

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DELLA CHRISTIE, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 09-2312RP  
 )  
 DEPARTMENT OF CORRECTIONS, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

FINAL ORDER

Pursuant to notice, a formal hearing was held in this case on September 17, 2009, at Tallahassee, Florida, before Administrative Law Judge (ALJ) Claude B. Arrington of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Terry R. Rigsby, Esquire  
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For Respondent: Timothy E. Dennis, Esquire  
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## STATEMENT OF THE ISSUES

Whether Petitioner has the requisite standing to challenge the subject Proposed Rule.

Whether Proposed Rule 33-401.701, published in the Florida Administrative Weekly on March 6, 2009, and subsequently amended on May 29, 2009, and June 19, 2009, constitutes an invalid exercise of delegated legislative authority pursuant to the provisions of Sections 120.56(1) and (2), Florida Statutes (2009).<sup>1</sup>

## PRELIMINARY STATEMENT

On November 14, 2008, Respondent Florida Department of Corrections (the Department) published a Notice of Rule Development for Proposed Rule 33-401.701 (the Proposed Rule). On March 6, 2009, the Department published a Notice of Proposed Rulemaking for the Proposed Rule. On April 30, 2009, Petitioners Louie Christie (Mr. Christie), Della Christie (Ms. Christie or Petitioner), William J. Sheppard (Mr. Sheppard), and Florida Justice Institute, Inc. (FJI), filed a "Petition To Determine Invalidity Of Proposed Rule 33-401.701" ("Petition") with DOAH. The Petition challenged the validity of the Proposed Rule, alleging that the Proposed Rule is an invalid exercise of delegated legislative authority. Petitioners specifically challenged subsections (1), (2)(f), (2)(h), (2)(i),

(3)(a), (3)(h), (10)(b), (10)(h), (10)(i), and (10)(j) of the Proposed Rule.

On May 1, 2009, the Chief Judge of DOAH assigned this matter to the undersigned ALJ. On May 5, 2009, Petitioners moved to file an Amended Petition. On May 5, 2009, the undersigned granted Petitioners' motion. On May 6, 2009, the parties waived the requirement set forth in Section 120.56(1)(c), Florida Statutes, that the hearing be commenced within 30 days of the filing of the Petition. On May 29, 2009, the Department published a Notice of Change for the Proposed Rule. On June 2, 2009, Petitioners filed a Second Amended Petition. On June 19, 2009, the Department published a second Notice of Change for the Proposed Rule.

On July 15, 2009, Mr. Christie filed a Notice of Dismissal by which he voluntarily withdrew as a petitioner.

On July 20, 2009, the remaining Petitioners moved for leave to file a Third Amended Petition and attached thereto their proposed Third Amended Petition, which specifically challenged the same subsections of the Proposed Rule (as amended) that were challenged in the initial Petition. On July 27, 2009, the undersigned entered an Order Granting Motion to Amend Petition, which granted Petitioners' motion and deemed the Third Amended Petition filed and served on the Department.

Also on July 20, 2009, the Department filed a Motion for Summary Final Order, asserting that the Petitioners did not have standing to challenge the Proposed Rule and also asserting that the Proposed Rule was not an invalid exercise of delegated legislative authority. A hearing was held on July 29, 2009, as to the issue of the Petitioners' standing only. As a result, a Final Order was entered on August 5, 2009, dismissing Mr. Sheppard and FJI as Petitioners. That Order is currently on appeal to the Florida First District Court of Appeal.

On August 28, 2009, Petitioner filed a Motion for Summary Final Order with Incorporated Memorandum of Law. On September 8, 2009, the Department filed its Response to Petitioner's Motion for Summary Final Order. On September 14, 2009, the undersigned entered an order denying Petitioner's Motion for Summary Final Order.

At the final hearing conducted on September 17, 2009, the Petitioner offered the testimony of Jeffrey Y. Bedenbaugh, Ms. Christie, and James M. Barclay, Esquire. Mr. Bedenbaugh is the Operations and Management Consultant Manager for the Department, its Privacy Officer under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), and its designated corporate representative in this rule challenge. Ms. Christie testified on her own behalf. Mr. Barclay is a health care attorney in private practice and was accepted as an

expert in medical record privacy and security under HIPAA. Petitioner offered Exhibits 18-21, 25, 26, 29, 31-38, 41, 43, 47, 48, 50, 51, and 53; all exhibits, except for Petitioner's Exhibit 29, were accepted into evidence. Petitioner further proffered Petitioner's Exhibits 1-4, 7-12, 14, 15, 17, 27, 28, 29, 30, 39, 40, and 42 for the record. Petitioner also proffered that the Department's current practice with regard to the medical records of a deceased inmate is no different than what the Proposed Rule intends in terms of procedure.

Respondent presented no witnesses, but offered one exhibit, which was admitted into evidence for the purpose of demonstrating the efforts that went in to drafting the Proposed Rule.

The Transcript of the final hearing, consisting of one volume, was filed on October 1, 2009. The Proposed Final Orders filed by the parties on October 12, 2009, have been duly-considered in the preparation of this Final Order.

#### FINDINGS OF FACT

##### The Parties

1. Ms. Christie is a citizen of Florida who resides at 8464 Southeast Pettway Street, Hobe Sound, Florida. Ms. Christie is the biological mother of Carvetta Thompson, a former inmate who died while in the custody of the Florida Department of Corrections.

2. Ms. Christie has attempted to obtain medical records of her deceased daughter that were generated while her daughter was incarcerated. Those inmate medical records are in the custody of the Department.<sup>2</sup> Ms. Christie has obtained some, but not all, of the requested inmate medical records. Ms. Christie testified, credibly, that she will continue to seek to obtain her deceased daughter's inmate medical records from the Department.

