

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

CUSTOM MOBILITY, INC., )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 07-2136RU  
 )  
 AGENCY FOR HEALTH CARE )  
 ADMINISTRATION, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

FINAL ORDER

Pursuant to notice, a formal hearing was held in this case on July 23, 2007, in Tallahassee, Florida, before Patricia M. Hart, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Maureen McCarthy Daughton, Esquire  
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For Respondent: Debra Fridie, Esquire  
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STATEMENT OF THE ISSUE

Whether the statistical formula for cluster sampling used by the Respondent to calculate Medicaid overpayments is a rule that has not been promulgated in accordance with the procedures set forth in Section 120.54(3), Florida Statutes, in violation of Section 120.54(1)(a), Florida Statutes.

PRELIMINARY STATEMENT

On May 11, 2007, Custom Mobility, Inc. ("Custom Mobility"), filed with the Division of Administrative Hearings its Petition for Administrative Determination That Agency Statement Violates Section 120.54(1)(a), Florida Statutes, and Is an Invalid Exercise of Delegated Legislative Authority ("Petition").<sup>1</sup> In its Petition, Custom Mobility asserted that the statistical formula for cluster sampling used by the Agency for Health Care Administration ("AHCA") to calculate Medicaid overpayments in those cases in which cluster sampling is used is an agency statement of general applicability that has not been enacted as a rule, as required by Section 120.54(1)(a), Florida Statutes (2007).<sup>2</sup> Specifically, Custom Mobility challenged the statistical formula for cluster sampling set forth in a Final Agency Audit Report dated December 19, 2005, and applied to the calculation of a \$245,317.83 Medicaid overpayment attributed to Custom Mobility<sup>3</sup>:

We used the following statistical formula for cluster sampling to calculate the amount due the Agency:

$$E - t \sqrt{\frac{U(U-N)}{N(N-1)} \sum_{i=1}^N (A_i - YB_i)^2}$$

Where:

$$E = \text{point estimate of overpayment} = F \left[ \frac{\sum_{i=1}^N A_i}{\sum_{i=1}^N B_i} \right]$$

$$F = \text{number of claims in the population} = \sum_{i=1}^U B_i$$

$A_i$  = total overpayment in sample cluster

$B_i$  = number of claims in sample cluster

$U$  = number of clusters in the population

$N$  = number of clusters in the random sample

$$Y = \text{mean overpayment per claim} = \frac{\sum_{i=1}^N A_i}{\sum_{i=1}^N B_i}$$

$t$  =  $t$  value from the Distribution of  $t$  Table

Pursuant to notice, the final hearing in this matter was scheduled for June 14 and 15, 2007. During a telephone conference, Custom Mobility made an ore tenus motion for a continuance, which was granted in an order entered June 15, 2007. The final hearing was conducted, pursuant to notice, on July 23, 2007.

At the hearing, Custom Mobility presented the testimony of Bruce D. Bayes, its President, and Petitioner's Exhibits 1 through 48 and 50 through 52 were offered and received into evidence. AHCA presented the testimony of Michael West and D. Kenneth Yon, and Respondent's Exhibits 1, 2, 4a-1 and 11 through 13 were offered and received into evidence. The transcript of the deposition of Robert Pierce, taken on June 26, 2007, by AHCA and received into evidence as Petitioner's Exhibit 45, was

presented in lieu of live testimony; the transcripts of the depositions of Robert Pierce, taken by Custom Mobility on June 6, 2007, and of Michael West were received into evidence as Petitioner's Exhibits 44 and 46, respectively. Official recognition was taken of a number of Final Agency Audit Reports pursuant to orders granting motions of both Custom Mobility and AHCA, and official recognition was also taken of Florida Administrative Code Rule 59G-7.0331.

Prior to the hearing, each party filed a Motion for Summary Final Order. These motions were denied in orders entered July 13, 2007, and July 18, 2007. At the conclusion of the Petitioner's case and at the conclusion of the testimony of Michael West, AHCA moved for entry of a summary final order on the ground that Custom Mobility had failed to meet its burden of proof that the Challenged Statement is a rule. The motions were denied.

The one-volume transcript of the proceedings was filed on July 27, 2007, and the parties filed their proposed findings of fact and conclusions of law on August 6, 2007.

#### FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing, on the stipulation of facts entered into during the hearing, and on the entire record of this proceeding, the following findings of fact are made:

## Parties

1. AHCA is the state agency responsible for administering Florida's Medicaid program, for auditing Medicaid providers, and for recouping overpayments made to Medicaid providers. See §§ 409.902 and 409.913, Fla. Stat.

