STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA HEALTH CARE ASSOCIATION, INC., A FLORIDA CORP. NOT FOR PROFIT; AND FLORIDA ASSOC. OF HOMES AND SERVICES FOR THE AGING, INC., A FLORIDA CORP., NOT FOR PROFIT,	)	
Petitioners,	)	
vs.	)	Case No. 08-2084RP
AGENCY FOR HEALTH CARE ADMINISTRATION,	)	
Respondent.	)	

FINAL ORDER

Pursuant to notice, a formal hearing was held in this case on June 2, 2008, in Tallahassee, Florida, before the Division of Administrative Hearings, by its designated Administrative Law Judge, Barbara J. Staros.

APPEARANCES

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For Respondent: Kelly A. Bennett, Esquire
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STATEMENT OF THE ISSUE

Whether proposed Rule 59G-6.0102 is an invalid exercise of delegated legislative authority pursuant to Section 120.52(8), Florida Statutes,[1/] for the reasons described by Petitioners in their Petition.

PRELIMINARY STATEMENT

Prior to the commencement of the instant proceeding, Petitioners herein filed a Petition for Determination of Invalidity of Non-Rule Policy, which was assigned Division of Administrative Hearings Case No. 08-0589RU. During the pendancy of that proceeding, the Agency for Health Care Administration (AHCA or the Agency) instituted rule-making procedures, and a proposed rule was published on February 15, 2008. The Administrative Law Judge assigned to Case. No. 08-0589RU granted AHCA's motion to dismiss and closed the file of the Division of Administrative Hearings. Petitioners then filed the Petition in the instant case.

Petitioners, Florida Healthcare Association, Inc., and Florida Association of Homes and Services for the Aging, Inc., filed a Petition challenging proposed Rule 59G-6.010 with the Division of Administrative Hearings on April 24, 2008. The case was assigned to the undersigned on April 28, 2008.

Following a telephone scheduling conference, A Notice of Hearing was issued on April 30, 2008, scheduling a formal hearing

for June 2, 2008. The parties filed a Joint Pre-Hearing Stipulation on May 29, 2008.

At the commencement of the hearing, Respondent made an ore tenus motion for summary final order, which was denied.

At hearing, Petitioners presented the testimony of Tony Marshall and Erwin Bodo. Petitioners' Exhibits numbered 1, 5, and 10 through 12 were admitted into evidence, which included the deposition testimony of Ross Nobles, Wesley Hagler, and Phil Williams.

Respondent presented the testimony of Phil Williams. Respondent's Exhibits numbered 1 through 8 were admitted into evidence.

Official recognition was taken of legislative proviso language as well as Sections 409.908 and 409.919, Florida Statutes.

A Transcript consisting of one volume was filed on June 23, 2008. The parties timely filed Proposed Final Orders which have been considered in the preparation of this Final Order.

FINDINGS OF FACT

Stipulated Facts

1. The Agency is responsible for administering the Medicaid program consistent with state and federal laws.

2. Medicaid reimbursements to nursing homes are set by AHCA as directed by the Florida Legislature pursuant to statute and the appropriations act.

3. The State of Florida has approximately 675 nursing homes.

4. Approximately 645 of those nursing homes have Medicaid rates set.

5. AHCA establishes a payment methodology that is described in a document called the Florida Title XIX Long Term Care Reimbursement Plan (the Reimbursement Plan).

6. The Reimbursement Plan is incorporated by reference into Florida Administrative Code Rule 59G-6.010.

7. AHCA has proposed a change to the Reimbursement Plan relating to rate reductions, regarding implementation of the appropriations act from the 2007 special session. That change is the subject of this dispute.

8. The procedural aspects of the rulemaking process of proposed rule 59G-6.010 are not at issue in this proceeding.

9. With respect to legislative appropriations for funding of nursing home rates, there can be a distinction between the appropriated amount of funds and actual expenditures based upon nursing home cost reports.

10. The appropriated amount is typically based upon the projected reimbursements for nursing homes by estimating the anticipated per diem rates and the annual bed days or patient days.