3. Ms. Christie is not familiar with the steps that must be followed in opening an estate for her deceased daughter so that a personal representative can be appointed for the estate. Ms. Christie testified, credibly, that she cannot afford the cost of retaining an attorney to open an estate for her deceased daughter.

4. Ms. Christie's substantial interests will be affected should the Proposed Rule become effective because she will be subject to its requirements in seeking her deceased daughter's inmate medical records. Ms. Christie has standing to bring this rule challenge. In addition to establishing the procedure for obtaining inmate medical records for a deceased inmate, the Proposed Rule also seeks to establish procedures for a living inmate or living former inmate to obtain his or her inmate medical records in paragraphs (3)(a), (3)(h), and (10)(j). Petitioner does not have standing to challenge the portions of

the Proposed Rule that relate to a living person obtaining his or her inmate medical records.

5. The Department is an agency of the State of Florida. The Department has the requisite rulemaking authority to enact the Proposed Rule. Sections 944.09 and 945.10, Florida Statutes, specifically direct the Department to adopt rules relating to the subjects encompassed by the Proposed Rule. Section 944.09(1) confers rulemaking authority on the Department. Section 944.09(1)(a) requires the Department to adopt rules relating to the rights of inmates. Section 944.09(1)(e) requires the Department to adopt rules relating to the ". . . operation and management of the correctional institution or facility and its personnel and functions." Section 945.10 requires the Department to adopt rules to ". . . prevent disclosure of confidential records or information to unauthorized persons."

#### The Rule Making Process

6. On November 14, 2008, in Volume 34, Number 46, of the Florida Administrative Weekly, the Department published Notice of the Development of the Proposed Rule, entitled Medical and Substance Abuse Clinical Files, which notice provided an opportunity to request a rule development workshop.

7. On November 20, 2009, FJI requested a rule development workshop. By letter dated December 3, 2008, Walter A. McNeil in

his capacity as the Secretary of the Department, the Department denied FJI's request and provided an explanation as to why a rule development workshop was considered to be unnecessary. Secretary McNeil noted that the Proposed Rule had been reviewed by numerous individuals who have considerable expertise and that the Proposed Rule merely transfers language from an existing rule. Secretary McNeil's response was as follows:

I have determined that a rule development workshop is not necessary at this time. The proposed rule has been reviewed by numerous individuals who have considerable expertise in the issues that are included in this proposal. Furthermore, the proposed rule merely transfers language from an existing rule while adding language that incorporates mandates of the Health Insurance Portability and Accountability Act Privacy Rule of 1996 (HIPAA) and Federal regulations regarding the privacy and security of personal health information.

Written comments received will be considered prior to drafting the final version of the rules for inclusion in the notice of proposed rulemaking. Affected persons will again be given the opportunity to offer comments and to request a public hearing if necessary subsequent to publication of the notice of proposed rulemaking in the Florida Administrative Weekly.

All comments received will be considered as we further analyze the rules of the Department.

8. On December 16, 2009, the Department received a letter from the Joint Administrative Procedures Committee ("JAPC") that indicated that the Notice of Rule Development for the Proposed



Rule had not been adequately posted at Sumter Correctional Institute ("Sumter C.I.").

9. On January 16, 2009, the Department responded to JAPC, stating that, although the Notice of Rule Development had not been initially posted at Sumter C.I. on November 14, 2008, it had been subsequently posted, giving the inmates there time to submit comments and/or workshop requests. The failure to initially post the notice at Sumter C.I. did not constitute a material departure from the applicable rule making process.

10. On March 6, 2009, in Vol. 35, No. 9 of the Florida Administrative Weekly, the Department published a Notice of the Proposed Rule. On March 18, 2009, FJI again timely requested a public hearing on the Proposed Rule. On April 21, 2009, the Department granted FJI's request and held a public hearing on the Proposed Rule at its Tallahassee headquarters. The Department's initial denial of the request for a workshop did not constitute a material departure from the applicable rule making process.

#### The Proposed Rule

11. The Department is a "covered entity" for purposes of HIPAA. As such, the Department is required to comply with the applicable provisions of HIPAA, including those provisions governing a covered entity's determination of who is eligible to obtain inmate medical records when the inmate is deceased.

12. The Department presently has an existing rule, 33-601.901, "Confidential Records," that governs, in part, the subjects identified in the Proposed Rule. Subsection (9)(a) of that rule provides, in relevant part, as follows:

(9) Any information, whether recorded or not, concerning the identity, diagnosis, prognosis or treatment of any inmate or offender which is maintained in connection with the performance of any alcohol or drug prevention or treatment function shall be confidential and disclosed only as follows:

(a) With the prior written consent of the inmate or offender. The written consent shall include the following information:

\* \* \*

6. The signature of the inmate or offender; or, when required for an inmate offender who is incompetent or deceased, the signature of a person authorized to sign in lieu of the inmate or offender.

13. The Department also has in place a Health Services Technical Instruction No. 15.12.03, "Health Records" (the Technical Instruction), but it has not been formally adopted as a rule. Appendix A of the Technical Instruction provides at page 15 of 23 under Section G.2.c. as to signing of the authorization form for the release of protected inmate medical records of a deceased inmate:

c. In case of a deceased inmate, authorization must be signed by next of kin (e.g. spouse, parent or children, or personal representative.) A certified copy of a letter of administration is required to be on file in the health record.

14. The Proposed Rule seeks to establish standards for the use and disclosure of inmate medical records in accordance with HIPAA and Florida law.

