STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HILLSBOROUGH COUNTY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 07-4432
	)	
DEPARTMENT OF JUVENILE JUSTICE,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the final hearing of this case for the Division of Administrative Hearings (DOAH) on December 12, 2007, in Tampa, Florida.

APPEARANCES

For Petitioner: Stephen M. Todd, Esquire
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For Respondent: Brian Berkowitz, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent assessed Petitioner for secure juvenile detention care for the 2007-2008 fiscal year in a manner that implements Section 985.686, Florida Statutes (2007), and Florida Administrative Code Rule 63G-1.[1]

PRELIMINARY STATEMENT

By letter dated August 29, 2007, Respondent notified Petitioner of proposed agency action to deny Petitioner's protest of Respondent's calculation of utilization days in the assessment imposed for the 2007-2008 fiscal year. Petitioner requested an administrative hearing, and Respondent referred the matter to DOAH to assign an ALJ to conduct the hearing.

At the hearing, Petitioner presented the testimony of two witnesses and submitted three exhibits for admission into evidence. Respondent presented the testimony of one witness and submitted three exhibits.

After the hearing, Petitioner submitted one late-filed exhibit on December 24, 2007. Respondent was suppose to file a fourth exhibit after the hearing, but never filed the exhibit.

The identity of the witnesses and exhibits and the rulings regarding each are reported in the one-volume Transcript of the hearing filed with DOAH on January 28, 2008. The ALJ granted Respondent's unopposed request for extension of time to file proposed recommended orders (PRO). Petitioner and Respondent timely filed their PROs on February 11, 2008.

FINDINGS OF FACT

1. Respondent is the state agency responsible for administering the cost sharing requirements in Section 985.686 for juvenile detention care. Petitioner is a non-fiscally

constrained county[2] subject to the statutory cost sharing requirements.

2. The statutory requirements for funding juvenile detention in the state guide the findings in this proceeding. Subsection 985.686(1) requires Petitioner and Respondent to share the costs of "financial support" for "detention care" for juveniles who reside in Hillsborough County, Florida (the County), and are held in detention centers operated by Respondent.

3. Subsection 985.686(3) requires Petitioner to pay the costs of detention care "for the period of time" prior to final court disposition (predisposition care). Respondent must pay the costs of detention care on or after final court disposition (post-disposition care).

4. Detention care is defined in Subsection 985.686(2)(a) to mean secure detention. Secure detention is defined in Subsection 985.03(18)(a), for the purposes of Chapter 985, to include custody "prior to" adjudication or disposition as well as custody after adjudication but "prior to" placement.[3]

5. The term "placement" is not defined by statute or rule. However, secure detention centers are legally unavailable to circuit courts for post-disposition placement. Post-disposition care of juveniles in a secure detention center is generally limited to juveniles who are waiting for residential placement.

6. The trier-of-fact construes the reference to placement in Subsection 985.03(18)(a) to mean residential placement. Secure detention includes custody in a detention center for both predisposition and post-disposition care. Predisposition care occurs prior to adjudication or final disposition. Post-disposition care occurs after adjudication or disposition but prior to residential placement.

7. Post-disposition care also includes custody in a detention center after final disposition but prior to release. Although this type of post-disposition care comprises a small proportion of total post-disposition care, references to post-disposition care in this Recommended Order include care after final disposition for: juveniles waiting for residential placement and juveniles waiting for release.

8. Juveniles are not supposed to remain in detention centers very long after final disposition while they wait for residential placement. However, juveniles with exceptional needs, such as mental health needs, may remain in detention centers for a longer period of time due to the limited availability of appropriate residential placement facilities.

9. Approximately 2,057 secure detention beds exist statewide. The operating cost for each bed is the same whether the bed is used for predisposition or post-disposition care.

10. The operating cost for a secure detention bed may increase if the detention center exceeds capacity because of overtime expenses, temporary staffing, and other temporary costs. Although only two secure detention centers did not exceed capacity at some time during the previous year, secure detention utilization in the same year averaged approximately 89 percent of capacity.

11. The Legislature funds the cost of juvenile detention care through an annual appropriation. Appropriations from 2002 forward have historically allocated approximately 11 percent of the cost of detention care to Respondent and approximately 89 percent to the counties.