11. In the 2007 special session, AHCA was mandated by the Florida Legislature to make a reduction as is set forth in the 2007 Special Session Appropriations Act at item 116. Specific appropriation 116 reads as follows:

> MEDICAID LONG TERM CARE
>
> 116 SPECIAL CATEGORIES
> NURSING HOME CARE
> FROM GENERAL REVENUE FUND -68,679,773
> FROM MEDICAL CARE TRUST FUND -90,647,696
>
> The reduced appropriation in Specific Appropriation 116 includes reductions of $16,198,032 from the General Revenue Fund and $21,393,131 from the Medical Care Trust Fund as a result of modifying the reimbursement for nursing home rates, effective January 1, 2008. The agency shall modify the Medicaid trend adjustment contained in the Title XIX Nursing Home Reimbursement Plan to achieve this recurring reduction.
>
> The reduced appropriation in Specific Appropriation 116 includes reductions of $4,823,045 from the General Revenue Fund and $6,369,912 from the Medical Care Trust Fund as a result of expanding the Nursing Home Diversion Program, effective January 1, 2008.
>
> The reduced appropriation in Specific Appropriation 116 includes reductions of $47,658,696 from the General Revenue Fund and $62,884,653 from the Medical Care Trust Fund based on the revised Fiscal Year 2007-2008 nursing care expenditure estimate provided in the September 14, 2007 Medicaid Impact Conference.[2/] (emphasis supplied)

12. In the Prehearing Stipulation, the parties describe the nature of the controversy as follows:

> The issue to be decided is whether legislatively mandated nursing home reimbursement reductions should be effectuated using a methodology that employs

> a cut directly from actual rates based upon cost reports and projected from estimated bed days or whether the methodology should employ the cut from the appropriated amount (requiring a rate reduction only to the extent required to contain costs at the appropriated amount less the amount of mandated reduction).

13. The Joint Administrative Procedures Committee is prepared to certify the rule amendment to the Bureau of Administrative Code.

14. The Centers for Medicare and Medicaid Services, the federal oversight agency for the Medicaid program, has approved the changes to the Reimbursement Plan.

Facts Based Upon the Evidence of Record

Standing

15. Petitioner, Florida Health Care Association (FHCA), is a trade association representing approximately 500 nursing homes in the state of Florida. Most if not all of its members participate in the Medicaid program.

16. Petitioner, Florida Association of Homes and Services for the Aging (FAHSA) is a trade association representing primarily not-for-profit facilities, including approximately 100 nursing home members, 90 to 95 of which participate in the Medicaid program.

17. There are approximately 82,000 beds or spaces available for residents of a nursing home, in licensed facilities in Florida. Approximately 72,000 beds are typically occupied at any

point in time, approximately 43,000 of which are occupied by Medicaid recipients.

18. A "per diem rate" is the amount of money that Medicaid pays a nursing home for each recipient on a daily basis.

19. Medicaid reimbursements are made to nursing homes based upon cost reports submitted by the nursing homes reflecting their costs over time. The cost reports are submitted and adjusted twice a year, in January and July. Each nursing home provider has its own specific rate. The Agency establishes the rate at which each provider is reimbursed based upon cost components, the largest of which is the direct patient care component.

20. The resulting rate is then adjusted, by rate-setting calculations.

21. Petitioners and their members will be substantially affected by the proposed rule.

The Proposed Rule

22. The text of the proposed rule reads as follows:

> 59G-6.010 –Payment Methodology for Nursing Home Services.--
>
> Reimbursement to participating nursing homes for services provided shall be in accordance with the Florida Title XIX Long-Term Care Reimbursement Plan, Version XXXIII, Effective Date January 1, 2008 and incorporated herein by reference. A copy of the Plan as revised may be obtained by writing to the Deputy Secretary for Medicaid, 2727 Mahan Drive, Mail Stop 8, Tallahassee, Florida 32308. The Plan Incorporates Provider Reimbursement Manual (CMS Pub. 15-1).

