STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ESTHER STRONG, Petitioner, vs. DEPARTMENT OF CHILDREN AND FAMILIES, Respondent.	Case No. 11-0535RU

FINAL ORDER

A final hearing was conducted in this case on February 21, 2011, in Tallahassee, Florida, before W. David Watkins, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

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For Respondent: Herschel Minnis, Esquire
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STATEMENT OF THE ISSUE

The issue is whether the Department's Access Policy Manual Sections 1840.0906.04 and 1840.0906.07 (Policy Manual); Training Module 4 (Training Module 4); Request for Veteran's Information Form CF-ES 2262 (Form CF-ES 2262); and Common Nursing Home and

Waiver Medicaid Terminology (Medicaid Terminology) constitute agency statements defined as rules but not adopted as such, in violation of section 120.54, Florida Statutes.

PRELIMINARY STATEMENT

Petitioner Esther Strong (Petitioner or Ms. Strong) filed her Petition for Administrative Determination of Invalidity of Agency Statements ("Petition") on January 28, 2011. The Petition alleged that Respondent developed and applied certain non-rule documents in determining that Petitioner was no longer eligible for participation in the Medicaid Diversion Program because "her income is too high to qualify for the program and they did not receive all information necessary to determine eligibility." Petitioner asserts that the use of the documents amounts to a rule under section 120.52(16), which must be adopted pursuant to section 120.54.

A Notice of Hearing and Order of Pre-hearing Instructions dated February 1, 2011, scheduled this matter for hearing on February 21, 2011.

On February 9, 2011, Respondent, Department of Children and Families (Respondent or DCF) filed a Motion for Continuance on the basis that the Governor's Executive Order 11-01 required prior authorization from the Office of Fiscal Accountability and Regulatory Reform (OFARR) before Respondent could initiate rulemaking addressed to the challenged statements. The motion stated that Respondent would "confer" with OFARR to determine

whether approval would be given to initiate rulemaking. Petitioner filed an Objection to Request for Continuance on February 9, 2011, and the motion was denied by Order dated February 11, 2011.

On February 18, 2011, Respondent filed a Second Motion for Continuance; again on the basis that Respondent was without authorization to begin rulemaking on the challenged statements absent approval by OFARR. The motion recited that "Respondent, this date, has submitted the necessary documents and materials to receive authorization to submit the attached documents for publication. Respondent reasonably anticipates receiving the authorization for publication no later than Monday, February 21, 2011." Attached to the motion were draft amendments to the Department's rule 65A-1.713 titled "SSI-Related Medicaid Income Eligibility Criteria".

On February 16, 2011, Respondent filed a Motion for Partial Summary Final Order, arguing that Petitioner had failed to prove that the Training Module and Medicaid Terminology were rules and that it was not feasible or practicable for Respondent to initiate rulemaking addressed to the Policy Manual and Information Form in light of Executive Order 11-01.

The final hearing was convened on February 21, 2011, and at the outset the pending motions for continuance and for partial summary final order were addressed. As to the motion for continuance, counsel for Respondent stated that authorization had

not yet been received from OFARR to begin rule development. Following additional argument from counsel on both motions, both were denied.

Also at the outset of the hearing the parties filed their Joint Pre-Hearing Stipulation, portions of which have been incorporated in this Final Order.

Petitioner did not call any witnesses to testify at final hearing. Petitioner's Exhibits P-1 through P-3 were received in evidence, while Petitioner's Exhibit P-4 was rejected, and ruling was reserved on the admissibility of Petitioner's Exhibit P-5. By Order dated March 2, 2011, Petitioner's P-5 was received in evidence. Post-hearing, Respondent was permitted to supplement Petitioner's Exhibit P-3 with Page I-95 of the Training Module.

Respondent presented the testimony of two witnesses, and Respondent's Exhibits R-1 and R-2 were received in evidence.

The parties filed proposed orders on March 4, 2011, and the court reporter filed the transcript of the proceedings with the Division of Administrative Hearings on March 10, 2011.

Unless otherwise indicated, all references are to the 2010 Florida Statutes.

FINDINGS OF FACT

1. Petitioner is a resident of an assisted living facility and receives a stipend under the Florida Medicaid Nursing Home Diversion Program. The program is one of the Medicaid "home and community-based services waiver" programs administered through

DCF. In order to qualify for the Assisted Living Waiver Program, applicants must comply with level of care, income and asset limitations. For example, eligible individuals may not have a monthly income greater than $2,022.00. The agency statements under challenge in this proceeding relate to the manner in which DCF calculated Petitioner's income in evaluating eligibility under the AL Waiver Program.

2. Section 409.919, Florida Statutes, requires DCF to adopt and accept transfer of any rules necessary to carry out its responsibilities for receiving and processing Medicaid applications and determining Medicaid eligibility.