15. Petitioner challenges Subsection (1) of the Proposed Rule, because it distinguishes medical records and hospital records. Subsection (1) provides as follows:

(1) The Department of Corrections Office of Health Services shall maintain a comprehensive medical file (including medical, dental and mental health components) on every person committed to the custody and care of the Department. Information included in the inmate's medical file is protected in accordance with the Health Insurance Portability and Accountability Act Privacy Rule of 1996, (HIPAA) and Florida law. The Department of Corrections shall also maintain a comprehensive substance abuse file on every inmate who receives substance abuse program services. Information included in the inmate's substance abuse file is confidential in accordance with [HIPAA] and Florida law. The Department of Corrections Reception and Medical Center Hospital shall maintain an inpatient hospital medical file on every inmate admitted for care and treatment at Reception Medical Center Hospital.

16. Petitioner challenges the following definitions set forth in subparagraphs (2)(f), (h), and (i) of Subsection of the Proposed Rule:

(2)(f) Hospital file - as used in this rule refers to an inmate's inpatient hospital patient records created and maintained by Reception Medical Center Hospital.

\* \* \*

(2)(h) Personal Representative - as used in this rule, means, with respect to a deceased inmate, an executor, administrator, or other person with authority under Florida law to act on behalf of the deceased inmate or the inmate's estate.

(2)(i) Privacy Officer - as used in this rule, refers to a designated employee in the Office of Health Services who is responsible for the development and implementation of the policies and procedures related to the HIPAA Privacy Rule. The privacy officer is the Department's contact person for HIPAA.

17. Other than the language contained in Subsection (2)(h), the Proposed Rule offers no guidance as to whom can qualify to be an "other person with authority under Florida law to act on behalf of the deceased inmate or the inmate's estate" for purposes of qualifying as a "personal representative" pursuant to the Proposed Rule. Instead, it is the responsibility of the individual requesting the medical records to determine the statutory or other legal basis that confers upon the person his or her legal authority to access the inmate medical records, and it is the responsibility of the person seeking the medical records to state that authority to the Department.

18. Petitioner challenges the following provisions set forth in subparagraphs (b), (h), (i), and (j) of Subsection 10 of the Proposed Rule:

(10)(b) Requests for access to a former inmate's medical file shall be submitted to: Inactive Medical Records, Reception and Medical Center, P.O. Box 628, Lake Butler, Florida 32054. Requests for access to an inmate's hospital file shall be submitted to: Reception and Medical Center Hospital, Attention: Hospital Administrator, P.O. Box 628, Lake Butler, Florida 32054.

\* \* \*

(10)(h) In accordance with 45 C.F.R. § 164.502, a personal representative of a deceased inmate shall have access to or authorize the disclosure of the deceased inmate's protected health information that is relevant to the personal representative's legal authority to act on behalf of the deceased inmate or the deceased inmate's estate. A certified copy of a letter of administration, court order, or other document demonstrating the legal authority of the personal representative shall be filed in the inmate's medical file and Form DC4-711B, Consent and Authorization for Use and Disclosure Inspection and Release of Confidential Information must be signed by a personal representative.

. . .

(10)(i) In accordance with 45 C.F.R. § 164.502, a personal representative of a living inmate shall have access to or authorize the disclosure of the inmate's protected health information that is relevant to the personal representative's legal authority to make health care decisions on behalf of the inmate. Form DC4-711B, Consent and Authorization for Use and Disclosure Inspection and Release of Confidential Information must be signed by a personal representative in accordance with Florida law. A copy of a health care surrogate form, durable power of attorney,

or other document demonstrating the personal representative's authority shall be filed in the inmate's medical file.

(10)(j) In addition to the access described above, in accordance with Section 395.3025, Florida Statutes, an inmate's guardian, curator, personal representative, or in the absence of one of those persons, next of kin of a decedent or the parent of a minor, shall have access to the protected health information contained in an inmate's hospital file created and maintained by the Reception Medical Center Hospital after the discharge of the inmate.

19. Other than specifying that before being accepted as a personal representative, the requesting party must submit a ". . . certified copy of a letter of administration, court order, or other document demonstrating the legal authority of the personal representative," the Proposed Rule offers no guidance as to what document will be required. Except in cases where an estate has been issued and there exists a letter of administration or other document issued by a court of competent jurisdiction, any asserted authority will depend on factual assertions. The Proposed Rule offers no guidance as to how those factual assertions should be made.

Florida Law

20. Sections 395.3025, 381.028, 408.051, 766.104, Florida Statutes, list categories of individuals who are eligible to request medical records and take action on behalf of a decedent

without opening an estate or obtaining a written designation as a "personal representative."

21. Section 395.3025, Florida Statutes, entitled Patient and personnel records; copies; examination, requires that any licensed facility furnish, without delays for legal review, a complete copy of all patient records to the next of kin of a deceased patient upon written request. Section 395.3025 provides, in pertinent part, as follows:

(1) Any licensed facility shall, upon written request, and only after discharge of the patient, furnish, in a timely manner, without delays for legal review, to any person admitted therein for care and treatment or treated thereat, or to any such person's guardian, curator, or personal representative, or in the absence of one of those persons, to the next of kin of a decedent or the parent of a minor, or to anyone designated by such person in writing, a true and correct copy of all patient records . . . .

22. Section 381.028, Florida Statutes, entitled Patients' Right-to-Know About Adverse Medical Incidents Act, grants patients and their next of kin access to records of adverse medical incidents made or received in the course of business by a health care facility or provider. Section 381.028 provides, in pertinent part, as follows:

(3)(a) "Have access to any records" means . . . making the records available for inspection and copying upon formal or informal request by the patient or a representative of the patient . . .

\* \* \*

(3)(k) "Representative of the patient" means a parent of a minor patient. . . . In the case of a deceased patient, the term also means the personal representative of the estate of the deceased patient; the deceased patient's surviving spouse, surviving parent, or surviving adult child; the parent or guardian of a surviving minor child of the deceased patient; or the attorney for any such person.