23. The Florida Title XIX Long-Term Care Reimbursement Plan, Version XXXIII reads in pertinent part as follows:

> 21. Effective July 1, 2004, through June 30, 2005, each component of a nursing home rate, except for the direct care component, shall be reduced proportionately until an aggregate total estimated savings of $66,689,094 is achieved.
>
> 22. Effective July 1, 2005, a proportional reimbursement rate reduction shall be established until an annual aggregate total estimated savings of $132,096,875 is achieved for the period ending June 30, 2006. The weighted average per diem rates as of July 1, 2005, and January 1, 2006, shall be the bases for the determination of these savings, and shall be compared to the weighted average per diem as of June 30, 2005, with a .5% increase. The full savings will be assumed realized if the weighted average rate for the period July 1, 2005, through June 30, 2006, does not exceed the weighted average rate of June 30, 2005, with a .5% increase. Effective July 1, 2006, the annual aggregate amount the rates were reduced during the period July 1, 2005 through July 30, 2006, shall become a recurring annual reduction. This recurring reduction, called the Medicaid Trend Adjustment, shall be applied proportionally to all rates on an annual basis.
>
> 23. Effective January 1, 2008, an additional Medicaid Trend Adjustment shall be applied to achieve a recurring annual reduction of $75,182,236. (emphasis indicating new language)

History of the Rule

24. In Florida, the Legislative appropriations process regarding Medicaid recipients includes an estimating conference that estimates the projected caseload, or actual occupancy, and expenditures for nursing homes.

25. The Agency's Division of Medicaid provides estimates of caseload and expenditures to the Social Services Estimating Conference.

26. The Social Services Estimating Conference (Estimating Conference) meets several times a year. At these meetings, the Medicaid caseloads and Medicaid expenditures are estimated, which forms the underlying basis on which most of the Medicaid budget is crafted.

27. Representatives of both Petitioners and the Agency had input in the information provided to the Estimating Conference held prior to the 2007 Special Session.

28. The term "Medicaid Trend Adjustment," referenced in appropriations act language quoted above, was first used in 2005. The term was used in the Long-Term Care Reimbursement Plan to describe the means to implement reductions to nursing home rates based upon a weighted average of Medicaid patient days. The Medicaid Trend Adjustment reduced the rates in the amount necessary to meet the reduction in appropriations as a percentage reduction from each facility's rate.

29. The Medicaid Trend Adjustment is applied proportionally to individual facilities' reimbursement rates until the aggregate of the targeted trend adjustment is achieved.

30. On October 30, 2007, shortly after the 2007 Special Session, representatives of both Petitioners and the Agency met

to discuss the methodology for implementing the reduction in appropriation.

31. At that meeting, only one methodology was discussed as to how to implement the reduced appropriation. That is, consistent with Petitioners' position, that of employing a cut from the appropriated amount. Representatives of the Petitioners believed that this was how the appropriations act language would be implemented, and that the Medicaid Trend Adjustment would be modified only as necessary to stay within the reduced appropriation.

32. Sometime after that meeting, AHCA proceeded with their normal rate setting process for January 1, 2008 rates. AHCA staff consulted with legislative staff as to rates and the methodology they intended to use to meet the reduced appropriation.

33. Phil Williams is the acting Assistant Deputy Secretary for Medicaid Finance with AHCA. Mr. Williams participated in the October 2007 meeting and was involved in the process described above regarding Medicaid reimbursement to providers.
Mr. Williams received a phone call on December 20, 2007, from legislative staff during which he received direction to make the reductions from the actual rates as of January 1, 2008.

34. Petitioners' representatives, who had participated in the October 2007 meeting, and who generally participated in the Legislative process regarding Medicaid reimbursements, then

received phone calls from AHCA in which they were informed that the methodology they discussed at the October 2007 meeting would not be utilized. Instead, as of January 1, 2008, the Agency would reduce actual rates for the period January 1 through June 30, 2008.

35. Imposing the reductions from the projected rates has a larger negative impact on the nursing home industry than a reduction from the appropriated amount.

CONCLUSIONS OF LAW

36. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding pursuant to Section 120.56(1) and (2), Florida Statutes.