12. The total appropriation for the 2007-2008 fiscal year was $125,327,667. The Legislature allocated $30,860,924 to the state and $101,628,064 to the counties. Negative amounts in certain categories brought the net appropriation to $125,327,667.

13. The Legislature pays the state's share of juvenile detention costs from general revenue. However, the "appropriation" for the counties' share of detention costs is actually an account payable. Pursuant to Subsection 985.686(6), Petitioner must make monthly payments into a state trust fund for its share of statewide predisposition detention costs.

14. Subsection 985.686(3) requires Respondent to develop an accounts payable system to allocate to the counties the costs of secure detention for predisposition care. Pursuant to Subsection 985.686(5), Respondent administers the account payable system through a system of prospective assessment and retroactive reconciliation.

15. Prospective assessments at the outset of a year are based on actual costs from the previous year. Subsection 985.686(5) requires Petitioner to pay the prospective assessment monthly and requires Respondent to complete an annual reconciliation at the end of the year to determine whether actual costs during the year were more or less than the prospective assessment. Sometime after the end of each fiscal year, Respondent either credits or debits Petitioner for any differences between the prospective assessment and actual costs determined in the annual reconciliation.

16. Subsection 985.686(3) requires Petitioner to pay for the costs of secure detention in the County for the "period of time" juveniles are in predisposition care. No statute or rule expressly defines the phrase "period of time."

17. Subsection 985.686(10) authorizes Respondent to adopt rules to administer Section 985.686. Rule 63G-1.004(1)(c) implicitly defines the statutory reference to a "period of time" in predisposition care to mean "service days."

18. Other provisions in Rule 63G-1.004 prescribe the methodology to be used in calculating Petitioner's share of the costs for predisposition care. Respondent must first identify all juveniles in predisposition care based upon usage during the preceding fiscal year. Second, Respondent must match each placement record with the corresponding identification code. Third, Respondent must calculate the "service days" in predisposition care. Finally, Respondent must divide the number of "service days" Petitioner used for predisposition care in the County by the service days used by all counties to determine the percentage of the counties' costs for predisposition care that Petitioner owes.

19. Petitioner disputes the methodology Respondent uses to determine the amount Petitioner owes for predisposition care in the County. However, that dispute is the subject of a companion case identified by DOAH Case No. 07-4398 and is beyond the scope of this proceeding.

20. The dispute in this proceeding is limited to Respondent's determination of the service days that Respondent allocated to Petitioner for predisposition care in the County. The term "service days" is not defined by statute or rule.

21. Respondent defines service days to mean "utilization" days. Utilization days are not synonymous with calendar days.

22. Utilization days correspond more closely to the number of juveniles in secure detention. If for example, 10 juveniles utilize one detention center during any part of a day, 10 utilization days have occurred during one calendar day.

23. A secure detention center may be utilized simultaneously by juveniles in predisposition care and juveniles in post-disposition care (dual-use occupancy). If the 10 utilization days in the preceding example were to include equal dual-use occupancy, Respondent would count five utilization days for predisposition care and five utilization days for post-disposition care.

24. The 10 juveniles in the preceding example may not occupy a detention center for an entire calendar day. The five juveniles in predisposition care may occupy the center for only part of a calendar day and five more juveniles may receive predisposition care for the remainder of the day. In that example, Respondent would allocate 10 utilization days to Petitioner for predisposition care during that calendar day and only five utilization days to the state for a total of 15 utilization days.

25. Respondent determined there were 709,251 utilization days for pre and post-disposition care in the state for the year in issue. Respondent allocated 579,409 utilization days to the counties' predisposition care and 129,842 utilization days to

the state for post-disposition care. Respondent allocated 47,714 utilization days to Petitioner and, after reconciliation, reduced that number to 47,214.

26. Petitioner claims the correct number of utilization days is 31,008. Respondent allegedly misallocated 16,206 utilization days for predisposition care by Petitioner.

27. Respondent identifies the 16,206 utilization days in nine categories. The categories and corresponding number of days that Petitioner challenges are: contempt of court (327), detention order (3,005), interstate compacts (1), pick up orders (12,267), prosecution previously deferred (28), transfer from another county awaiting commitment beds (444), violation of after care (10), violation of community control (79), and violation of probation (45).