2. Custom Mobility is a corporation that is in the business of providing and servicing adaptive wheelchairs and wheelchair accessories, as well as other types of equipment.

3. Custom Mobility has been a Medicaid provider operating under Medicaid Provider Agreement in Florida since in or about January 1990.

## Standing

4. AHCA conducted an audit of the Medicaid claims submitted for payment by Custom Mobility between January 1, 2001, and December 31, 2003 ("Audit Period").

5. A Preliminary Audit Report dated November 3, 2005, was sent to Custom Mobility advising it that the Office of Medicaid Program Integrity ("OMPI") had completed its review of the documentation provided by Custom Mobility for Medicaid claims paid during the Audit Period and that it had preliminarily determined that Custom Mobility was overpaid in the amount of \$593,154.87. The overpayment calculation was performed using the statistical formula for cluster sampling that is identical to the Challenged Statement.

6. In a Final Audit Report dated December 19, 2005, AHCA advised Custom Mobility that it had completed its review of the documentation provided and that it had determined that Custom Mobility was overpaid in the amount of \$245,317.83. The overpayment calculation was performed using the statistical formula for cluster sampling that is the Challenged Statement.

7. Custom Mobility was notified in the Final Audit Report that it had the right to request a formal or an informal hearing with respect to the overpayment determination set forth in the FAR. Custom Mobility requested a formal hearing pursuant to Section 120.57(1), Florida Statutes, and AHCA forwarded the matter to the Division of Administrative Hearings for assignment of an administrative law judge. The matter was assigned DOAH Case No. 07-1749MPI and is scheduled for final hearing on October 18-19, 2007.

8. Custom Mobility has established that it is substantially affected by the Challenged Statement in that the Challenged Statement was used as the basis for calculating the amount that AHCA is seeking to recover from Custom Mobility as alleged Medicaid overpayments.

#### Challenged Statement

9. AHCA uses both statistical sampling methodologies and non-statistical methodologies to calculate Medicaid overpayments. Statistical sampling methodologies are used to

permit the auditors working with the OMPI to analyze a random sample from the population of Medicaid recipients and/or claims, determine the findings in the sample, and extend the sample findings to the population of recipients and/or claims.

10. The decision regarding the methodology to be used in calculating an overpayment is made by AHCA auditors shortly before beginning the audit of a Medicaid provider. Among the factors considered by the auditors in determining which methodology to use are the way the Medicaid provider keeps records, the type of Medicaid infraction that might be at issue during the audit, the relationship between claims and recipients, and the number of claims per recipient.

11. The statistical sampling methodologies most frequently used by AHCA in making determinations of overpayments are simple random sampling, cluster sampling, and two-stage cluster sampling; AHCA also sometimes uses judgmental sampling, sequential sampling, and stratified random sampling.

12. AHCA applies a different statistical formula to extend the results of the sample to the population of claims for each of the statistical methodologies used. The statistical formulas for simple random sampling, cluster sampling, and two-stage cluster sampling were compiled from statistical reference sources and included in documents prepared by Robert Pierce, formerly the Administrator of the OMPI, so that OMPI would have

a record of the formulas that were being used and the way in which the overpayment calculations were made.

13. In using the statistical sampling methodology of cluster sampling, the AHCA auditor draws a random sample of Medicaid recipients who have received goods or services from a particular Medicaid provider and evaluates the claims for each recipient who is included in the sample. The amount of overpayment is determined for each claim for each recipient, and the statistical formula for cluster sampling is used to extend the overpayment found in the sample to the entire population of Medicaid claims to determine the total overpayment.

14. The Challenged Statement is the only statistical formula used by AHCA to calculate Medicaid overpayments when the statistical sampling methodology of cluster sampling is used.

15. Cluster sampling is an accepted and valid statistical methodology.

16. According to OMPI's Statistical Sampling Internal Operating Procedure No. 11, revised June 2003, the calculations extending the sample findings to the population of claims when cluster sampling is used are made by a qualified person using computer programs and instructions applying the Challenged Statement to the data collected by the auditor.

17. Between June 1, 2004, and May 31, 2007, AHCA audited approximately 3500 Medicaid providers. Approximately 3,140



audits were conducted using non-statistical methodologies to calculate Medicaid overpayments. Approximately 350 providers were audited using the statistical methodology of cluster sampling; one was audited using the statistical methodology of cluster sampling with a delta distribution; and 13 were audited using the statistical methodology of two-stage cluster sampling.

