STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NATIONAL FOUNDATION TO PREVENT CHILD SEXUAL ABUSE, INC.	)	
Petitioner,	)	
vs.	)	Case No. 07-4898RU
DEPARTMENT OF LAW ENFORCEMENT,	)	
Respondent.	)	

SUMMARY FINAL ORDER

Pursuant to the stipulation of the parties, the undersigned administrative law judge, Stuart M. Lerner, has decided this case summarily, without an evidentiary hearing, there being no disputed issues of material fact.

APPEARANCES

For Petitioner: Jody. A. Gorran, President
National Foundation to Prevent
Child Sexual Abuse, Inc.[1/]
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For Respondent: John P. Booth, Esquire
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STATEMENT OF THE ISSUE

Whether the first paragraph of the answer to Question 10 of the "Frequently Asked Questions" about "Volunteer and Employee Background Checks" posted on the Florida Department of Law Enforcement's (Department's) public website (Challenged Statement) is a rule that violates Section 120.54(1)(a), Florida Statutes, as alleged by Petitioner.

PRELIMINARY STATEMENT

On October 29, 2007, Petitioner filed an amended petition with the Division of Administrative Hearings (DOAH) pursuant to Section 120.56(4), Florida Statutes, seeking an administrative determination that the Challenged Statement violates Section 120.54(1)(a), Florida Statutes, and, in addition, requesting "a ruling that any future proposed rule based on the statement and the underlying state statute F.S. 943.0542 would be declared an invalid exercise of delegated legislative authority."

On October 30, 2007, the undersigned issued a notice advising Petitioner and the Department that an evidentiary hearing on the amended petition would be held on November 28, 2007.

On November 2, 2007, the Department filed a Motion for Summary Final Order Dismissing Amended Petition, arguing that Petitioner's Section 120.56(4) challenge should be summarily dismissed inasmuch as "the statement [Petitioner] attacks,

regarding the fees for state criminal history record checks of care providers, embodies a rule [Florida Administrative Code Rule 11C-6.004(3)(b)] which has already been adopted [by the Department pursuant to the rulemaking procedure set forth in Section 120.54, Florida Statutes] and then challenged, unsuccessfully, by the Petitioner [in DOAH Case No. 07-4614RX]." The Department explained in its motion that it understood, from its reading of the Petitioner's amended petition, that Petitioner was challenging only "that part [of the Challenged Statement] having to do with a state fee being charged for the conduct[ing] of a state-level criminal history check."[2/]

On November 5, 2007, Petitioner filed a Response to Respondent's Motion for Summary Final Order Dismissing Amended Petition. In its response, among other things, Petitioner clarified that it was "challenging the entirety of the [Challenged Statement]."

Later that same day (November 5, 2007), the Department filed a Reply to Petitioner's Response to Motion for Summary Final Order Dismissing Amended Petition. Attached to the reply was a copy of CJIS Information Letter 07-03, a document issued June 1, 2007, by the Criminal Justice Information Services (CJIS) Division of the Federal Bureau of Investigation (FBI) that contains the FBI's current fee schedule for national criminal history information checks.

Oral argument on the Department's Motion for Summary Final Order Dismissing Amended Petition was heard on November 6, 2007, by telephone conference call.

On November 6, 2007, following the telephone conference call, Petitioner filed a Unilateral Stipulation, in which it stipulated to the following:

> 1. There are no disputed issues of material fact.
>
> 2. The FBI CJIS Information Letter dated June 1, 2007 reflects the current FBI fees in effect as of October 1, 2007 for fingerprint-based national criminal history record checks performed by the FBI.
>
> 3. The Honorable Administrative Hearing Judge may cancel the hearing scheduled for November 28, 2007, and make his ruling based upon the record of prior pleadings in this case.

On November 7, 2007, the Department filed a pleading entitled, "Stipulation and Provision of Documents," the body of which read as follows:

> 1. Respondent, FDLE, by and through undersigned counsel, stipulates and agrees that there are no disputed issues of material fact in this proceeding, and that the Administrative Law Judge may issue a summary ruling based upon the law and the pleadings, thus eliminating the need for a formal (evidentiary) administrative hearing.
>
> 2. Attached to this stipulation, as Exhibits A through D, are copies of the documents which are incorporated by reference in Rule 11C-6.004(4), Florida Administrative Code. Specifically, VECHS

> [Volunteer and Employee Criminal History System] Qualified Entity Application; VECHS User Agreement; VECHS Waiver Agreement and Statement; and VECHS Dissemination Log. The Application and User Agreement are available on the FDLE web site.
>
> 3. Because the undersigned did not anticipate that the difference between the FBI's fee for "hard card" fingerprint submissions and its (lower) fee for electronic submission of fingerprints would be an issue in the hearing today, I believed I was obliged to qualify my response that FDLE would be willing to correct any inaccuracy in this respect in the agency "statement" which is challenged in this proceeding. That response can now be unqualified. FDLE will correct the inaccuracy. In support of this representation, I am attaching as Exhibit E, a copy of a letter which FDLE sent to (among others) the VECHS Customers (i.e., qualified entities which submit requests for criminal history background checks on care providers), informing them of the difference in fees charged by the FBI for manual versus electronic submission of fingerprints.
>
> 4. Because Petitioner has not had an opportunity to examine and comment on the letter attached as Exhibit E, I recognize and acknowledge that by filing it now, I am in effect re-opening the hearing and affording Petitioner an opportunity to respond if [it] so chooses. I would respectfully ask for permission to do this.

On November 7, 2007, following his receipt of this pleading, the undersigned issued an order announcing that, pursuant to the parties' requests, the instant case would "be decided summarily without an evidentiary hearing" and that he therefore was cancelling the evidentiary hearing scheduled for

November 28, 2007. He further indicated in his order that Petitioner would have the opportunity to file a pleading in response to the "letter attached as Exhibit E" to the Department's "Stipulation and Provision of Documents," provided it did so on or before November 21, 2007. To date, no such response has been filed.

