STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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| PLANTATION NURSING AND REHABILITATION CENTER,<br><br>Petitioner,<br><br>vs.<br><br>AGENCY FOR HEALTH CARE ADMINISTRATION,<br><br>Respondent. | ) | Case No. 10-10313RX |

SUMMARY FINAL ORDER

PRELIMINARY STATEMENT

Petitioner, Plantation Nursing and Rehabilitation Center (Plantation), filed a Petition for Determination of Invalidity of Existing Rule. In its Petition, Plantation alleges that Florida Administrative Code Rule 59A-4.1295(7)(e) is an invalid exercise of delegated legislative authority as defined in Section 120.52(8)(b),(c), and (e), Florida Statutes. Specifically, Plantation alleges that AHCA exceeded its grant of rulemaking authority in adopting the challenged rule; that the rule enlarges, modifies, or contravenes the specific provisions of law implemented; and that the challenged rule is arbitrary and capricious.

On December 1, 2010, Respondent, the Agency for Health Care Administration (the Agency or AHCA), filed a Response to Petition for Determination of Invalidity of Existing Rule. Its Response reads in pertinent part:

> 1. The Agency agrees that Petitioner is substantially affected by the Rule at issue and therefore has standing to seek an administrative determination of the invalidity of the Rule at issue.
>
> 2. The Agency concurs with Petitioner that there is no statutory authority for Rule 59A-4.1295(7)(e), Florida Administrative Code, which caps the number of pediatric residents that can reside in a licensed skilled nursing facility.
>
> 3. As such, the Agency has no objection to an order being entered finding that Rule 59A-4.1295(7)(e), Florida Administrative Code, is without statutory authority, and as such, is an invalid rule.
>
> 4. However, the Agency does object to being assessed attorney fees and costs in this matter, as the Agency has at all times acted with justification and in good faith, as has been demonstrated by the Agency's attempt to repeal this rule through the rulemaking process.[1/]

On December 2, 2010, a Petition for Leave to Intervene was filed by Broward Children's Center, Inc. (Broward). On December 2, 2010, Plantation filed a Motion to Dismiss the Petition to Intervene. Plantation also filed a Motion for Summary Final Order. On December 3, 2010, AHCA filed a Motion to Dismiss Petition for Leave to Intervene. On December 9,

2010, Broward filed a Response to Motions to Dismiss Petition for Leave to Intervene. On December 13, 2010, Broward filed a Response to Motion for Final Summary Order.

DISCUSSION

This case is in an unusual, if not unique, procedural posture. That is, the Agency agrees with Petitioner that the challenged Rule is invalid, and asserts that it has been trying to repeal this Rule. Broward seeks to intervene into this case to defend the validity of the Rule. However, it finds itself with no party with which to align, as neither party believes the Rule is valid.

Plantation's Motion for Summary Final Order was filed pursuant to Florida Administrative Code Rule 28-106.204(4). Based upon the Agency's response to the Petition, it is concluded that the Agency does not dispute any material fact alleged in the Petition and, therefore no findings of material fact are necessary.

In its Petition for Determination of Invalidity of Existing Rule, Plantation describes itself as a licensed nursing home which, in addition to providing traditional geriatric services, provides a pediatric program. Plantation desires to expand this program but is prohibited from doing so because of the limitations contained in the challenged Rule. Plantation is

substantially affected by the challenged Rule and has standing to seek a determination of the invalidity of the Rule.

CONCLUSIONS OF LAW

1. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding pursuant to Sections 120.56(1)(3), and 120.57(1)(h), Florida Statutes.

2. The language of the Rule which is the subject of this challenge reads in pertinent part:

> 59A-4.1295 Additional Standards for Homes That Admit Children 0 Through 20 Years of Age
>
> * * *
>
> (7) For those nursing facilities who admit children age 0 through 15 years of age the following standards apply in addition to those above and throughout Chapter 59A-4, F.A.C.
>
> * * *
>
> (e) The facility shall be equipped and staffed to accommodate no more than sixty (60) children at any given time, of which there shall be no more than 40 children of ages 0 through 15 at any given time, nor more than 40 children of ages 16 through 20 at any given time.