18. The Challenged Statement was used to calculate Medicaid overpayments in all of the audits done between June 1, 2004, and May 31, 2007, in which the statistical methodology of cluster sampling was used.

19. The Challenged Statement is generally applicable to all audits in which the statistical methodology of cluster sampling is used to calculate Medicaid overpayments.

20. The Challenged Statement has been used by AHCA for approximately 20 years to calculate Medicaid overpayments using the cluster sampling methodology.<sup>4</sup>

21. The Challenged Statement has not been adopted as a rule pursuant to the procedures set forth in Section 120.54, Florida Statutes.

22. According to D. Kenneth Yon, an AHCA Administrator with OMPI, it would be "extremely difficult" and "extremely complex" to adopt the Challenged Statement as a rule because AHCA uses "a lot of auditing methodologies"; because Medicaid "fraud and abuse changes" and combating fraud and abuse would be

hampered if AHCA were required to include in a rule the statistical methodologies used by AHCA to calculate Medicaid overpayments; and because statistical formulas are "highly technical in nature," so that most people would have to go to a statistician to interpret the formulas in any event.<sup>5</sup>

23. Adoption of the Challenged Statement as a rule pursuant to the procedures set forth in Section 120.54(1)(a), Florida Statutes, is both feasible and practicable.

#### CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.56, 120.569, and 120.57(1), Florida Statutes.

#### Standing

25. Section 120.54(4)(1), Florida Statutes, requires that a "person [be] substantially affected by an agency statement [to] seek an administrative determination that the statement violates s. 120.54(1)(a)."

26. Custom Mobility bears the burden of proving by a preponderance of the evidence that it is substantially affected by the Challenged Statement. See § 120.57(1)(j), Fla. Stat.

27. Based on the findings of fact herein, Custom Mobility has proven by a preponderance of the evidence that it has suffered an injury-in-fact as a result of the application of the

Challenged Statement to calculate an alleged Medicaid overpayment assessed against it, and Custom Mobility has also proven by a preponderance of the evidence that it falls within the zone of interest protected by the statutory scheme in Section 409.902, Florida Statutes, which authorizes AHCA to make payments to Medicaid providers for services covered by the Medicaid Program, and by Section 409.913(20), Florida Statutes, pursuant to which overpayments are to be calculated using "accepted and valid auditing, accounting, analytical, statistical, or peer-review methods, or combinations thereof." See Jacoby v. Florida Bd. of Med., 917 So. 2d 358, 360 (Fla. 1st DCA 2005).

28. Custom Mobility has, therefore, met its burden of proving that it is substantially affected by the Challenged Statement and, therefore, has standing to maintain this challenge to an agency statement that has not been adopted as a rule, as provided in Section 120.56(4), Florida Statutes.

The Challenged Statement is a rule that has not been adopted pursuant to the rulemaking procedures set forth in Section 120.54, Florida Statutes.

29. The Challenged Statement is used by AHCA in carrying out its responsibilities, as set forth in Sections 409.913 and 409.913(20), Florida Statutes, to audit Medicaid providers and to determine if a provider has received payments to which it is not entitled under the Medicaid program.

30. Section 409.913(20), Florida Statutes, provides as follows:

(20) In making a determination of overpayment to a provider, the agency must use accepted and valid auditing, accounting, analytical, statistical, or peer-review methods, or combinations thereof. Appropriate statistical methods may include, but are not limited to, sampling and extension to the population, parametric and nonparametric statistics, tests of hypotheses, and other generally accepted statistical methods. Appropriate analytical methods may include, but are not limited to, reviews to determine variances between the quantities of products that a provider had on hand and available to be purveyed to Medicaid recipients during the review period and the quantities of the same products paid for by the Medicaid program for the same period, taking into appropriate consideration sales of the same products to non-Medicaid customers during the same period. In meeting its burden of proof in any administrative or court proceeding, the agency may introduce the results of such statistical methods as evidence of overpayment.

(Emphasis added.)

31. Custom Mobility bears the burden of proving by a preponderance of the evidence that the Challenged Statement "constitutes a rule under s. 120.52 and that the agency has not adopted the statement by the rulemaking procedure provided by s. 120.54." See §§ 120.56(4)(a) and (b) and 120.57(1)(f), Fla. Stat.