FACTS

Challenged Statement

1. The Department maintains a public website on which it posts answers to "Frequently Asked Questions" about "[c]hecking the [b]ackground of [p]ersons [w]ho [w]ork or [v]olunteer with [c]hildren, the [e]lderly, or the [d]isabled [u]nder [t]he National Child Protection Act (1993), as amended, and [S]ection 943.0542, Florida Statutes." Question 10 of these "Frequently Asked Questions" asks whether there is a fee that organizations participating in the Department's VECHS program (referred to as "qualified entities") must pay to obtain state and national criminal history checks on employees and volunteers. The first paragraph of the answer to this question is the statement that Petitioner is challenging in the instant case. It reads as follows:

> There is a state fee of $23 for Florida record checks, plus a federal fee for national record checks of $30.25 for current or prospective employees. For current or prospective volunteers there is a state fee

> of $18, plus a federal fee for national record checks of $15.25. FDLE collects both payments and forwards the appropriate federal fees to the FBI.

CJIS Information Letter 07-03

2. On June 1, 2007, the CJIS Division of the FBI issued Information Letter 07-3 giving "[n]otification of [the] [i]nterim [r]evised [f]ees" it would charge, effective October 1, 2007, for national criminal history information checks. These "[i]nterim [r]evised [f]ees" included the following fees for checks requested by "non-federal customers": for a manual fingerprint-based check of an employee: $30.25; for an electronic fingerprint-based check of an employee: $19.25; and for a manual or electronic fingerprint-based check of a volunteer: $15.25.

3. On page 3 of Information Letter 07-3, under the heading, "What Does Not Change," is the following discussion:

> Under current business practices, federal agencies, certain state agencies, and approved non-governmental entitles that submit fingerprint CHRI [Criminal History Record Information] checks function as de facto centralized billing service providers (CBSPs) by collecting the appropriate user fees from concerned individuals or subordinate agencies and paying the FBI for the CHRI checks in a consolidated payment. It is more cost-effective for the FBI to bill a CBSP than to process individual direct payments for single or small groups of submissions. The CJIS Division will continue the practice of allowing approved CBSPs to retain a portion of the user fee as

> reimbursement for this centralized billing service (under the interim fee structure, the reimbursement amount will remain at $2). For these purposes, federal agencies should remit the CBSP amount shown on the fee table at the end of this letter.

Exhibit E: August 10, 2007, Department Memorandum

4. In an August 10, 2007, memorandum addressed to "[a]ll [l]icensing, [e]mployment and VECHS [c]ustomers," the Department gave written notice of the "FBI [f]ee [c]hange" announced in Information Letter 07-3. The memorandum contained the following advisement:

> Some of you may have received notice directly for the FBI but for those of you who did not, we wanted to alert you to changes in the FBI fee structure.
>
> Effective October 1, 2007, the FBI fee will be:
>
> - $19.25 for electronic fingerprint
> - submissions, except volunteers
>
> - $30.25 for hard card fingerprint submissions, except volunteers
>
> - $15.25 for volunteer submissions

PERTINENT STATUTORY AND RULE PROVISIONS DEALING WITH CRIMINAL HISTORY INFORMATION CHECKS

Federal Law

5. The National Child Protection Act of 1993, as amended by the Volunteers for Children Act (sections 221 and 222 of Public Law 105–251), is codified in 42 U.S.C. § 5119(a)-(d).

6. "Background checks" are addressed in 42 U.S.C.

§ 5119(a), which provides as follows:

> (a) In general.
>
> (1) A State may have in effect procedures (established by State statute or regulation) that require qualified entities designated by the State to contact an authorized agency of the State to request a nationwide background check for the purpose of determining whether a provider has been convicted of a crime that bears upon the provider's fitness to have responsibility for the safety and well-being of children, the elderly, or individuals with disabilities.
>
> (2) The authorized agency shall access and review State and Federal criminal history records through the national criminal history background check system and shall make reasonable efforts to respond to the inquiry within 15 business days.
>
> (3) In the absence of State procedures referred to in paragraph (1), a qualified entity designated under paragraph (1) may contact an authorized agency of the State to request national criminal fingerprint background checks. Qualified entities requesting background checks under this paragraph shall comply with the guidelines set forth in subsection (b) and with procedures for requesting national criminal fingerprint background checks, if any, established by the State.
>
> (b) Guidelines. The procedures established under subsection (a) shall require--
>
> (1) that no qualified entity may request a background check of a provider under subsection (a) unless the provider first provides a set of fingerprints and completes and signs a statement that--

(A) contains the name, address, and date of birth appearing on a valid identification document (as defined in section 1028 of title 18, United States Code) of the provider;

(B) the provider has not been convicted of a crime and, if the provider has been convicted of a crime, contains a description of the crime and the particulars of the conviction;

(C) notifies the provider that the entity may request a background check under subsection (a);

(D) notifies the provider of the provider's rights under paragraph (2); and

(E) notifies the provider that prior to the completion of the background check the qualified entity may choose to deny the provider unsupervised access to a person to whom the qualified entity provides care;

(2) that each provider who is the subject of a background check is entitled--

(A) to obtain a copy of any background check report; and

(B) to challenge the accuracy and completeness of any information contained in any such report and obtain a prompt determination as to the validity of such challenge before a final determination is made by the authorized agency;

(3) that an authorized agency, upon receipt of a background check report lacking disposition data, shall conduct research in whatever State and local recordkeeping systems are available in order to obtain complete data;

(4) that the authorized agency shall make a determination whether the provider has been

convicted of, or is under pending indictment for, a crime that bears upon the provider's fitness to have responsibility for the safety and well-being of children, the elderly, or individuals with disabilities and shall convey that determination to the qualified entity; and

(5) that any background check under subsection (a) and the results thereof shall be handled in accordance with the requirements of Public Law 92-544, except that this paragraph does not apply to any request by a qualified entity for a national criminal fingerprint background check pursuant to subsection (a)(3).

(c) Regulations.