\* \* \*

(4) Patients' right of access. - Patients have a right to have access to any records made or received in the course of business by a health care facility or health care provider relating to any adverse medical incident.

23. Section 408.051, Florida Statutes, entitled Florida Electronic Health Records Exchange Act (the "Health Records Act"), was passed in the 2009 Legislative session and signed into law on June 16, 2009. The Health Records Act establishes standards and procedures to maintain the privacy and security of identifiable health records. Section 408.051 expressly recognizes the right of a patient or a "patient representative" to authorize the use or release, in any form or medium, of an identifiable health record. Section 408.051 defines a "patient representative" as follows:

(2)(g) "Patient representative" means a parent of a minor patient, a court-appointed guardian for the patient, a health care surrogate, or a person holding a power of



attorney. . . . In the case of a deceased patient, the term also means the personal representative of the estate of the deceased patient; the deceased patient's surviving spouse, surviving parent, or surviving adult child; the parent or guardian of a surviving minor child of the deceased patient; the attorney for the patient's surviving spouse, parent, or adult child; or the attorney for the parent or guardian of a surviving minor child.

24. Section 408.051 further establishes certain obligations which a health care provider must fulfill upon the receipt of a valid authorization form submitted by a patient or his/her representative, as follows:

(4)(c) A health care provider receiving an authorization form containing a request for the release of an identifiable health records shall accept the form as a valid authorization to release an identifiable health record.

\* \* \*

(4)(e) A health care provider that releases an identifiable health record in reliance on the information provided to the health care provider on a properly completed authorization form does not violate any right of confidentiality and is immune from civil liability for accessing or releasing an identifiable health record under this subsection.

25. Section 766.104, Florida Statutes, entitled Pleading in medical negligence cases; claim for punitive damages; authorization for release of records for investigation, requires a health care provider to provide a complete set of medical

records to the next of kin of a deceased patient, prior to the administration of such patient's estate, for the purposes of a required investigation of an action for personal injury or wrongful death arising out of medical negligence. Section 766.104 provides, in pertinent part, as follows:

(3) For purposes of conducting the investigation required by this section, and notwithstanding any other provision of law to the contrary, subsequent to the death of a person and prior to the administration of such person's estate, copies of all medical reports and records, including bills, films, and other records relating to the care and treatment of such person that are in the possession of a health care practitioner as defined in s. 456.001 shall be made available, upon request, to the spouse, parent, child who has reached majority . . . or attorney in fact of the deceased pursuant to chapter 709.

#### HIPAA

26. HIPAA, at 45 C.F.R. Section 164.502(a), provides that a "covered entity" may not use or disclose protected health information except as permitted or required by the specific provisions of HIPAA. The Department, a health care provider and a HIPAA covered entity, is required to implement, comply with, and enforce the mandates of HIPA.

27. The protections provided by HIPAA continue to apply with respect to the protected health information of a deceased individual and survive an individual's death. See 45 C.F.R. § 164.502(f).

28. HIPAA requires that a covered entity treat an executor, administrator, or other person as a "personal representative" of a deceased individual only if applicable law (in this case Florida law) provides authority for such person to act on behalf of a deceased individual or the individual's estate. HIPAA requires that the covered entity treat the person as a "personal representative," who stands in the shoes of the individual, only "with respect to protected health information relevant to such personal representation."

29. A covered entity must provide an individual who qualifies as a personal representative under state law with access to the protected health information that is relevant to the personal representative's authority to act on behalf of the deceased person as authorized under state law. 45 C.F.R. § 164.502(g)(4). HIPAA provides at 45 C.F.R. Section 502(f)-(g), in pertinent part, as follows:

(f) Standard: Deceased individuals. A covered entity must comply with the requirements of this subpart with respect to the protected health information of a deceased individual.

(g)(1) Standard: Personal representatives. As specified in this paragraph, a covered entity must, except as provided in paragraphs (g)(3) and (g)(5) of this section, treat a personal representative as the individual for all purposes of this subchapter.

\* \* \*

(g)(4) Implementation specification:  
Deceased individuals. If under applicable law an executor, administrator, or other person has authority to act on behalf of a deceased individual or of the individual's estate, a covered entity must treat such person as a personal representative under this subchapter, with respect to protected health information relevant to such personal representation.

30. HIPAA establishes a foundation of federally-protected rights which permit individuals to control certain uses and disclosures of their protected health information. HIPAA confers several important rights on individuals regarding their own protected health information, including the right of access to protected medical records held by a covered entity set forth in 45 C.F.R. Section 164.524(a)(1).

31. In defining what protected health information must be made accessible to an individual by a covered entity, HIPAA does not distinguish between medical files and hospital files, or between in-patient medical records and out-patient medical records. If a covered entity that receives a request for records does not possess all of the requested records, HIPAA places an affirmative obligation upon the covered entity to notify the requesting individual of where the remaining records are located. The Proposed Rule is consistent with those requirements of HIPAA.

32. HIPAA further provides specific standards regarding who has authority to act as a personal representative and access the medical records of a deceased individual. Pursuant to HIPAA, if an individual has authority under applicable state law to act on behalf of a deceased individual, he or she is designated as that deceased individual's personal representative and enjoys full rights of access to that deceased individual's protected health information. The Proposed Rule is consistent with those requirements.

33. While as to this proceeding, Florida law determines who can qualify as a personal representative, the disclosure of the protected records must, at a minimum, comply with HIPAA disclosure requirements. Pursuant to HIPAA, the Department, as a covered entity, is required to verify the identity and the authority of a person requesting inmate medical records prior to disclosure. See 45 C.F.R. § 164.514(h)(1).

#### CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to the provisions of Section 120.56, Florida Statutes.

35. Pursuant to the provisions of Section 120.56(1)(e), Florida Statutes, this a de novo proceeding with the undersigned having final order authority.

36. Pursuant to Section 120.56(2)(a), Florida Statutes, the burden of proof pertinent to this proceeding is as follows:

The petitioner has the burden of going forward. The agency has the burden to prove by the preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised.

37. Pursuant to Section 120.56(2)(c), Florida Statutes, a proposed rule is not presumed to be valid or invalid.

38. Pursuant to Sections 120.56(2)(a) and 120.57(1)(j), Florida Statutes, the standard of proof is a preponderance of the evidence.

39. Chapter 120 affords a hearing "in all proceedings in which the substantial interests of a party are determined by an agency and where there is a disputed issue of material fact." See Palm Beach County Environmental Coalition v. Florida Dept. of Environmental Protection, 14 So. 3d 1076 (Fla. 4th DCA 2009).

40. Any individual who is "substantially affected" by a proposed rule has standing to challenge the proposed rule as an invalid exercise of delegated legislative authority. See State, Department of Health and Rehabilitative Services v. Alice P., 367 So. 2d 1045, 1052 (Fla. 1st DCA 1979).

41. In order for a petitioner to establish standing, the petitioner must demonstrate that the petitioner has or will suffer an injury, or threat of injury, that is real and

immediate. This injury, or threat of injury, cannot be speculative, nonspecific, hypothetical, or lacking in immediacy and reality. A petitioner must also demonstrate that the petitioner's alleged interest is arguably within the zone of interest to be protected or regulated. See Rosenzweig v. Department of Transportation, 979 So. 2d 1050, 1052 (Fla. 1st DCA 2008). A petitioner need not demonstrate any likelihood of success on the ultimate merits of the challenge, however, in order to enjoy standing. See Palm Beach County Environmental Coalition, supra, 14 So. 3d at 1076.

42. Based on the findings of fact set forth above, it is concluded that Ms. Christie has the requisite standing to bring this rule challenge. In its Proposed Final Order, the Department agreed with that conclusion.

43. Pursuant to Section 120.56(1)(a), Florida Statutes, a petitioner may seek an administrative determination regarding the invalidity of a rule only on the grounds that the rule is an "invalid exercise of delegated legislative authority."

44. Section 120.52(8), Florida Statutes, defines "invalid exercise of delegated legislative authority" to mean:

. . . action that goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority only if any one of the following applies:

a. The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;

b. The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;

c. The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;

d. The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;

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; or

f. The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

. . .

45. Many of the allegations in the Third Amended Petition appear to challenge the anticipated application of the Proposed Rule, rather than its facial validity. A challenge to a proposed rule pursuant to Section 120.56, Florida Statutes, is to the facial validity of the proposed rule, but such a challenge is not to determine the validity of the proposed rule as to specific facts. See *Fairfield Communities v. Fla. Land and Water Adjudicatory Commission*, 552 So. 2d 1012, 1014 (Fla. 1st DCA 1988). The allegations as to the anticipated implementation of the Proposed Rule are beyond the scope of this proceeding.



Section 120.52(8)(a), Florida Statutes

46. Petitioner asserted that the Department materially failed to follow the applicable rule making procedures or requirements set forth in Chapter 120, Florida Statutes, within the meaning of Section 120.52(8)(a), Florida Statutes.

Ms. Christie raised two issues that she contends show the Department violated Section 120.52(8)(a). First, Ms. Christie contends that the Department materially failed to follow applicable rule making procedures by denying a request made by FJI to conduct a workshop at the rule development stage. Second, Ms. Christie contends that the Department materially failed to follow applicable rule making procedures by failing to post rulemaking notices at Sumter C.I.

47. As set forth in the Findings of Fact, Petitioner failed to establish that either alleged deficiency constitutes a material failure on the part of the Department to follow applicable rule making procedures.

48. The greater weight of the credible evidence established that the Department has followed all applicable procedural steps in reaching this juncture in the rulemaking process.

Section 120.52(8)(b), Florida Statutes

49. Section 120.52(b), Florida Statutes, "pertains to the adequacy of the grant of rulemaking authority," including any

statutory qualifications upon the exercise of such authority. See State, Board of Trustees of Internal Improvement Trust Fund v. Day Cruise Assoc., Inc., 794 So. 2d 696, 701 (Fla. 1st DCA 2001); Department of Business and Professional Regulation v. Calder Race Course, Inc., 724 So. 2d 100, 104 (Fla. 1st DCA 1998); and St. Johns River Water Management District v. Consolidated-Tomoka Land Co., 717 So. 2d 72, 81 (Fla. 1st DCA 1998).

50. Section 120.52(17), Florida Statutes, defines the term "rulemaking authority," as follows:

(17) "Rulemaking authority" means statutory language that explicitly authorizes or requires an agency to adopt, develop, establish, or otherwise create any statement coming within the definition of the term "rule."

51. Section 120.52(16), Florida Statutes, defines the term "rule," in relevant part, as follows:

(17) "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.  
. . . .

52. In addition to the definitions set forth above, Section 120.52(8), Florida Statutes, contains the following

provision, which is commonly referred to as the "flush left provision":

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.

53. In the instant proceeding, Sections 944.09 and 945.10, Florida Statutes, specifically direct the Department to adopt rules relating to subjects encompassed by the Proposed Rule. Section 944.09, Florida Statutes, provides as follows:

(1) The department has authority to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement its statutory authority. The rules must include rules relating to:

(a) The rights of inmates.

\* \* \* \*

(e) The operation and management of the correctional institution or facility and its personnel and functions.