37. Petitioners have standing to challenge the proposed rule which is the subject of this dispute.

38. The Agency is the single state agency responsible for administering state and federal law governing the Medicaid program in Florida.

39. In a challenge to a proposed rule, the party attacking the proposed rule has the burden of going forward. The agency then has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised. The proposed rule is not presumed to be valid or invalid. § 120.56(2)(a) and (c), Fla. Stat.

Analysis

40. Paragraph 18 of the Petition challenging proposed rule 59G-6.010 alleges that the proposed rule "as implemented" constitutes an invalid exercise of delegated authority. Further, Petitioners allege in paragraph 16 that "because AHCA has already notified facilities of rate changes, Petitioners are aware of how this provision is being interpreted, and the interpretation is contrary to legislative intent."

41. As to any allegation that the proposed rule is invalid as implemented, that argument will not be addressed in this order as that is beyond the scope of this proceeding. See generally Beverly Health and Rehabilitative Services, Inc., v. Agency for Health Care Administration, 708 So. 2d 616 (Fla. 1st DCA 1998); Hasper v. Department of Administration, 459 So. 2d 398 (Fla. 1st DCA 1984).

42. Moreover, the parties' own statement as to the nature of the controversy is problematic. That is, the parties are arguing about which is the appropriate methodology to use. Whether there is an alternative method or even a better method than that chosen by the Agency does not matter in a facial challenge to the validity of the rule. State Department of Health and Rehabilitative Services v. Framat Realty, 407 So. 2d 238 (Fla. 1st DCA 1981). The appropriate analysis in a Section 120.56(2) proceeding is of a facial attack on a proposed rule.

43. Despite the true nature of the controversy, the parties address the substantive allegations of a rule challenge which will be discussed here.

Rule Challenge Discussion

44. Petitioners assert that the proposed rule enlarges, modifies, or contravenes the specific provisions of law implemented, and is arbitrary and capricious.[3/] See Subsections (c), and (e) of Section 120.52(8), Florida Statutes.

45. Section 120.52(8), Florida Statutes, reads in pertinent part as follows:

> (8) 'Invalid exercise of delegated legislative authority' means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
>
> * * *
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;
>
> * * *
>
> (e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational . . . .

46. "The authority to adopt an administrative rule must be based on an explicit power or duty identified in the enabling statute . . . [T]he authority for an administrative rule is not a matter of degree. The question is whether the statute contains

a specific grant of legislative authority for the rule, not whether the grant of authority is specific enough." (Emphasis in original) Florida Board of Medicine v. Fla. Academy of Cosmetic Surgery, 808 So. 2d 243, 253, quoting Southwest Florida Water Management District v. Save the Manatee Club, Inc., 773 So. 2d 594, 599 (Fla. 1st DCA 2000).

47. In this instance, the Agency's general grant of rulemaking authority is found in Section 409.919, Florida Statutes, which reads as follows:

> 409.919 Rules.--
>
> The agency shall adopt any rules necessary to comply with or administer ss. 409.901-409.920 and all rules necessary to comply with federal requirements. In addition, the Department of Children and Family Services shall adopt and accept transfer of any rules necessary to carry out its responsibilities for receiving and processing Medicaid applications and determining Medicaid eligibility, and for assuring compliance with and administering ss. 409.901-409.906, as they relate to these responsibilities for the determination of Medicaid eligibility.

48. The Agency is authorized to operate the Florida Medicaid Program, including the functions related to reimbursement methodologies to Medicaid providers. Section 409.908, Florida Statutes, which is the law cited by the Agency as the “law implemented”, provides in pertinent part as follows:

> Subject to specific appropriations, the agency shall reimburse Medicaid providers, in accordance with state and federal law, according to methodologies set forth in the rules of the agency and in policy manuals and handbooks incorporated by reference therein.

. . . Payment for Medicaid compensable services made on behalf of Medicaid eligible persons is subject to the availability of moneys and any limitations or directions provided for in the General Appropriations Act or chapter 216. Further, nothing in this section shall be construed to prevent or limit the agency from adjusting fees, reimbursement rates, lengths of stay, number of visits, or number of services, or making any other adjustments necessary to comply with the availability of moneys and any limitations or directions provided in the General Appropriations Act, provided the adjustment is consistent with legislative intent.