(1) The Attorney General may by regulation prescribe such other measures as may be required to carry out the purposes of this Act, including measures relating to the security, confidentiality, accuracy, use, misuse, and dissemination of information, and audits and recordkeeping.

(2) The Attorney General shall, to the maximum extent possible, encourage the use of the best technology available in conducting background checks.

(d) Liability. A qualified entity shall not be liable in an action for damages solely for failure to conduct a criminal background check on a provider, nor shall a State or political subdivision thereof nor any agency, officer or employee thereof, be liable in an action for damages for the failure of a qualified entity (other than itself) to take action adverse to a provider who was the subject of a background check.

(e) Fees. In the case of a background check pursuant to a State requirement adopted after the date of the enactment of this Act [enacted December 20, 1993]

> conducted with fingerprints on a person who volunteers with a qualified entity, the fees collected by authorized State agencies and the Federal Bureau of Investigation may not exceed eighteen dollars, respectively, or the actual cost, whichever is less, of the background check conducted with fingerprints. The States shall establish fee systems that insure that fees to non-profit entities for background checks do not discourage volunteers from participating in child care programs.

7. The term "qualified entity," as used in 42 U.S.C. § 5119(a), is defined in 42 U.S.C. § 5119(c)(10) as "a business or organization, whether public, private, for-profit, not-for-profit, or voluntary, that provides care or care placement services, including a business or organization that licenses or certifies others to provide care or care placement services."

8. The term "care," as used in 42 U.S.C. § 5119(a) and 42 U.S.C. § 5119(c)(10), is defined in 42 U.S.C. § 5119(c)(5) as "the provision of care, treatment, education, training, instruction, supervision, or recreation to children, the elderly, or individuals with disabilities."

9. The term "provider," as used in 42 U.S.C. § 5119(a), is defined in 42 U.S.C. § 5119(c)(9) as follows:

> (A) a person who--
>
> (i) is employed by or volunteers with a qualified entity (including an individual who is employed by a school in any capacity, including as a child care provider, a teacher, or another member of school personnel);

(ii) who owns or operates a qualified entity; or

(iii) who has or may have unsupervised access to a child to whom the qualified entity provides child care; and

(B) a person who--

(i) seeks to be employed by or volunteer with a qualified entity (including an individual who seeks to be employed by a school in any capacity, including as a child care provider, a teacher, or another member of school personnel);

(ii) seeks to own or operate a qualified entity; or

(iii) seeks to have or may have unsupervised access to a child to whom the qualified entity provides child care.

State Law

10. Section 943.0542, Florida Statutes, is entitled, "Access to criminal history information provided by the department[3/] to qualified entities." It provides as follows:

(1) As used in this section, the term:

(a) "Care" means the provision of care, treatment, education, training, instruction, supervision, or recreation to children, the elderly, or individuals with disabilities.

(b) "Qualified entity" means a business or organization, whether public, private, operated for profit, operated not for profit, or voluntary, which provides care or care placement services, including a business or organization that licenses or certifies others to provide care or care placement services.

(2)(a) A qualified entity must register with the department before submitting a request for screening under this section. Each such request must be voluntary and conform to the requirements established in the National Child Protection Act of 1993, as amended. As a part of the registration, the qualified entity must agree to comply with state and federal law and must so indicate by signing an agreement approved by the department. The department may periodically audit qualified entities to ensure compliance with federal law and this section.

(b) A qualified entity shall submit to the department a request for screening an employee or volunteer or person applying to be an employee or volunteer on a completed fingerprint card,[4/] with a signed waiver allowing the release of state and national criminal history record information to the qualified entity.

(c) Each such request must be accompanied by a fee, which shall approximate the actual cost of producing the record information, as provided in s. 943.053, plus the amount required by the Federal Bureau of Investigation for the national criminal history check in compliance with the National Child Protection Act of 1993, as amended.

(d) Any current or prospective employee or volunteer who is subject to a request for screening must indicate to the qualified entity submitting the request the name and address of each qualified entity that has submitted a previous request for screening regarding that employee or volunteer.

(3) The department shall provide directly to the qualified entity the state criminal history records that are not exempt from disclosure under chapter 119 or otherwise

confidential under law. A person who is the subject of a state criminal history record may challenge the record only as provided in s. 943.056.[5/]

(4) The national criminal history data is available to qualified entities to use only for the purpose of screening employees and volunteers or persons applying to be an employee or volunteer with a qualified entity. The department shall provide this national criminal history record information directly to the qualified entity as authorized by the written waiver required for submission of a request to the department.

(5) The determination whether the criminal history record shows that the employee or volunteer has been convicted of or is under pending indictment for any crime that bears upon the fitness of the employee or volunteer to have responsibility for the safety and well-being of children, the elderly, or disabled persons shall solely be made by the qualified entity. This section does not require the department to make such a determination on behalf of any qualified entity.

(6) The qualified entity must notify in writing the person of his or her right to obtain a copy of any background screening report, including the criminal history records, if any, contained in the report, and of the person's right to challenge the accuracy and completeness of any information contained in any such report and to obtain a determination as to the validity of such challenge before a final determination regarding the person is made by the qualified entity reviewing the criminal history information. A qualified entity that is required by law to apply screening criteria, including any right to contest or request an exemption from disqualification, shall apply such screening criteria to the

> state and national criminal history record information received from the department for those persons subject to the required screening.
>
> (7) The department may establish a database of registered qualified entities and make this data available free of charge to all registered qualified entities. The database must include, at a minimum, the name, address, and phone number of each qualified entity.
>
> (8) A qualified entity is not liable for damages solely for failing to obtain the information authorized under this section with respect to an employee or volunteer. The state, any political subdivision of the state, or any agency, officer, or employee of the state or a political subdivision is not liable for damages for providing the information requested under this section.
>
> (9) The department has authority to adopt rules to implement this section.

11. Subsection (3)(b) of Section 943.053, Florida Statutes (the statutory provision referenced in Subsection (2)(c) of Section 943.0542, Florida Statutes) provides, in pertinent part, as follows:

> The fee per record for criminal history information provided pursuant to this subsection is $23 per name submitted, except that . . . the fee for requests under the National Child Protection Act shall be $18 for each volunteer name submitted. . . .