54. The Proposed Rule relates to the rights of inmates, i.e., the rights of inmates to access and authorize the release of their protected health information. Additionally, the Proposed Rule relates to the operation and management of correctional institutions and facilities, and their personnel and functions. The Proposed Rule directs all personnel regarding the disclosure of inmate protected health information and contains specific directives to health services administrators regarding their functions with respect to inmate medical files.

55. Section 945.10, Florida Statutes, states in part that:

(1) Except as otherwise provided by law or in this section, the following records and information held by the Department of Corrections are confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution:

(a) Mental health, medical, or substance abuse records of an inmate or an offender.

\* \* \*

(h) Records that are otherwise confidential or exempt from public disclosure by law.

\* \* \*

(4) The Department of Corrections shall adopt rules to prevent disclosure of confidential records or information to unauthorized persons.

56. The Proposed Rule addresses the mandate set forth in Section 945.10(4), Florida Statutes, to adopt rules to prevent

the disclosure of confidential protected health information to unauthorized persons.

57. The Department is subject to at least two statutes that direct it to adopt rules related to the health, medical, substance abuse, and hospital files of an inmate, which is the subject of the Proposed Rule. Consequently, the undersigned concludes that the Department has not exceeded its grant of rulemaking authority.

Section 120.52(8)(c), Florida Statutes

58. Pursuant to the provisions of Section 120.52(9), Florida Statutes, the "law implemented," as that term is used in Section 120.52(8)(c), "means the language of the enabling statutes being carried out or interpreted by an agency through rulemaking."

59. The Proposed Rule lists the following provisions of law as being implemented: Sections 119.07, 395.3025, 944.09, 945.10, and 945.25, Florida Statutes.

60. In her Third Amended Petition, Ms. Christie specifically contends that the Proposed Rule contravenes, "at a minimum," Sections 381.038, 395.3025, 765.401, and 766.104, Florida Statutes. Sections 381.038, 765.401, and 766.104, Florida Statutes, are not being implemented by the Proposed Rule.

61. Ms. Christie has cited only one statute that was cited by the Department as being implemented -- Section 395.3025(1), Florida Statutes, which applies to "licensed facilities," i.e., hospitals and other specified facilities that have been licensed pursuant to Chapter 395, Florida Statutes.

62. Section 395.3025(1), Florida Statutes, generally provides that a licensed facility must, upon written request, furnish to:

the next of kin of a decedent . . . or to anyone designated by such person in writing, a true and correct copy of all patient records in the possession of the licensed facility.

63. In addition to Section 395.3025, Florida Statutes, the Petitioner also alleges that the Proposed Rule contravenes other provisions of Florida law, specifically, Sections 381.028, 765.401, and 766.104, Florida Statutes. As set forth in the Findings of Fact section of this Final Order, the referenced statutes provide rights to certain persons, usually specific family members of a deceased person, to act on behalf of the decedent or the decedent's estate for specified, often limited, purposes.

64. The Proposed Rule does not facially conflict with any of the statutes cited by the Petitioner. The Department, in recognition of these provisions in Florida law, has specifically provided in Section (2)(h) of the Proposed Rule that a "personal

representative" may, in addition to an administrator or executor of a deceased inmate's affairs, be any "other person with authority under Florida law to act on behalf of a deceased inmate or the inmate's estate." The plain language of the Proposed Rule does not prohibit or exclude anyone entitled, pursuant to Florida law, from seeking the medical or hospital files of a deceased inmate.

65. Once it is determined that a person is entitled to act as a personal representative, the disclosure of the protected records must, at a minimum, comply with the applicable provisions of HIPAA.

66. To comply with HIPAA and applicable state law, the Proposed Rule provides for verification and documentation demonstrating the requestor's legal authority to act as the personal representative. The verification and documentation provisions contained in the Proposed Rule implement requirements set forth in HIPAA at 45 C.F.R. Section 164.514(h)(1), and the requirement set forth in Section 945.10, Florida Statutes, that the Department adopt rules to prevent the disclosure of confidential inmate medical information to unauthorized persons.

67. Given the substantial civil and criminal penalties that may be imposed for violations of HIPAA, such requirements are reasonable and do not set forth such a barrier that they can

be said to impermissibly enlarge, modify, or contravene the statutes implemented.<sup>3</sup>

68. The definition of "personal representative" set forth in Subsection (2)(h) of the Proposed Rule is consistent with and does not contradict or misstate 45 C.F.R. Section 164.502(g) of HIPAA. With respect to a deceased inmate, Subsection (2)(h) recognizes that a personal representative may be any person with authority under Florida law to act on behalf of the deceased inmate or the deceased inmate's estate.

69. Subsection (10)(h) of the Proposed Rule states:

In accordance with 45 C.F.R. § 164.502, a personal representative of a deceased inmate shall have access to or authorize the disclosure of the deceased inmate's protected health information that is relevant to the personal representative's legal authority to act on behalf of the deceased inmate or the deceased inmate's estate. A certified copy of a letter of administration or other document demonstrating the legal authority of the personal representative shall be filed in the inmate's medical file and Form DC4-711B, Consent and Authorization for Use and Disclosure Inspection and Release of Confidential Information must be signed by a personal representative.

70. This subsection is also consistent with and does not facially conflict with 45 C.F.R. Section 164.502(g) of HIPAA. With respect to a deceased inmate, this subsection recognizes that a personal representative of a deceased inmate can access (or authorize the disclosure of) the deceased inmate's protected



health information that is relevant to the personal representative's legal authority.

71. In addition, subsection (10)(h) is facially consistent with 45 C.F.R. Section 164.514(h)(1) of HIPAA, which requires that prior to any disclosure of protected health information, a covered entity must verify the identity and the authority of the requestor to have access to protected health information, if such is not known to the covered entity. Subsection (10)(h) of the Proposed Rule is not facially inconsistent with 45 C.F.R. Section 164.514(h)(1) by requiring, where a letter of administration or court order is not provided, some other document demonstrating the legal authority of the personal representative.