3. The challenged Rule, which was adopted in 1997, cites Section 400.23(4), Florida Statutes, as the law implemented.[2/] Subsection 400.23(5), Florida Statutes (2010), reads as follows:

> (5) The agency, in collaboration with the Division of Children's Medical Services of the Department of Health, must, no later

> than December 31, 1993, adopt rules for minimum standards of care for persons under 21 years of age who reside in nursing home facilities. The rules must include a methodology for reviewing a nursing home facility under ss.408.031-408.045 which serves only persons under 21 years of age. A facility may be exempt from these standards for specific persons between 18 and 21 years of age, if the person's physician agrees that minimum standards of care based on age are not necessary.

4. In its Motion for Summary Final Order, Plantation alleges that, pursuant to Section 120.52(8)(b) and (c), Florida Statutes, Rule 59A-4.1295(7)(e) is an invalid exercise of delegated legislative authority in that the Agency has exceeded its grant of rulemaking authority and that the rule enlarges, modifies, or contravenes the specific provisions of law implemented.[3/] The Agency simply asserts that there is no statutory authority for the challenged Rule. Petitioner asserts, and the undersigned agrees, that the Agency's interpretation of the statutes and rules that it is charged with implementing is entitled to great deference. Cone v. State, Dept. of Health, 886 So. 2d 1007, 1009 (Fla. 1st DCA 2004).

5. The statutory citation contains no language setting forth a maximum number of pediatric residents that can be treated in any particular facility. The challenged rule does not address nursing homes that serve only persons under 21 years of age, but sets an occupancy limit for nursing homes with a

licensed bed capacity of greater than 60 beds from being permitted to serve only persons under 21 years of age. It is concluded that Florida Administrative Code Rule 59A-4.1295(7)(e) constitutes an invalid exercise of delegated legislative authority in that it exceeds the Agency's specific grant of rulemaking authority and modifies or contravenes the specific law implemented.

Intervention

6. Broward, which seeks to intervene in this proceeding, describes itself as, through its affiliate, Children's Comprehensive Care Center, a free standing skilled nursing facility for children which provides 24-hour nursing/respiratory care and developmentally appropriate educational training. Broward asserts that it has standing to intervene into this rule challenge proceeding:

> Plantation's facility is located approximately 13 miles from the Broward Children's Center facility. [Broward] will be immediately and substantially affected if Plantation's challenge is successful.

Both Petitioner and Respondent have moved to dismiss Broward's Petition for Leave to Intervene asserting that Broward lacks standing.

7. A fundamental characteristic of intervention is that it is subordinate to and in recognition of the propriety of the main proceeding. See East County Water Control District v. Lee

County, 884 So. 2d 93 (Fla. 2nd DCA 2004); Hoechst Celanese Corp. v. Fry, 693 So. 2d 1003 (Fla. 3d DCA 1997); Fla. R. Civ. P. 1.230. In the main proceeding, neither party defends the validity of the existing rule. Broward states in its Response to Motion for Summary Final Order that it "seeks to intervene in this case to defend AHCA's existing rule." If granted intervention, Broward would be elevated to a status of a principal party, and would not be aligned with either party of the main proceeding. See Humana of Florida, Inc. v. Department of Health and Rehabilitative Services, 500 So. 2d 186 (Fla. 1st DCA 1986). Accordingly, intervention in this instance is not appropriate.

Based upon the above, it is

ORDERED:

1. Petitioner's and the Agency's Motions for Summary Final Order are granted.

2. Broward Children's Center, Inc.'s Petition for Leave to Intervene is denied.

3. Based upon Petitioner's representation, Petitioner's request for attorney's fees and costs has been waived, in view of the disposition by Summary Final Order.

4. The hearing scheduled for December 22, 2010, is canceled.

DONE AND ORDERED this 14th day of December, 2010, 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 14th day of December, 2010.

ENDNOTES

1/ In its Motion for Summary Final Order, Plantation represents that it is willing to waive its request for attorney's fees and costs against the Agency in the event that its Motion is granted and the rule is declared to be an invalid exercise of delegated legislative authority.

2/ Since the time the Rule was adopted, the subsection was renumbered to its current subsection (5) in 1999. However, the Rule citation was not revised to be consistent with the renumbered statute.

3/ The Motion for Summary Final Order does not include the argument that the challenged rule is arbitrary or capricious as alleged in the Petition to Determine Invalidity of Rule.

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## NOTICE OF RIGHT TO JUDICIAL REVIEW

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