28. Subsection 985.686(6) requires Respondent to calculate the monthly assessment against Petitioner with input from the County. Respondent allowed input from the counties during rulemaking workshops but has thwarted virtually any input from the County during the annual processes of calculating assessments and reconciliation.

29. Respondent classifies each of the nine challenged categories as predisposition care. However, the data that Respondent provides to the County each year does not include final disposition dates.

30. The omission of disposition dates from the information that Respondent provides to Petitioner effectively thwarts the County's ability to provide meaningful input into the calculations that Respondent performs pursuant to Subsection 985.686(6). The absence of disposition dates precludes the County from independently auditing, or challenging, the assessments that Respondent calculates pursuant to Subsection 985.686(6). The absence of disposition dates also deprives the trier-of-fact of a basis for resolving the dispute over the nine categories of utilization days that Respondent determined were predisposition care.

31. Respondent claims the allegation of misclassification is a challenge to agency policy that is not subject to the due process requirements prescribed in Chapter 120. To the contrary, the allegation raises a disputed issue of fact over the correct disposition date, and that issue is not infused with agency policy or agency expertise.

32. The correct disposition date can be determined through conventional means of proof, including public records. Although Respondent presumably uses that information to determine a disposition date, Respondent does not make the information available to the County.

33. Even if a determination of the disposition date were solely a policy issue, it is not exempt from the due process

requirements prescribed in Subsection 120.57(1). One of the principal purposes of a proceeding conducted pursuant to Subsection 120.57(1) (a 120.57 proceeding) is to encourage responsible agency policymaking.

34. During this proceeding, Respondent did not explicate, by conventional methods of proof, any intelligible standards that guide the exercise of agency discretion in classifying the nine challenged categories of utilization days as predisposition days. Nor did Respondent explicate any evidential predicate to support a finding that the classification is infused with agency expertise and entitled to great deference. The only standards that Respondent articulated during the evidentiary hearing is that agency employees exercise discretion pursuant to instructions from agency management.

35. Respondent also considers open charges against juveniles as a basis for distinguishing predisposition utilization days from post-disposition utilization days. If, for example, a juvenile is in secure detention awaiting placement after final disposition of one charge but has another open charge, Respondent classifies that utilization day as predisposition care.

36. The trier-of-fact finds that secure detention after final disposition, but before residential placement for the charge adjudicated, is post-dispositional care. The record does

not disclose how many, if any, of the 47,215 utilization days allocated to Petitioner involve open charges.

37. Respondent did not explicate any intelligible standards to guide the exercise of agency discretion in using open charges as a basis for distinguishing predisposition utilization days from post-disposition utilization days. Nor did Respondent explicate an evidentiary basis to support a finding that the relevant classification is infused with either agency expertise or agency policy and entitled to deference.

38. Petitioner acknowledges that some of the nine categories require final disposition before a juvenile can be placed in secure detention prior to residential placement. For example, data identification codes for offenses such as contempt of court, detention orders, pick up orders, prosecution previously deferred, violation of after care, violation of community control, and violation of probation require a final disposition. The omission of a final disposition date from the data available to Petitioner deprives Petitioner of the ability to provide input to Respondent to correct the assessments that Respondent calculates pursuant to Subsection 985.686(6).

CONCLUSIONS OF LAW

39. DOAH has jurisdiction over the parties and subject matter in this proceeding. §§ 120.569 and 120.57(1). DOAH provided the parties with adequate notice of the final hearing.

40. The burden of proof is on the party asserting the affirmative of an issue. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977). The proposed agency action is to assess Petitioner for predisposition care in the County. Respondent asserts the affirmative of that issue and must prove by a preponderance of the evidence that the proposed assessment should become final agency action.

41. Regardless of whether Respondent or Petitioner has the burden of proof, a preponderance of the evidence shows that Respondent did not calculate the proposed assessment with input from Petitioner in violation of Subsection 985.686(6). Respondent unilaterally calculates utilization days without disclosing disposition dates to Petitioner and without disclosing intelligible standards for the exercise of agency discretion in distinguishing predisposition utilization days from post-disposition utilization days.