Section 120.52(8)(d), Florida Statutes

72. Petitioner challenges Subsections (2)(h) (which defines the term "personal representative") and (10)(h) (which establishes guidelines for the disclosure of a deceased inmate's protected health information) of the Proposed Rule on the grounds that these provisions are vague, fails to establish adequate standards for agency decisions, or vest unbridled decisions in the agency within the meaning of Section 120.52(8)(d), Florida Statutes.

73. An administrative rule is invalid pursuant to Section 120.52(8)(d), Florida Statutes, if it requires the performance

of an act in terms that are so vague that men of common intelligence must guess as to its meaning. See Southwest Florida Water Management District v. Charlotte County, 774 So. 2d 903, 915 (Fla. 2d DCA 2001). Where a rule vests unbridled discretion in the hands of those implementing it, the rule must also be found to be vague and must be similarly struck down as an invalid exercise of delegated legislative authority. See Merritt v. Department of Business and Professional Regulation, Board of Chiropractic, 654 So. 2d 1051, 1054 (Fla. 1st DCA 1995).

74. The sufficiency of a rule's standards and guidelines may depend upon the subject matter dealt with and the degree of difficulty in articulating finite standards. See Cole Vision Corp. v. Department of Business and Professional Regulation, Board of Optometry, 688 So. 2d 404, 410 (Fla. 1st DCA 1007). In determining whether the challenged provisions are vague, the undersigned has considered that the provisions of HIPAA and applicable Florida law are complex.

75. In defining the term "personal representative" Subsection (2)(h) of the Proposed Rule contains the phrase ". . . or other person with authority under Florida law to act on behalf of the deceased inmate or the inmate's estate.

76. The right to receive or authorize the release of a deceased individual's protected health information is

specifically authorized and governed by several Florida statutes and by HIPAA. The Florida laws specify varying degrees of access to the deceased's medical records, depending upon the purpose and circumstances of the request. HIPAA further instructs covered entities such as the Department to look to the applicable law, i.e., Florida law, to determine whether or not to grant such requests. Because of the complexity of the subject matter dealt with, it would be extremely difficult for the Department to set forth every possible person whom would be authorized to act as a personal representative. A person seeking to act as a personal representative on behalf of a deceased inmate should know, or ascertain, his or her legal authority for making the request. It is not the responsibility of the Department in its Proposed Rule to delineate all circumstances that would provide such authority.

77. The challenged phrase in Subsection (2)(h) of the Proposed Rule is not vague. The inclusion of the challenged phrase expands the circumstances that will authorize a person to act as a personal representative on behalf of a deceased inmate.

78. Subsection (10)(h) of the Proposed Rule requires the person to provide to the Department ". . . [a] certified copy of a letter of administration, court order, or other document documenting the legal authority of the personal representative. . . ." The use of the term "or other document" without further

guidance is so vague that men of common intelligence must guess as to its meaning and vests unbridled discretion in the Department in implementing the determination of what constitutes an "other document documenting the legal authority of the personal representative." Any assertion of authority will require a factual predicate. It is not clear whether a letter from the individual seeking to serve as the personal representative or from that individual's lawyer will suffice, or whether an affidavit, birth certificate, death certificate, or other unknown document will be required. Without guidance from the Department as to what constitutes "other document" or what factual proof is required, Subsection 10(h) of the Proposed Rule is impermissibly vague.

Section 120.52(8)(e), Florida Statutes

79. In her Third Amended Petition, the Petitioner claims that the Proposed Rule's differentiation between how the Department maintains, stores, and releases a deceased inmate's hospital files, versus the decedent's other medical files, is arbitrary and capricious.

80. Pursuant to Section 120.52(8)(e), Florida Statutes, a proposed rule is arbitrary if it is not supported by logic or the necessary facts and proposed rule is capricious if it is adopted without thought or reason or is irrational. A proposed rule is neither arbitrary nor capricious within the

meaning of Section 120.52(8)(e), Florida Statutes, if it is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance. See Dravo Basic Materials Co., Inc. v. Department of Transportation, 602 So. 2d 634, n. 3 (Fla. 2d DCA 1992)).

81. One of the "laws implemented" by the Proposed Rule is Section 395.3025, Florida Statutes, which only applies to "licensed facilities," such as the Department's Reception and Medical Center Hospital. Section 395.3025(1), Florida Statutes, states:

(1) Any licensed facility shall, upon written request, and only after discharge of the patient, furnish, in a timely manner, without delays for legal review, to any person admitted therein for care and treatment or treated thereat, or to any such person's guardian, curator, or personal representative, or in the absence of one of those persons, to the next of kin of a decedent or the parent of a minor, or to anyone designated by such person in writing, a true and correct copy of all patient records, including X-rays, and insurance information concerning such person, which records are in the possession of the licensed facility, provided the person requesting such records agrees to pay a charge. The exclusive charge for copies of patient records may include sales tax and actual postage, and, except for nonpaper records that are subject to a charge not to exceed \$2, may not exceed \$1 per page. A fee of up to \$1 may be charged for each year of records requested. These charges shall apply to all records furnished, whether directly from the facility or from a copy service providing these services on behalf

of the facility. However, a patient whose records are copied or searched for the purpose of continuing to receive medical care is not required to pay a charge for copying or for the search. The licensed facility shall further allow any such person to examine the original records in its possession, or microforms or other suitable reproductions of the records, upon such reasonable terms as shall be imposed to assure that the records will not be damaged, destroyed, or altered.