12. Florida Administrative Code Rule 11C-6.004 is a Department-adopted rule that prescribes "[p]rocedures for

[r]equesting [c]riminal [h]istory [r]ecords." It provides as follows:

> (1) Requests for Florida criminal history records contained in the systems of the Florida Department of Law Enforcement are to be directed to the following address:
>
> Florida Department of Law Enforcement
>
> Division of Criminal Justice Information Services
>
> User Services Bureau
>
> Post Office Box 1489
>
> Tallahassee, Florida 32302-1489.
>
> (2) All requests will be subject to processing in the following declining order of priorities:
>
> (a) Requests from law enforcement and criminal justice agencies for criminal justice purposes, including criminal justice agency applicant processing;
>
> (b) Requests for a personal record review pursuant to Rule 11C-8.001, F.A.C.;
>
> (c) Requests from the Judicial Qualifications Commission, the Governor, and the President of the Senate or the appropriate Senate standing committee, select committee or subcommittee thereof relating to the appointment of officers;
>
> (d) Requests from non-criminal justice agencies having specific statutory authority to receive criminal history information;
>
> (e) Requests from other governmental agencies relying upon the Public Records Law (Chapter 119, F.S.);

(f) Requests from private individuals, businesses or organizations relying upon the Public Records Law.

(3) Fees.

(a) There shall be no charge for conducting record checks under paragraphs (2)(a) through (c).

(b) As provided in subsection 943.053(3), F.S., a processing fee of $23 shall be charged for each subject inquired upon under paragraphs (2)(d) through (f), except that a fee of $8 shall be charged for each subject inquired upon for vendors of the Department of Children and Family Services, the Department of Juvenile Justice, and the Department of Elderly Affairs; a fee of $15 shall be charged for each subject inquired upon pursuant to a state criminal history record check required by law to be performed by the Department of Agriculture and Consumer Services; a fee of $18 shall be charged for each volunteer subject inquired upon under the National Child Protection Act of 1993, as amended; and no fee shall be charged for Florida criminal history information or wanted person information requested by the state offices of the Public Defender. If the Executive Director of the Department determines that conducting the record check would be in the interest of law enforcement or criminal justice or that good cause otherwise exists, the prescribed fee may be waived or reduced, as provided in subsection 943.053(3), F.S.

(c) The processing fee charged for each subject inquired upon via the internet shall be the fee authorized for inquiries from persons in the private sector in subsection 943.053(3), F.S. This fee shall be assessed based on the inquiry regardless of whether the results show no criminal history record or some possible records. When an inquiry on one subject is made and more than one

person is presented as possibly the same person, the customer will receive one criminal history record as a result of the prescribed payment. If the customer wants additional criminal history records from the list of persons presented for this same inquiry, a processing fee of $8.00 shall be charged for each additional criminal record.

(4) Entities applying to the Florida Department of Law Enforcement to be qualified to receive criminal history records under the National Child Protection Act of 1993, as amended, must first complete and submit the following documents to the Florida Department of Law Enforcement, in accordance with the instructions provided: VECHS Qualified Entity Application - Volunteer & Employee Criminal History System (NCPA 1; Rev. January 1, 2001); and VECHS User Agreement - Volunteer & Employee Criminal History System (NCPA 2; Rev. January 1, 2001). Entities that are qualified through the Florida Department of Law Enforcement to receive criminal history records under the National Child Protection Act must complete and submit the following documents to the Florida Department of Law Enforcement with each request for a criminal history record, in accordance with the instructions provided: An authorized fingerprint card for each person whose criminal history record is requested; and a VECHS Waiver Agreement and Statement - Volunteer & Employee Criminal History System (NCPA 3; Rev. January 1, 2001). Qualified entities that release to another qualified entity any criminal history record information received pursuant to the National Child Protection Act must complete and maintain the following document, in accordance with the instructions provided: VECHS Dissemination Log - Volunteer & Employee Criminal History System (NCPA 4, Rev. January 1, 2001). These forms are incorporated by reference.

13. Each of the four forms incorporated by reference in Subsection (4) of Florida Administrative Code Rule 11C-6.004 make mention of national, as well as state, criminal history checks.[6/]

14. One of these forms, the VECHS User Agreement form, refers to the payment that must be made to obtain these checks. It provides as follows:

> I. Parties to Agreement
>
> This Agreement, entered into by the Florida Department of Law Enforcement (hereinafter referred to as FDLE), an agency of the State of Florida, with headquarters in Tallahassee, Florida, and
> _____
> _____,
> (hereinafter referred to as User), located at _____
> _____
> _____, is intended to set forth the terms and conditions under which criminal history background checks authorized by the National Child Protection Act of 1993, as amended, (hereafter referred to as the NCPA), and as implemented by Section 943.0542, Florida Statutes, (F.S.), shall be conducted.
>
> A. FDLE has established and maintains intrastate systems for the collection, compilation, and dissemination of state criminal history records and information in accordance with subsection 943.05(2), F.S., and, additionally, is authorized and does participate in similar multi-state and federal criminal history records systems pursuant to subsection 943.05(2), F.S.;
>
> B. FDLE and its user agencies are subject to and must comply with pertinent state and federal regulations relating to the receipt,

use, and dissemination of records and record information derived from the systems of FDLE and the United States Department of Justice (Chapter 943, F.S., Chapter 11C-6, F.A.C., 28 C.F.R. Part 20);

C. User is a public, private, for profit, or not-for-profit entity operating within the State of Florida and is authorized to submit fingerprint cards and review resultant criminal history records as part of the screening process for its current and/or prospective employees and volunteers (which classes of persons shall be understood for purposes of this Agreement to include contractors and vendors who have or may have unsupervised access to the children, disabled, or elderly persons for whom User provides care), pursuant to section 943.0542, F.S., and the NCPA, and forms the legal basis for User's access to criminal history record information derived from the systems of the U.S. Department of Justice; and

D. User is desirous of obtaining and FDLE is required and willing to provide such services so long as proper reimbursement is made and all applicable federal and state laws, rules, and regulations are strictly complied with.