42. The fact-finder must resolve conflicts in the evidence and decide an issue one way or the other. Dunham v. Highlands County School Board, 652 So. 2d 894, 896 (Fla. 2d DCA 1995); Heifetz v. Department of Business Regulation, Division of Alcoholic Beverages & Tobacco, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985); Department of Professional Regulation v. Wagner, 405

So. 2d 471, 473 (Fla. 1st DCA 1981). The trier-of-fact resolved the evidential conflict in favor of Petitioner. The fact-finder is the sole arbiter of credibility. Bejarano v. State, Department of Education, Division of Vocational Rehabilitation, 901 So. 2d 891, 892 (Fla. 4th DCA 2005); Hoover, M.D. v. Agency for Health Care Administration, 676 So. 2d 1380, 1384 (Fla. 3d DCA 1996); Goss v. District School Board of St. Johns County, 601 So. 2d 1232, 1234 (Fla. 5th DCA 1992).

43. The record evidence does not set forth a reasonable basis for finding that an interpretation of terms such as "disposition date," "period of time," "days," "service days," and "utilization days" require special agency insight or expertise. Petitioner did not articulate any underlying technical reasons for deference to agency expertise. Johnston, M.D. v Department of Professional Regulation, Board of Medical Examiners, 456 So. 2d 939, 943-944 (Fla. 1st DCA 1984).

44. Respondent's interpretation of the statutory requirement in Subsection 985.686(6) to calculate assessments with input from the County is clearly erroneous. The omission of disposition dates in the information available to the County deprives the County of any meaningful input within the meaning of Subsection 985.686(6). The failure to explicate by conventional methods of proof any intelligible standards to guide agency discretion also deprives the County of meaningful

input in violation of Subsection 985.686(6). McDonald v. Dept. of Banking and Finance, 346 So. 2d 569, 583 (Fla. 1st DCA 1977).

45. Respondent's determination that challenges to disposition dates are challenges to agency policy is clearly erroneous. Disposition dates are public record and not infused with agency policy or expertise. Disposition dates are factual issues within the exclusive province of the trier-of-fact.

46. Respondent does not provide the County with sufficient information to determine what part, if any, of the 15,599 utilization days classified as predisposition care for pick-up orders (12,267), contempt of court (327), and detention orders (3,005) are duplicative. Subsection 985.101, for example, authorizes a court to issue a pick-up order when a juvenile fails to appear in court. A detention order for secure detention pursuant to a pick-up order may not exceed 72 hours unless the court conducts a contempt proceeding, pursuant to the due process requirements prescribed in Section 985.037, and finds the juvenile presents a substantial risk of not appearing at a subsequent hearing. A.K. v. Dobuler, 951 So. 2d 989, 991 (Fla. 3d DCA 2007); A.M.W. v. Portsey, 714 So. 2d 1170 (Fla. 2d DCA 1998); W.N. v. Fryer, 572 So. 2d 24 (Fla. 4th DCA 1990). Any utilization after 72 hours must be pursuant to a final disposition of the pick-up order, contempt of court, or

detention order and is properly classified as post-disposition care.

47. If challenges to disposition dates were challenges to agency policy, Respondent incorrectly concludes that challenges to agency policy are beyond the scope of a 120.57 proceeding.[4] Department of General Services v. Willis, 344 So. 2d 580, 592 (Fla. 1st DCA 1977). In Willis the court explained:

> We are accustomed to think that the principal use of hearings is to develop records for "adjudicatory" or "quasi-judicial" decisions. (Citations omitted) That was the limited role of administrative hearings in years past, when the "universe of administrative law was hierarchical, with the judiciary at its apex." (Footnote omitted) [The current] administrative process . . . recognizes that a hearing independently serves the public interest by providing a forum to expose, inform and challenge agency policy and discretion.

Willis, 344 So. 2d at 591.

48. An ALJ conducting a 120.57 proceeding is not limited to making findings of fact and conclusions of law. The ALJ has the additional duty of serving the public interest by encouraging responsible agency policymaking.

> [T]he [ALJ] does not merely find the facts and supply the law, as would a court. The [ALJ] "independently serves the public interest by providing a forum to expose, inform and challenge agency policy and discretion." (Citations omitted)

McDonald, 346 So. 2d at 580-583.

49. The requirements for responsible agency policymaking are not defined by statute, rule, or case law. At a minimum, however, an ALJ should not recommend that the agency issue a final order which is subject to mandatory remand pursuant to Subsection 120.68(7).