3. Respondent has adopted Florida Administrative Code Rule 65A-1.713 relating to SSI-Related Medicaid Income Eligibility Criteria. This rule requires DCF to follow the exclusionary policies specified in 20 C.F.R. § 416.1100, including exclusionary policies regarding Veterans Administration (VA) benefits such as VA Aid and Attendance, unreimbursed medical expenses (UME) and reduced VA improved Pensions (VAIP) to determine what counts as income and what is excluded from income for eligibility determinations.

4. Rule 65A-1.713, provides in relevant part:

> (2) Included and Excluded Income. For all SSI-related coverage groups the department follows the SSI policy specified in 20 C.F.R. 416.1100 (2007) (incorporated by reference) et seq., including exclusionary policies regarding Veterans Administration benefits such as VA Aid and Attendance, unreimbursed Medical Expenses, and reduced VA Improved

pensions, to determine what counts as income and what is excluded as income with the following exceptions:

(a) In-kind support and maintenance is not considered in determining income eligibility

(b) Exclude total of irregular or infrequent earned income if it does not exceed $30 per calendar quarter.

(c) Exclude total of irregular or infrequent unearned income if it does not exceed $60 per calendar quarter.

(d) Income placed into a qualified income trust is not considered when determining if an individual meets the income standard for ICP, institutional Hospice program or HCBS.

(e) Interest and dividends on countable assets are excluded, except when determining patient responsibility for ICP, HCBS and other institutional programs.

5. On or about August 3, 2010, Petitioner applied to DCF for re-certification to participate in the AL Waiver Program. On August 10, 2010, DCF issued a notice to Petitioner's designated representative that Petitioner needed to provide a copy of a qualified income trust statement and a bank account for the trust, since her combined income from Social Security and the amount she was receiving from the VA exceeded the income limit of $2,022.00.

6. On August 27, 2010, DCF issued a notice to Petitioner that she was no longer eligible for the Medicaid Diversion Program because "her income is too high to qualify for the program and they did not receive all information necessary to determine eligibility."

7. Petitioner timely requested a Medicaid Fair Hearing because she disagreed with the way her income was evaluated by DCF. The Fair Hearing was held on December 1, 2010. At the Fair Hearing, representatives of DCF referenced the Policy Manual, Training Module and Medicaid Terminology in explaining what policy required DCF to count payments received from the VA in determining eligibility for the AL Waiver Program.

8. Shawnee T. Daniels, a DCF manager with supervisory responsibility for DCF case workers, testified at Petitioner's Fair Hearing. When asked if DCF employees could exercise independent thought or judgment in evaluating applications, Ms. Daniels stated that DCF case workers rely on DCF policy and knowledge from their training materials and information they receive from their clients in making determinations about eligibility.

9. Petitioner has challenged Respondent's Access Policy Manual Sections 1840.0906.04 and 1840.0906.07 as unpromulgated rules. Those sections provide:

> **1840.0906.04 Veterans Administration Improved Pension (MSSI, SFP)**
>
> The Veterans and Survivors Pension Improvement Act changed the method of determining the pension payable and pension rates effective January 1979, but the new rates of payment are not automatic. Since the new rates are not automatic, the veteran or survivor who was receiving benefits prior to January 1979 must apply to VA to establish entitlement under the Act. All individuals who apply for or receive Medicaid benefits must apply for the Veterans Administration

Improved Pension Program (VAIP). An individual who receives a VA pension under the old law must apply for improved pension under the new law unless the individual's VA benefit would be lowered under the improved pension. If an individual's pension would be lower under the improved pension, he may continue to receive the pension under the old law. VAIP includes allowances for aid and attendance, housebound, and unreimbursed medical expenses.

Section 8003 of the Omnibus Budget Reconciliation Act of 1990 (OBRA '90) provides for a reduction in Veterans Administration Improved Pensions (VAIP) for single veterans and surviving spouses residing in Title XIX nursing facilities who have no dependents and who are Medicaid eligible. The pension will be reduced to $90 or less per month, which is all considered aid and attendance and is not counted as income for the eligibility determination. Also, it's not added back into the patient responsibility.

However, if the veteran is enrolled in the Medically Needy Program in the nursing home and Medicaid is not paying for nursing home care, the veteran is entitled to the full VA benefit, and must apply to receive it.

1840.0906.07 VA Unreimbursed Medical Expenses (MSSI, SFP)

This policy does not apply to OSS.

VA provides an allowance for unreimbursed medical expenses (UME) incurred by the veteran that exceed five percent of an individual's annual income. UME is excluded income.

10. Respondent has stipulated that Access Policy Manual sections 1840.0906.04 and 1840.0906.07 meet the definition of a "rule" as that term is defined in section 120.52(16), Florida Statutes (2010). (Joint Pre-hearing Stipulation, p. 5;

Respondent's Proposed Final Order, p. 2). Respondent also stipulated that as an agency statement meeting the definition of a rule, DCF was required to go through the rule promulgation process required by section 120.54(1), and has not done so. (Joint Pre-Hearing Stipulation, p. 1, 5).