32. Section 120.52(15), Florida Statutes, provides in pertinent part: "'Rule' means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure and 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."

33. Based on the findings of fact herein, Custom Mobility has met its burden of proving that the Challenged Statement is an agency statement of general applicability that is used by AHCA in all audits in which cluster sampling is the statistical methodology by which Medicaid overpayments are calculated pursuant to Section 409.913(20), Florida Statutes. AHCA's contention that the Challenged Statement is not a statement of general applicability because it is not used to calculate Medicaid overpayments in all audits of Medicaid providers is an overly-broad interpretation of "general applicability" in the circumstances of this case.

34. Based on the findings of fact herein, the Challenged Statement implements the requirement in Section 409.913(20), Florida Statutes, that AHCA

must use accepted and valid auditing, accounting, analytical, statistical, or peer-review methods, or combinations thereof" and that "appropriate statistical methods may include, but are not limited to,

sampling and extension to the population, parametric and nonparametric statistics, tests of hypotheses, and other generally accepted statistical methods."

35. Section 120.54, Florida Statutes, provides in pertinent part:

1) GENERAL PROVISIONS APPLICABLE TO ALL RULES OTHER THAN EMERGENCY RULES.--

(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.

36. It is undisputed that the Challenged Statement has not been adopted as a rule pursuant to Section 120.54(1)(a), Florida Statutes, and that AHCA has not instituted any of the rulemaking procedures prescribed in Section 120.54, Florida Statutes.

It is feasible and practicable for AHCA to adopt the Challenged Statement in accordance with the rulemaking procedures set forth in Section 120.54, Florida Statutes.

37. Once the petitioner in a challenge instituted under Section 120.56(4), Florida Statutes, has met its burden of proving that an agency statement is a rule that has not been adopted pursuant to the rulemaking procedures set forth in Section 120.54, Florida Statutes, the burden shifts to the agency to prove by a preponderance of the evidence "that rulemaking is not feasible and practicable under s. 120.54(1)(a)."

38. Section 120.54(1)(a), Florida Statutes, provides in pertinent part:

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.

39. Based on the findings of fact herein, AHCA has failed to meet its burden of proving by a preponderance of the evidence that rulemaking with respect to the Challenged Statement is not feasible or practicable, as defined in Section 120.54(1)(a)1.

and 2., Florida Statutes. The evidence AHCA presented on these points was insufficient to rebut the presumptions that rulemaking with respect to the Challenged Statement would be feasible and practicable. That rulemaking would be "extremely difficult" and "extremely complex" does not satisfy the requirements necessary to rebut the presumptions.

#### CONCLUSION

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

(1) The Challenged Statement violates Section 120.54(1)(a), Florida Statutes, and the Agency for Health Care Administration shall immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action;

(2) Custom Mobility, Inc., is entitled to an award of reasonable costs and reasonable attorneys' fees pursuant to Section 120.595(4), subject to the limitation stated in therein. The parties are accorded 30 days from the date of this Final Order to resolve Custom Mobility's entitlement to and the amount of such award. If the parties have not resolved Custom Mobility's entitlement to and the amount of the award within the designated period of time, the parties shall so advise the Administrative Law Judge, and a hearing will be scheduled to resolve such issues.



DONE AND ORDERED this 23rd day of August, 2007, in  
Tallahassee, Leon County, Florida.



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PATRICIA M. HART  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 23rd day of August, 2007.

ENDNOTES

- <sup>1</sup>/ On June 11, 2007, Custom Mobility filed a Notice of Withdrawal of Request for Administrative Determination of Invalidity of Rule Pursuant to Section 120.56(3), F.S. This case, therefore, has proceeded only under the claim under Section 120.54(1)(a), Florida Statutes.
- <sup>2</sup>/ References herein to the Florida Statutes shall be to the 2007 edition, unless otherwise indicated.
- <sup>3</sup>/ This statement will be referred to throughout this Recommended Order as the "Challenged Statement."
- <sup>4</sup>/ Former Florida Administrative Code Rule 59G-9.030 set forth the procedures by which AHCA would determine overpayments of Medicaid claims. Florida Administrative Code Rule 59G-9.030(4)(b) included general procedures for statistical calculations, but it did not contain any statistical formulas such as the Challenged Statement. The rule was repealed effective December 7, 1998.
- <sup>5</sup>/ Transcript of the proceedings at pages 156-57 and 165.

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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.