50. Subsection 1120.68(7), in relevant part, requires a reviewing court to remand a final order of an agency if the exercise of agency discretion violates a constitutional or statutory provision. To avoid remand, the exercise of agency discretion sanctioned in the final order must not violate the separation of powers doctrine. Fla. Const., Art. II, § 3.

51. The separation of powers doctrine prohibits an executive agency, including either Respondent or DOAH, from exercising legislative power to modify, enlarge, or amend a statute. The separation of powers doctrine encompasses two prohibitions. No branch of government may encroach upon the powers of another, and no branch may delegate its power to another branch. The second prohibition is the non-delegation doctrine. Chiles v. Children A, B, C, D, E, and F, 589 So. 2d 260, 264-266 (Fla. 1991).

52. The non-delegation doctrine prohibits the Legislature from delegating legislative authority to an agency of the executive branch. Chiles, 589 So. 2d at 264-266. The administration of legislative programs by executive agencies,

including Respondent and DOAH, must be pursuant to minimal standards and guidelines ascertainable by reference to statutory terms enacted by the Legislature and implemented in the agency's rules. Chiles, 589 So. 2d at 264-266.

53. The Legislature may authorize administrative agencies to interpret, but never to alter statutes. Carver v. State of Florida, Division of Retirement, 848 So. 2d 1203, 1206 (Fla. 1st DCA 2003) (citing Cortes v. State Board of Regents, 655 So. 2d 132, 136 (Fla. 1st DCA 1995)). If Rule 63G-1.004 were deemed to authorize the exercise of agency discretion at issue in this proceeding, a literal conflict between the Rule and a statute must be resolved in favor of the statute in order to preserve the validity of the Rule.[5] Willette v. Air Products and Bassett and Department of Labor and Employment Security, Division of Workers' Compensation, 700 So. 2d 397, 399 (Fla. 1st DCA 1997). In Willette, the court wrote:

> Executive branch rulemaking is authorized in furtherance of, not in opposition to, legislative policy. Just as a court cannot give effect to a statute (or administrative rule) in a manner repugnant to a constitutional provision, so a duly promulgated rule, although "presumptively valid until invalidated in a section 120.56 rule challenge [citations omitted]," must give way in judicial proceedings to any contradictory statute that applies.

Id.

54. An administrative agency has statutory authority to adopt only those rules that implement or interpret the specific powers and duties granted by the enabling statute. § 120.52(8). An agency cannot implement by non-rule policy agency discretion that the separation of powers doctrine prohibits the agency from implementing by rule.

RECOMMENDATION

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

RECOMMENDED that Respondent enter a final order assessing Petitioner for the costs of predisposition care in the County using utilization days determined in accordance with this Recommended Order and meaningful input from the County.

DONE AND ENTERED this 10th day of March, 2008, in Tallahassee, Leon County, Florida.

S

DANIEL MANRY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of March, 2008.

ENDNOTES

[1/] References to subsections, sections, and chapters are to Florida Statutes (2007) unless otherwise stated. References to rules are to rules promulgated in the Florida Administrative Code in effect on the date of the hearing.

[2/] A non-fiscally constrained county is one that is not a fiscally constrained county defined in Subsection 985.686(2)(b) as a county within a rural area of critical economic concern.

[3/] Rule 63G-1.002(6) defines secure detention in substantially the same manner as Subsection 985.03(18)(a).

[4/] Agency policy is non-rule policy if it does not satisfy the definition of a rule in Subsection 120.52(15). Agency policy is an un-adopted rule, within the meaning of Subsections 120.56(4) and 120.57(1)(e), if it satisfies the definition of a rule in Subsection 120.52(15) but has not been promulgated in accordance with the rulemaking requirements prescribed in Section 120.54 (an un-promulgated rule). See, "The Scarecrow in McDonald's Farm: A Fairy Tale About Administrative Law," Fla. Bar. J., No. 3 (March 1999).

[5/] Petitioner does not allege that Rule 63G-1.004 amends, enlarges, or modifies Section 985.686 within the meaning of Subsections 120.52(8), 120.56(3), and 120.68(7)(e)4. The issue is whether the methodology adopted by Respondent either deviates from the rule or interprets the rule in a manner that effectively amends the rule.

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.