Now, therefore, in light of the foregoing representations and the promises, conditions, terms, and other valuable considerations more fully set forth hereinafter or incorporated by reference and made a part hereof, FDLE and User agree as follows:

II. Service, Compliance, and Processing

A. FDLE agrees to:

1. Assist User concerning the privacy and security requirements imposed by state and federal laws, and regulations; provide User

with copies of all relevant laws, rules, and or regulations as well as updates as they occur; offer periodic training for User's personnel;

2. Provide User with such state criminal history records and information as reported to, processed, and contained in its systems and legally available to the User; and

3. Act as an intermediary between User and the United States Department of Justice, securing for the use and benefit of User such federal and multi-state criminal history records or information as may be available to User under federal laws and regulations.

B. User agrees to:

1. Submit requests to FDLE for criminal history background checks pursuant to this agreement only for User's current and prospective Florida employees and volunteers, for whom User is not already required to obtain state and national (Level 2) criminal history background checks under any other state or federal statutory provision. User shall continue to comply with all other such statutory provisions for all applicable persons;

2. Determine whether the current or prospective employee or volunteer has been convicted of, or is under pending indictment for, a crime that bears upon his or her fitness to have access to or contact with children, the elderly, or individuals with disabilities;

3. Obtain a completed and signed Waiver Agreement and Statement form (provided by FDLE) from every current or prospective employee and volunteer, for whom User submits a request for a criminal history background check to FDLE. (The signed Waiver Agreement and Statement allows the

release of state and national criminal history record information to the qualified entity.) The Waiver Agreement and Statement must include the following: (a) the person's name, address, and date of birth that appear on a valid identification document (as defined at 18 U.S.C. section 1028); (b) an indication of whether the person has or has not been convicted of a crime, and, if convicted, a description of the crime and the particulars of the conviction; (c) a notification to the person that User may request a criminal history background check on the person as authorized by section 943.0542, F.S., and the NCPA; (d) a notification to the person of his or her rights as explained in paragraph 12 below; and (e) a notification to the person that, prior to the completion of the background check, User may choose to deny him or her unsupervised access to a person to whom User provides care. User shall retain the original of every Waiver Agreement and Statement and provide FDLE with a copy thereof;

4. Use only fingerprint cards provided by FDLE specifically designed for use with requests for criminal history record checks under the NCPA; provide FDLE with a properly completed and executed fingerprint card for each current or prospective employee and volunteer for whom User requests a criminal history record check pursuant to this agreement; and indicate either "NCPA/VCA VOLUNTEER" or "NCPA/VCA EMPLOYEE" in the "reason fingerprinted" block of each fingerprint card submitted.[7/] (VCA refers to Volunteers for Children Act);

5. Keep all records necessary to facilitate a security audit by FDLE and to cooperate in such audits as FDLE or other authorities may deem necessary. Examples of records that may be subject to audit are criminal history records; notification that an individual has no criminal history; internal policies and

procedures articulating the provisions for physical security; records of all disseminations of criminal history information; and a current, executed User Agreement with FDLE;

6. IF ENTITY IS PRIVATE, FOR PROFIT OR NOT FOR PROFIT** - Pay for services provided by FDLE and the Federal Bureau of Investigation (FBI) in accordance with rule 11C-6.004, F.A.C., with the submission of fingerprint cards;

* * *

9. Insure that the appropriate personnel know to keep the information obtained under this agreement in a secure place and to use it only for the screening as outlined in this agreement;

10. Promptly advise FDLE of any violations of this agreement;

11. Share criminal history information with other qualified entities only after confirming with FDLE that the requesting entity has been designated a qualified entity and has signed a user agreement, and only after verifying that the current prospective employee or volunteer has authorized the release of his or her criminal history records, if any, to other qualified entities by a statement on his or her signed waiver. User will respond that it is unable to provide any information to the requesting entity if the current or prospective employee or volunteer has requested that his or her criminal history record (s) not be released to any other qualified entity; and

12. Notify the current or prospective employee or volunteer of his or her right to obtain a copy of the criminal history records, if any, contained in the report, and of the person’s right to challenge the

> accuracy and completeness of any information contained in any such report, and to obtain a determination as to the validity of such challenge before a final determination regarding the person is made by the qualified entity reviewing the criminal history information. (Information on these rights may be obtained by contacting FDLE, regarding Florida records, at FDLE, Attn: USB/VECHS Unit, P.O. Box 1489, Tallahassee, Florida 32302-1489, (850) 410-8324, or by contacting the FBI, regarding federal/national records, at FBI, Criminal Justice Information Services Division, Attn: SCU, MOD D-2, 1000 Custer Hollow Road, Clarksburg, West Virginia 26306, (304) 625-3878.) A qualified entity that is required by law to apply screening criteria, notwithstanding any right to contest or request an exemption from disqualification, shall apply such screening criteria to the state and national criminal history record information received from the department.

* * *

DOAH CASE NO. 07-4614RX

15. In DOAH Case 07-4614RX, Petitioner filed a petition pursuant to Section 120.56(3), Florida Statutes, seeking an administrative determination of the invalidity of Subsection (3)(b) of Florida Administrative Code Rule 11C-6.004. Petitioner's challenge to this rule provision was unsuccessful. In her Final Order dismissing the petition, Administrative Law Judge June C. McKinney stated the following:

> Florida Administrative Rule 11C-6.004(3)(b) is a reiteration of what is in Section 943.053, Florida Statutes, and the wording of both the rule and statute are almost identical.