11. Request for Veteran's Information Form CF-ES 2262 is a form used to gather information about pensions and other benefits provided by the VA to applicants for the Medicaid AL Waiver Program. The form itself is addressed to the "Department of Veterans Affairs" and requires verification from a VA representative. The bottom of the form includes a footer reading "CF-ES 2262, PDF 10/2005", indicating that this version of the form was developed in October, 2005.

12. Respondent has stipulated that Form CF-ES 2262 meets the definition of a "rule" as that term is defined in section 120.52(16), Florida Statutes (2010). (Joint Pre-hearing Stipulation, p. 5; Respondent's Proposed Final Order, p. 2). Respondent also stipulated that as an agency statement meeting the definition of a rule, DCF was required to go through the rule promulgation process required by section 120.54(1), and has not done so. (Joint Pre-Hearing Stipulation, p. 1, 5).

13. Respondent has stipulated that Petitioner is substantially affected by DCF's use of Access Policy Manual sections 1840.0906.04 and 1840.0906.07 and Form CF-ES 2262. (Respondent's Proposed Final Order, p. 2).

14. Training Module 4 is a tool used to train DCF employees, and describes the duties of DCF employees who determine public assistance eligibility. It is used by DCF employees in carrying out their assigned job duties. Training Module 4 contains a section entitled "Policy: Identify Income from the Veterans Administration" found at pages I-49 through I-51. On page I-49 of Training Module 4 appears the following statement:

> Only the following types of Veterans' benefits are excluded as income for all programs:
>
> 1. Reductions in basic pay while in active duty service or selected reserve service to provide for future basic educational assistance
>
> 2. Payments to a natural child of a Vietnam veteran born with spina bifida, except spina bifida occulta, as a result of the exposure of one or both parents to Agent Orange
>
> 3. Payments to a natural child of a woman Vietnam veteran born with one or more birth defects resulting in permanent physical or mental disability
>
> 4. Payments for aid and attendance, housebound allowance or unreimbursed medical expenses (except OSS)

15. Page I-51 of Training Module 4 contains a section entitled "Manual Citation", in which there are references to "On-Line Policy Manual" sections. Among those citations are section 1840.906.05 entitled "VA Improved Pension", and section 1840.906.08 entitled "VA Un-reimbursed Medical Expenses".

Notwithstanding the single digit difference in the numbering of these two sections from the numbering in the Policy Manual, given the identical titling of the sections it is reasonable to conclude that these are a reference to Policy Manual Sections 1840.0906.04 and 1840.0906.07.[1]

16. Respondent stipulated that Training Module 4 contains agency statements of general applicability and describes the practice or procedure requirements of the agency. Respondent also acknowledges that Training Module 4 has not been adopted as a rule. (Joint Pre-Hearing Stipulation, P. 3). However, Respondent denies that Training Module 4 meets the definition of a rule.

17. "Common Nursing Home and Waiver Medicaid Terminology" contains definitions of numerous terms used in administering the Medicaid program. Within the section entitled "Other SSI-Related Medicaid Terminology" appears the terms:

> **Aid and Attendance (VA AA)** is a special Veterans Administration allowance for individuals who require the constant aid and attendance of another person to help with personal needs. Most often this allowance is paid to persons in a nursing facility. VA AA payments do not count in the Medicaid eligibility test or post-eligibility budget, but do count in State Funded Programs.
>
> and,
>
> **Un-reimbursed Medical Expense (UME)** is a term used by the Veterans Administration for medical expenses they recognize as a factor in computing pension amounts. VA UME is not counted in the Medicaid eligibility test or

post-eligibility budget, but it counts for State Funded Programs.

The document bears a footer on each page which reads "CCC Vocabulary Helps/Updated 12/05/06".

18. Medicaid Terminology is a tool that is used to train DCF employees to perform their job and describes how agency policy should be applied in any given situation. When asked during the Fair Hearing what the DCF policy was regarding VA unreimbursed medical expenses, DCF Medicaid Specialist for the Policy Unit of the Suncoast Region, Naureen Yazdani read the above definition of UME as set forth in the Medicaid Terminology document.

19. Respondent stipulated that the Medicaid Terminology contains agency statements of general applicability and interprets or prescribes law or policy. Respondent also acknowledges that the Medicaid Terminology has not been adopted as a rule. (Joint Pre-Hearing Stipulation, P. 3). However, Respondent denies that the Medicaid Terminology meets the definition of a rule.

20. Respondent received actual notice of the rule challenge petition on December 23, 2010, more than 30 days prior to the filing of the petition at the Division of Administrative Hearings on January 28, 2011.