* * *

(2)(a)1. Reimbursement to nursing homes licensed under part II of chapter 400 and state-owned-and-operated intermediate care facilities for the developmentally disabled licensed under part VIII of chapter 400 must be made prospectively.

* * *

(b) Subject to any limitations or directions provided for in the General Appropriations Act, the agency shall establish and implement a Florida Title XIX Long-Term Card Reimbursement Plan (Medicaid) for nursing home care in order to provide care and services in conformance with the applicable state and federal laws. . .

* * *

It is the intent of the Legislature that the reimbursement plan achieve the goal of providing access to health care for nursing home residents who require large amounts of care while encouraging diversion services as an alternative to nursing home care for residents who can be served within the community. The agency shall base the establishment of any maximum rate of payment, whether overall or component, on the available moneys as provided for in the

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

49. Petitioners argue in their proposed final order that the proposed rule is inconsistent with legislative intent and, therefore, enlarges, modifies, or contravenes the specific provisions of law implemented.[4/] However, as discussed above, Petitioners' argument in this regard is focused on the implementation of the proposed rule, not its facial validity.

50. In its publication of the proposed rule, the Agency cited Section 409.908, Florida Statutes, as the law implemented. That statute gives broad authority to the Agency to reimburse Medicaid providers according to rules of the Agency and in policy manuals and handbooks incorporated by reference therein. Thus, the proposed rule, which references the Reimbursement Plan incorporated by reference therein, does not enlarge, modify, or contravene the specific provisions of law implemented. Moreover, in accordance with Section 409.908, the proposed rule, and the Reimbursement Plan incorporated therein, address reductions or limitations as directed in the Appropriations Act.

51. Based upon the statutory authority outlined above, the challenged proposed rule does not enlarge, modify, or contravene the specific provisions of law implemented as contemplated by Subsection 120.52(8)(c), Florida Statutes.

52. Finally, the Petition alleges that the proposed rule is arbitrary and capricious.

53. A rule is arbitrary if it is not supported by logic or the necessary facts. A rule is capricious if it is adopted without thought or reason or is irrational. § 120.52(8)(e), Fla. Stat. As written, the proposed rule, and the corresponding amended language in the Reimbursement Plan, is not arbitrary or capricious.

54. Based upon the evidence presented and the statutory authority outlined above, the proposed rule does not enlarge, modify, or contravene the specific provisions of law implemented; and the proposed rule is not arbitrary or capricious.

ORDER

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

ORDERED:

The Petition challenging proposed rule 59G-6.010 is dismissed.

DONE AND ORDERED this 4th day of August, 2008, in Tallahassee, Leon County, Florida.

BARBARA J. STAROS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of August, 2008.

ENDNOTES

[1/] All references to Fla. Stat. will be to Florida Statutes 2007, unless otherwise indicated.

[2/] The 2007 Special Session Appropriations Act listed negative numbers as amounts to be reduced from amounts previously appropriated in the Regular Session, rather than the appropriated amounts.

[3/] While alleged in the Petition, Petitioners also alleged in the Petition that the proposed rule violates Section 120.52(8)(d), Florida Statutes. However, Petitioners omit that argument in their Proposed Final Order.

[4/] There was considerable debate as to the Legislative intent of the pertinent language of the 2007 special session appropriations act. The expert testimony of Petitioners' witnesses provided valuable technical and historical facts, but was not relied upon in any way in considerations of legislative intent. See, T.R.J. Holding Co., Inc., v. Alachua County, 617 So. 2d 798 (Fla. 1st DCA 1993). Similarly, while the Agency's consultation with legislative staff may have given it confidence that it was applying the correct methodology, such after-the-fact communication from legislative staff is not competent indicia of legislative intent for purposes of any analysis here. Compare, American Home Assurance Co., v. Plaza Materials Corporation,

908 So. 2d 360 (Fla. 2005) (Court looked to Legislative history and legislative staff analyses to discern legislative intent.)

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of appeal with the Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.