cost of a provider.

37. The low occupancy adjustment operates as, and therefore is, a penalty the Agency places on nursing homes that do not meet certain occupancy thresholds. Whether the adjustment is viewed as a penalty or simply as an adjustment is irrelevant. The low occupancy adjustment is an invalid exercise of delegated legislative authority in that the statutory authority does not authorize the Agency to create either an adjustment or a penalty for low occupancy.

38. Further, the Legislature has enumerated certain cost limitations to be used by the Agency in setting a provider's Medicaid reimbursement per diem rate. The authorized cost-driven mechanisms are designed to control costs to the Medicaid program. The low occupancy adjustment, on the other hand, is driven by utilization and further reduces reimbursement that has already been limited by the cost-driven provisions permitted by the Legislature. The low occupancy adjustment not only has no statutory basis but also modifies and enlarges the specific cost-controlling provisions established by the Legislature. It is, therefore, for that additional reason, an invalid exercise of delegated legislative authority.

39. The low occupancy adjustment artificially reduces the appropriate reimbursement levels in contravention of the statutory directive to establish reimbursement to nursing homes so that they can provide care that complies with applicable state and federal statutes and rules and with quality and safety standards. As explained above, the Agency applied the occupancy penalty to the operating, direct patient care, and indirect patient care components for the January 2006 rate semester, but only applied the occupancy penalty to the operating and indirect patient care components for the July 2006 rate semester.

40. The direct patient care component consists only of salaries for nurses and certified nursing assistants who directly provide care to Medicaid residents. Those costs are variable in that they fluctuate based upon the amount of utilization of the facility by Medicaid patients. Manor Pines' cost report upon which the January 1, 2006, rate semester per diem was based reflected direct patient care costs of $72.14 per patient day. Those costs represent Manor Pines' actual costs of providing the staff to meet the minimum staffing requirements of the residents actually at the facility. The low occupancy adjustment reduced that reimbursement to $46.75 per patient day, effectively reducing Manor Pines' direct patient care costs by approximately 30 percent. The low occupancy adjustment is

arbitrary and capricious with respect to the direct patient care component.

41. Effective July 1, 2006, the Agency amended the low occupancy adjustment by deleting the adjustment to the direct patient care component, but retaining the adjustment to the indirect patient care and the operating components. The indirect patient care component consists of costs that are associated with patient care but are not nursing and nursing assistants' salaries. Operating costs consist of costs that are associated with keeping the facility operating, such as electric, water, and administrative costs.

42. The indirect patient care component has statutorily-permissible cost limitations: cost-based class ceilings, the target rate class ceilings, and the individual provider targets. The statute contains no language that would permit a cost limitation in the operating component. The low occupancy adjustment reduces Medicaid's reimbursement of those costs although those costs are essential to the operation of the facility, including basic necessities. The adjustment, therefore, violates the legislative directive to provide reimbursement that allows nursing homes to provide care in conformance with applicable state and federal statutes and rules and quality and safety standards.

43. The low occupancy adjustment is also an invalid delegation of legislative authority because it is arbitrary and capricious. It penalizes nursing homes for low occupancy at a time when the Legislature has established numerous successful programs to divert nursing home residents to home- and community-based services. The enabling legislation itself, Section 409.908(2)(b)6, Florida Statutes, specifically states this Legislative intent to place in nursing home residents who require large amounts of care while diverting residents who can be served in the community. In addition to contravening the statute, the adjustment is, therefore, arbitrary and capricious. In penalizing lower occupancies, the adjustment actually provides an incentive for nursing homes to accept and retain any resident that meets even the lowest admission criteria.

44. The Legislature has stated its intent to divert nursing home prospective residents and to move nursing home residents to less restrictive settings, not only in the statute under consideration herein, but also in the various statutes creating those diversion programs. See, e.g., §§ 430.202 (community care for the elderly), 430.601 (home care for the elderly), 430.710(1) (long-term care community diversion pilot project), and 430.7031 (nursing home transition program), Fla. Stat.

45. It is clear from a reading of those statutes that the Legislature intends to reduce nursing home occupancy in an effort to control costs. The low occupancy adjustment has the exact opposite effect. The adjustment creates incentive to keep nursing home facilities occupied. It is illogical and an invalid exercise of delegated legislative authority for the Agency to penalize a nursing home for having reduced occupancy when the Legislature has stated on numerous occasions that its intent is to reduce nursing home occupancies. The low occupancy adjustment is also arbitrary since the Legislative emphasis is placed on diverting residents from nursing home and placing these individuals in home- and community-based settings.

46. The low occupancy adjustment is also arbitrary because it creates a penalty, the effect of which increases with every Medicaid day being utilized. As a facility attempts to achieve a higher occupancy level, the adjustment creates a deeper economic penalty. Since the low occupancy adjustment affects the per diem rate after the statutorily-permissible cost limitations are factored into the reimbursement rate, every Medicaid resident represents a loss of revenue to the facility. Essentially, the Agency is requiring facilities affected by this adjustment to incur greater economic loss in order to try to escape this penalty. This arbitrary adjustment is for this

additional reason an invalid exercise of delegated legislative authority.

47. Accordingly, Petitioner has proven that the low occupancy adjustment exceeds the Agency's grant of rulemaking authority, contravenes the specific provisions of law implemented, is arbitrary because it is illogical, and is capricious because it is irrational.

48. On the other hand, the Agency has offered no explanation for the existence of its low occupancy adjustment or for its change in the costs components affected between Version XXIX and Version XXX of the Plan. The Agency's only proof in this proceeding was limited to its assertions that Petitioner knew about the adjustment before it became a Medicaid provider, that Petitioner could sell some of its beds thereby increasing its occupancy rate, and that, ignoring any increases over the years in Broward County population, nursing home occupancy in Broward County is staying about the same.

49. Petitioner seeks an award of its attorney's fees and costs incurred in this proceeding pursuant to Section 120.595(3), Florida Statutes. That Section requires that if a rule is declared invalid, an order shall be rendered against the Agency for reasonable costs and reasonable attorney's fees unless the Agency demonstrates that its actions were substantially justified or that special circumstances exist

which would make an award of attorney's fees and costs unjust. The Agency has offered no evidence that its adoption of the low occupancy adjustment had a reasonable basis in law or fact; rather, Petitioner has proven that the adjustment is irrational. Further, the Agency has suggested no special circumstances that would make the award sought by Petitioner unjust.

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

ORDERED that:

1. Section V. B. 7. of the Florida Title XIX Long-Term Care Reimbursement Plan which is incorporated in Florida Administrative Code Rule 59G-6.010 is an invalid exercise of delegated legislative authority.

2. The Agency shall pay to Petitioner its reasonable attorney's fees and its reasonable costs incurred in this proceeding in an amount not to exceed $15,000.

DONE AND ORDERED this 25th day of April, 2007, in Tallahassee, Leon County, Florida.

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LINDA M. RIGOT
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of April, 2007.

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 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.