82. Subsections 2(f) and (g) of the Proposed Rule define, respectively, "hospital file" as "an inmate's inpatient hospital patient records created and maintained by Reception Medical Center Hospital" and the term "medical files" as defined in the Proposed Rule refers to "the inmate's medical, mental health, and dental files maintained by the department."

83. Recognizing that Section 395.3025, Florida Statutes, imposes specific requirements for how the patient files of a licensed hospital can be disclosed, the Proposed Rule distinguishes between how requests for "medical files" and requests for "hospital files" should be submitted. Subsection (10)(b) of the Proposed Rule states:

(10)(b) Requests for access to a current inmate's medical file shall be submitted to the health services administrator at the institution where the inmate is housed. Requests for access to a former inmate's medical file shall be submitted to: Inactive Medical Records, Reception and Medical Center, P. O. Box 628, Lake Butler, Florida 32054. Requests for access to an inmate's hospital file shall be submitted

to: Reception and Medical Center Hospital,  
Attention: Hospital Administrator, P.O. Box  
628, Lake Butler, Florida 32054.

84. The Proposed Rule further specifies who, in conformance with Section 395.3025, Florida Statutes, may review such records. Section (10)(j) of the Proposed Rule states:

In addition to the access described above, in accordance with Section 395.3025, Florida Statutes, an inmate's guardian, curator, personal representative, or in the absence of one of those persons, next of kin of a decedent or the parent of a minor, shall have access to the protected health information contained in an inmate's hospital file created and maintained by the Reception Medical Center Hospital after the discharge of the inmate.

85. Though the Department owns and operates a licensed 153-bed licensed hospital, the Department itself is not a "licensed facility" for purposes of Chapter 395. Thus, the differentiation in the Proposed Rule in regard to access to a deceased inmate's "hospital files" and the inmate's other "medical files" is consistent with the statute implemented and is not arbitrary or capricious.

86. The Proposed Rule is not invalid on the basis that it differentiates between a request for and release of hospital files and other types of protected health information pursuant to Section 395.3025, Florida Statutes.

87. Petitioner also contends that the Proposed Rule requires the filing of documents not required by the provisions

of Sections 395.3025, 381.028, 408.051, 766.104, Florida Statutes. That contention is rejected because the release of the records described in those provisions are also subject to HIPAA requirements set forth in 45 C.F.R. Section 164.514(h)(1), to verify and document the authority of the person seeking to serve as a personal representative. Once it is determined who may serve as a personal representative, the disclosure is subject to HIPAA's requirements of verification and documentation. The Proposed Rule is consistent with those HIPAA requirements.

88. The Department's Technical Instruction<sup>4</sup> addresses the subject of inmate health records and the disclosure thereof, but it has not been adopted as a rule. The Proposed Rule does not facially conflict with the Technical Instruction because reference to a letter of administration being on file clearly relates to the circumstance where a personal representative of an estate is the requestor. To the extent the Technical Instruction is construed to conflict with the Proposed Rule, the Proposed Rule, if adopted, would supersede the Technical Instruction.

89. The Subsections of the Proposed Rule challenged by Petitioner are neither arbitrary nor capricious within the meaning of Section 120.52(8)(e), Florida Statutes.



Section 120.52(8)(f), Florida Statutes

90. Finally, the Petitioner contends that the Proposed Rule imposes costs upon her and other next of kin of deceased inmates by requiring family members to first be a declared personal representative of an estate before being able to obtain the deceased inmate's medical records.

91. As previously stated, the Petitioner's allegations that the Proposed Rule requires one to open an estate and/or be declared a personal representative is not apparent on the face of the Proposed Rule. Petitioner's contention involves the potential application of the Proposed Rule, and is not appropriate for this facial challenge pursuant to Section 120.56, Florida Statutes.

92. The following Subsections of the Proposed Rule do not meet the statutory definition of the term "invalid exercise of delegated legislative authority" set forth in Section 120.52(8), Florida Statutes: (1), (2)(f), (2)(h), (2)(i), (3)(a), (3)(h), (10)(b), and (10)(j).

93. As set forth above, Subsections (10)(h) and (10)(i) of the Proposed Rule are "vague, fails to establish adequate standards, or vests unbridled discretion in the agency" within the meaning of Section 120.52(8)(d), Florida Statutes, which renders the Proposed Rule an "invalid exercise of delegated legislative authority" in part.

FINAL ORDER

Based upon the foregoing findings and conclusions, it is determined that Subsections (10)(h) and (10)(i) of the Proposed Rule 33-401.701 are an invalid exercise of delegated legislative authority as that term is defined by Section 120.52(8)(d), Florida Statutes, and that, consequently, the Proposed Rule is partly invalid. Petitioner failed to prove her other challenges to the Proposed Rule, and, therefore, the remainder of the Proposed Rule, excepting Subsections (10)(h) and (10)(i), is valid.

DONE AND ORDERED this 2nd day of November, 2009, in Tallahassee, Leon County, Florida.



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CLAUDE B. ARRINGTON  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 2nd day of November, 2009.

ENDNOTES

<sup>1/</sup> All statutory references are to Florida Statutes (2009).

<sup>2/</sup> For ease of reference, medical records (including medical, dental, mental health, and substance abuse records) in the possession of the Department that were generated while a person was in the custody of the Department will be referred to as inmate medical records.

<sup>3/</sup> These procedural requirements will be discussed further in determining whether the Proposed Rule is vague within the meaning of Section 120.52(8)(d), Florida Statutes. Petitioner's argument that the Proposed Rule is arbitrary or capricious because the Proposed Rule is inconsistent with certain provisions of the cited statutes will be discussed further in determining whether the Proposed Rule is arbitrary and/or capricious.

<sup>4/</sup> See paragraph 13 of this Final Order.

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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.