> Upon consideration and the undersigned being fully advised, the undersigned concludes that no genuine issue as to any material fact exists. Petitioner's assertions that the matters of whether a state criminal record check is required, how costly it is to produce the records, how the amount of the cost is determined, the inflation of the fees and surplus of monies are immaterial since the fees are prescribed by law. Mandates by law, such as fees in this matter, are only within the legislature's purview and any change in law must be addressed by the legislature. Section 943.053, Florida Statutes (2007), sets forth specific fees that must be charged for records regardless of the cost to the agency.

CONCLUSIONS OF LAW

16. The instant challenge is being made pursuant to Section 120.56(4), Florida Statutes, which allows "[a]ny person substantially affected" by an "agency statement[] defined as [a] rule[]" to "seek an administrative determination that the statement violates [Section] 120.54(1)(a) [Florida Statutes]," by filing a petition with DOAH that "include[s] the text of the statement or a description of the statement and . . . state[s] with particularity facts sufficient to show that the statement constitutes a rule under [Section] 120.52 [Florida Statutes] and that the agency has not adopted the statement by the rulemaking procedure provided by [Section] 120.54 [Florida Statutes]." § 120.56(4)(a), Fla. Stat.[8/]

17. Not every "agency statement" is a "rule" as defined by Section 120.52(15), Florida Statutes, which provides as follows:

> "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or 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. The term also includes the amendment or repeal of a rule. The term does not include:
>
> (a) Internal management memoranda which do not affect either the private interests of any person or any plan or procedure important to the public and which have no application outside the agency issuing the memorandum.
>
> (b) Legal memoranda or opinions issued to an agency by the Attorney General or agency legal opinions prior to their use in connection with an agency action.
>
> (c) The preparation or modification of:
>
> 1. Agency budgets.
>
> 2. Statements, memoranda, or instructions to state agencies issued by the Chief Financial Officer or Comptroller as chief fiscal officer of the state and relating or pertaining to claims for payment submitted by state agencies to the Chief Financial Officer or Comptroller.
>
> 3. Contractual provisions reached as a result of collective bargaining.
>
> 4. Memoranda issued by the Executive Office of the Governor relating to information resources management.

Only agency statements of "general applicability," i.e., those statements which are intended by their own effect to create or adversely effect rights, to require compliance, or to otherwise have the direct and consistent effect of law, fall within this definition. See Department of Highway Safety and Motor Vehicles v. Schluter, 705 So. 2d 81, 82 (Fla. 1st DCA 1997); Balsam v. Department of Health and Rehabilitative Services, 452 So. 2d 976, 977-978 (1st DCA, 1984); and McDonald v. Department of Banking and Finance, 346 So. 2d 569, 581 (Fla. 1st DCA 1977).

18. "An agency statement constituting a rule [as defined in Section 120.52(15), Florida Statutes] may be challenged pursuant to Section 120.56(4), Florida Statutes, only on the ground that 'the agency has not adopted the statement by the rulemaking procedure provided by s. 120.54.'" Zimmerman v. Department of Financial Services, Office of Insurance Regulation, No. 05-2091RU, slip op. at 11 (Fla. DOAH August 24, 2005)(Summary Final Order of Dismissal)(emphasis added). If the challenge is successful, "the agency [must] immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action." § 120.56(4)(d), Fla. Stat. Such prospective injunctive relief is the sole remedy available under the statute. The administrative law judge is without authority in a Section 120.56(4) proceeding to make a determination, such as the one

Petitioner has asked the undersigned to make in the instant case, that "any future proposed rule based on the statement" being challenged "would be declared an invalid exercise of delegated legislative authority." See Southwest Florida Water Management District v. Charlotte County, 774 So. 2d 903, 908-09 (Fla. 2d DCA 2001)("The basis for a challenge to an agency statement under this section [Section 120.56(4), Florida Statutes] is that the agency statement constitutes a rule as defined by section 120.52(15), Florida Statutes (Supp. 1996), but that it has not been adopted by the rule-making procedure mandated by section 120.54. In the present case, the challenges to the existing and proposed agency statement on the grounds that they represent an invalid delegation of legislative authority are distinct from a section 120.56(4) challenge that the agency statements are functioning as unpromulgated rules."); Florida Association of Medical Equipment Services v. Agency for Health Care Administration, No. 02-1314RU, slip op. at 6 (Fla. DOAH October 25, 2002)(Order on Motions for Summary Final Order)("[I]n a Section 120.56(4) proceeding which has not been consolidated with a proceeding pursuant to Section 120.57(1)(e), the issue whether a rule-by-definition is substantively invalid for reasons set forth in Section 120.52(8)(b)-(g), Florida Statutes, should not be reached. That being so, the ultimate issues in this case are whether the alleged agency statements

are rules-by-definition and, if so, whether their existence violates Section 120.54(1)(a)."); and Johnson v. Agency for Health Care Administration, No. 98-3419RU, 1999 Fla. Div. Adm. Hear. LEXIS 5180 *15 (Fla. DOAH May 18, 1999)(Final Order of Dismissal)("It is apparent from a reading of subsection (4) of Section 120.56, Florida Statutes, that the only issue to be decided by the administrative law judge in a proceeding brought under this subsection is 'whether all or part of [the agency] statement [in question] violates s. 120.54(1)(a),' Florida Statutes, ..."); see also S. T. v. School Board of Seminole County, 783 So. 2d 1231, 1233 (Fla. 5th DCA 2001)("Unless created by the constitution, an administrative agency has no common law powers, and has only such powers as the legislature chooses to confer upon it by statute."); and Department of Environmental Regulation v. Puckett Oil Co., 577 So. 2d 988, 991 (Fla. 1st DCA 1991)("It is well recognized that the powers of administrative agencies are measured and limited by the statutes or acts in which such powers are expressly granted or implicitly conferred.").

19. Petitions seeking relief under Section 120.56(4), Florida Statutes, if found by DOAH's director to meet the pleading requirements of the statute, are assigned to an administrative law judge, who has the authority to determine, by

final order, "whether all or part of [the] statement [being challenged] violates [Section] 120.54(1)(a) [Florida Statutes]." § 120.56(4)(c), Fla. Stat. The administrative law judge may issue a summary final order in cases, such as the instant one, where the judge determines from the documents "on file" that "no genuine issue as to any material fact exists." § 120.57(1)(h), Fla. Stat.; see also Fla. Admin. Code R. 28-106.204(4)("In cases in which the Division of Administrative Hearings has final order authority, any party may move for summary final order whenever there is no genuine issue as to any material fact.").

20. The "agency statement" Petitioner is challenging in the instant case is an excerpt from material posted by the Department on the "Frequently Asked Questions" section of that portion of the Department's public website which discusses the Department's VECHS program, through which "qualified entities" may obtain state and national criminal history checks on employees and volunteers. The excerpt addresses the amount, collection, and disposition of fees charged for these criminal history checks.

21. Significantly, the Challenged Statement does not, by its own terms, establish any new fee requirements or procedures. Rather, it attempts merely to summarize, for the benefit of interested members of the public, existing requirements and procedures that have been established elsewhere (specifically,

in Subsection (2)(c) of Section 943.0542, Florida Statutes; Subsection (3)(b) of Section 943.053, Florida Statutes; Florida Administrative Code Rule 11C-6.004; and the FBI's CJIS Information Letter 07-03). The statement is descriptive, informative, and advisory, not prescriptive or directive. Its clear purpose is to provide guidance to the public (using a "Frequently Asked Question" format), not to form "a basis for agency action." Even if this guidance given by the Department were inaccurate (which, from a review Subsection (2)(c) of Section 943.0542; Subsection (3)(b) of Section 943.053; Florida Administrative Code Rule 11C-6.004; and the FBI's CJIS Information Letter 07-03, appears not to be the case[9/]), the statement would not constitute a "rule," as defined in Section 120.52(15), Florida Statutes, because it is intended to simply inform and educate and does not purport to have the force and effect of law. See Florida Hometown Democracy v. Department of State, No. 06-3968RU, 2007 Fla. Div. Adm. Hear. LEXIS 52 *18-19 (Fla. DOAH January 25, 2007)(Final Order)("Likewise, DOS's current rule specifies that all changes (which would include translations) to an initiative must be submitted for review, but that only material changes must actually be approved. Rule 1S-2.009(7) expressly defines what constitutes a material change, and translation of an initiative where the English version has been approved previously is not listed as a material change.

Therefore, the statement on the DOS website is consistent with the existing rule. When the statement is viewed in context, it is clear that it simply confirms DOS's position regarding the parameters of its statutory responsibility, consistent with its existing rule. The agency statement does not require compliance with any standard, it simply states that DOS does not proof translations. It creates no rights while adversely affecting others, and it does not have the direct and consistent effect of law."); Florida Education Association v. Florida State Board of Education, No. 05-0813RU, 2005 Fla. Div. Adm. Hear. LEXIS 1278 *27-28 (Fla. DOAH September 15, 2005)(Final Order)("BOE counters that the Technical Assistance Paper does not meet the definition of a 'rule' because it is merely an informational document explaining the terms of the new Consent Order provisions. The Technical Assistance Paper does not 'implement, interpret or prescribe' law or policy and, of itself, compels no compliance. It merely describes the terms of the Stipulation Modifying Consent Decree approved by order of the federal court. The provisions of the Federal Consent Order are enforceable with or without the promulgation of a rule by BOE. Even if the Technical Assistance Paper ceased to exist, the requirements of the Federal Consent Order would be the same. A side-by-side reading of the Stipulation Modifying Consent Decree and the Technical Assistance Paper confirms BOE's contention. While the

Technical Assistance Paper provides detailed explanations in a format more likely to be useful to educational professionals than the language of the stipulation, nothing in the Technical Assistance Paper imposes any requirement not already set forth by the modified Federal Consent Order."); Reynolds v. Board Of Trustees of the Internal Improvement Trust Fund, No. 03-4478RU, 2004 Fla. ENV LEXIS 222 *15-16 (Fla. DOAH February 20,2004)(Final Order)("Lastly, regarding the first statement challenged, the history surrounding driving on the beach and regulation by the BOT indicates that the Legislature has limited BOT's jurisdiction to regulate driving on the beach by Section 161.58, Florida Statutes. The challenged statement is [a] re-statement of the scheme of statutory regulation, and not a statement of BOT policy."); Pope v. Department of Environmental Protection, Nos. 03-3860RX and 03-3861RU, 2003 Fla. ENV LEXIS 243 *30-31 (Fla. DOAH November 24, 2003)(Final Order)("The Statement does not meet Chapter 120's definition of the term 'Rule': 'each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the practice and procedure requirements of an agency . . . .' § 120.52(15), Fla. Stat. The Statement did not create any right or impose any obligation on the regulated. It did not have the force and effect of law. The greater weight of the evidence establishes that it was not used by DEP or the Bureau in setting

the Continuous Line of Construction that applies to the Ray's permit. It did nothing more than offer a concerned party a starting point in deciding whether or not to pursue a permit for activity seaward of a CCCL pursuant to Section 161.053(5)(b), Florida Statutes."); Harrison v. Crist, No. 01-0293RU, 2001 Fla. Div. Adm. Hear. LEXIS 2618 *16-17 (Fla. DOAH May 18, 2001)(Final Order)("The DOE Pamphlet at page 3 clearly states that applicants to FSDB must 'meet enrollment requirements.' It is consistent with Sections 230.23(4)(m)3, and 242.3305, Florida Statutes, and Rule 6D-3.002, Florida Administrative Code, which provide that a student must meet certain criteria to be admitted to FSDB. The DOE Pamphlet does not reasonably limit or alter the statutorily authorized admissions criteria, as set forth by Rule 6D-3.002, Florida Administrative Code. . . . The DOE Pamphlet, including the challenged sentences is not a 'rule' as defined by Section 120.52(15), Florida Statutes."); Save Our Bays, Air and Canals, Inc., v. Department of Environmental Protection, No. 01-2326RU, 2001 Fla. ENV LEXIS 295 *12 (Fla. DOAH September 19, 2001)(Final Order)("Even if Section 120.573 were given the interpretation urged by SOBAC, it still could not be found, on the record of this case, that the alleged statement does anything more than impart information as to the availability of mediation under Section 120.573 in a particular case. As such, it cannot be found to be a 'statement of general

applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency.'"); and Jones v. Department of Children and Family Services, No. 97-4215RU, 1997 Fla. Div. Adm. Hear. LEXIS 5696 *16-17 (Fla. DOAH December 1, 1997)(Final Order)("Although Dr. Awad has attempted to state the agency policy concerning rescreening of existing employees and initial screening of job applicants on dates subsequent to October 1, 1995, his reiteration of that policy is inconsequential. It cannot be determined from a reading of the second paragraph to Dr. Awad's letter what offenses by date of commission would form a basis for disqualification, because the letter is silent on that point. All that is stated is that employees undergoing rescreening and new job applicants being screened must generally comply with existing law. That statement is not understood to resolve the pertinent issue of the treatment of offenses that predate October 1, 1995. Consequently, in the present context, the policy is not found by its own effect to create rights, or to require compliance, or otherwise to have the direct and consistent effect of law and is not a 'Rule' by the definition in Section 120.52(15), Florida Statutes (Supp. 1996).").

22. Having failed to establish that the Challenged Statement is a "rule," as defined in Section 120.52(15), Florida

Statutes, Petitioner cannot prevail in this proceeding, and its petition must be dismissed.

ORDER

Based on the foregoing, it is

ORDERED that:

the relief requested by Petitioner in its amended petition filed with DOAH pursuant to Section 120.56(4), Florida Statutes (to wit: an administrative determination that the Challenged Statement violates Section 120.54(1)(a), Florida Statutes, and, in addition, "a ruling that any future proposed rule based on the statement and the underlying state statute F.S. 943.0542 would be declared an invalid exercise of delegated legislative authority") is DENIED and the amended petition is DISMISSED.

DONE AND ORDERED this 27th day of November, 2007, in Tallahassee, Leon County, Florida.

STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of November, 2007.

ENDNOTES

1/ Petitioner is representing itself in these proceedings through Mr. Gorran. Such self-representation is permissible in administrative proceedings. See Magnolias Nursing and Convalescent Center v. Department of Health and Rehabilitative Services, 428 So.2d 256, 257 (Fla. 1st DCA 1982).

2/ Petitioner had stated on page four of its amended petition that it had "no issue with the collection of the federal fee but [did] object to the collection of a state fee . . . ."

3/ "Department," as that term is used in Chapter 943, Florida Statutes, "means the Department of Law Enforcement." § 943.02(1), Fla. Stat.

4/ The statute requires the submission of hard copy fingerprint cards. It makes no provision for the electronic submission of fingerprints.

5/ Section 943.056, Florida Statutes, provides as follows:

> (1) For purposes of verification of the accuracy and completeness of a criminal history record, the Department of Law Enforcement shall provide, in the manner prescribed by rule, such record for review upon verification, by fingerprints, of the identity of the requesting person. If a minor, or the parent or legal guardian of a minor, requests a copy of the minor's criminal history record, the Department of Law Enforcement shall provide such copy for review upon verification, by fingerprints, of the identity of the minor. The providing of such record shall not require the payment of any fees, except those provided for by federal regulations.
>
> (2) Criminal justice agencies subject to chapter 120 shall be subject to hearings regarding those portions of criminal history records for which the agency served as originator. When it is determined what the record should contain in order to be complete and accurate, the Criminal Justice Information Program shall be advised and

> shall conform state and federal records to the corrected criminal history record information.
>
> (3) Criminal justice agencies not subject to chapter 120 shall be subject to administrative proceedings for challenges to criminal history record information in accordance with rules established by the Department of Law Enforcement.
>
> (4) Upon request, an individual whose record has been corrected shall be given the names of all known noncriminal justice agencies to which the data has been given. The correcting agency shall notify all known criminal justice recipients of the corrected information, and those agencies shall modify their records to conform to the corrected record.

Neither Section 943.056, nor Florida Administrative Code Rule 11C-8.001, the Department rule that implements Section 943.056, deals with the subject covered by the Challenged Statement--the fees charged "qualified entities" (not "providers") for criminal history information. The Florida statutory provision that does address this subject is Section 943.0542, Florida Statutes, specifically Subsection (2)(c) thereof.

6/ Subsections (1) through (3) of Florida Administrative Code Rule 11C-6.004, on the other hand, deal exclusively with state criminal history checks.

7/ Consistent with the requirements of Section 943.0542, Florida Statutes, Subsection (4) of Florida Administrative Code Rule 11C-6.004, as well as the VECHS User Agreement form that is incorporated therein, provide that hard copy fingerprint cards must be used for the submission of fingerprints.

8/ An agency may avoid an administrative determination that the statement in question violates Section 120.54(1)(a), Florida Statutes, by showing that rulemaking is not feasible or practicable. See Ikon Office Solutions, Inc., v. Pinellas County School Board, No. 07-1266RU, 2007 Fla. Div. Adm. Hear. LEXIS 289 *21-22 (Fla. DOAH May 14, 2007)(Final Order)("Once the Petitioner establishes that the cited statements constitute

rules, the burden then shifts to the agency to establish that rulemaking is not feasible and practicable under Subsection 120.54(1)(a), Florida Statutes."). The Department, however, has not raised this affirmative defense in the instant case.

9/ The $19.25 "non-federal customer" fee that the FBI's CJIS Information Letter 07-03 prescribes for an electronic fingerprint-based national criminal history check of an employee would appear to be inapplicable under Florida law to employee screening requests "qualified entities" make to the Department inasmuch as Subsection (2) of Section 943.0542, Florida Statutes, and Subsection (4) of Florida Administrative Code Rule 11C-6.004, as well as the VECHS User Agreement form that is incorporated by reference in this rule provision, require the submission of a hard copy fingerprint card along with the request and make no provision for the electronic submission of fingerprints.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Summary 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.