21. Pursuant to the Governor's Executive Order 11-01, dated January 4, 2011, all rulemaking by executive agencies, including DCF, was suspended pending approval from the newly created Office

of Fiscal Accountability and Regulatory Reform. As of the date of the hearing Respondent had not received approval from OFARR to engage in rulemaking addressed to any of the challenged agency statements.[2/]

22. Although Respondent concedes that the challenged provisions of the Policy Manual and Form CF-ES 2262 meet the statutory definition of a rule, Respondent contends that rulemaking addressed to the challenged statements is not feasible or practicable. However, aside from the lack of approval from OFARR to proceed with rulemaking, Respondent has not offered evidence in this record to establish that rulemaking addressed to the challenged statements is not feasible or practicable.

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction of the subject matter and the parties to this proceeding. See §§ 120.569 and 120.57(1), Fla. Stat.

24. Section 120.56(4)(a), Florida Statutes, states in pertinent part, that "[a]ny person substantially affected by an agency statement may seek an administrative determination that the statement violates s. 120.54(1)(a)." A person or entity demonstrates it is "substantially affected" by demonstrating that: (a) it will suffer an injury in fact of sufficient immediacy to entitle it to a formal administrative proceeding; and (b) the substantial injury is of a type or nature that the

proceeding is designed to protect. See Ameristeel v. Clark, 691 So. 2d 473 (Fla. 1997).

25. In this case, Petitioner has standing to challenge the documents at issue as unpromulgated rules because her application for participation in the Medicaid AL Waiver Program was evaluated by Respondent, at least in part, in accordance with the policies set forth in the challenged statements. Moreover, Respondent has stipulated that Petitioner is substantially affected by DCF's use of Access Policy Manual Sections 1840.0906.04 and 1840.0906.07 and Form CF-ES 2262.

26. Petitioner has the burden of establishing by a preponderance of the evidence that the challenged agency statements constitute unpromulgated rules. See Bravo Basic Material Co., Inc. v. Dep't of Transp., 602 So. 2d 632 (Fla. 2nd DCA 1992); Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

27. Petitioner alleges that the following agency statements are rules, as defined by Section 120.52(16):

> (1) Access Policy Manual Sections 1840.0906.04 and 1840.0906.07;
> (2) Training Module 4;
> (3) Request for Veteran's Information Form CF-ES 2262; and
> (4) Common Nursing Home and Waiver Medicaid Terminology.

28. Section 120.54(1) provides:

> 120.54 Rulemaking.—
>
> (1) GENERAL PROVISIONS APPLICABLE TO ALL RULES OTHER THAN EMERGENCY RULES.—

> (a) Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable.
>
> 1. Rulemaking shall be presumed feasible unless the agency proves that:
> a. The agency has not had sufficient time to acquire the knowledge and experience reasonably necessary to address a statement by rulemaking; or
> b. Related matters are not sufficiently resolved to enable the agency to address a statement by rulemaking.
>
> 2. Rulemaking shall be presumed practicable to the extent necessary to provide fair notice to affected persons of relevant agency procedures and applicable principles, criteria, or standards for agency decisions unless the agency proves that:
> a. Detail or precision in the establishment of principles, criteria, or standards for agency decisions is not reasonable under the circumstances; or
>
> b. The particular questions addressed are of such a narrow scope that more specific resolution of the matter is impractical outside of an adjudication to determine the substantial interests of a party based on individual circumstances.

29. Section 120.52(16) defines a rule as follows in pertinent part:

> (16) "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule. The term does not include:
>
> (a) Internal management memoranda which do not affect either the private interests of

> any person or any plan or procedure important to the public and which have no application outside the agency issuing the memorandum.

30. An agency statement is invalid only if it falls within the definition of a rule. See Dep't of Rev. v. Novoa, 745 So. 2d 378 (Fla. 1st DCA 1999).

31. It was stipulated that the challenged Policy Manual provisions and Form CF-ES 2202 meet the definition of a "rule" as defined by section 120.52(16) for which rulemaking was required by section 120.54(1). However, Respondent contends that rulemaking is not currently feasible or practicable due to Executive Order 11-1's prohibition on rulemaking absent prior approval from the Office of Fiscal Accountability and Regulatory Reform. However, no evidence was presented that Respondent has not had sufficient time to acquire the knowledge and experience reasonably necessary to address the statements by rulemaking[3/], or that related matters are not sufficiently resolved to enable the agency to address a statement by rulemaking. Similarly, Respondent did not prove that one of the circumstances described in section 120.54(1)(a)2 exists which has rendered rulemaking impracticable. Accordingly, there is no factual or legal basis in this record to conclude that rulemaking by DCF to address the challenged statements is not feasible and practicable. See Spear v. Dep't of High. Saf. & Motor Veh., Case No. 92-4816RU (Fla. DOAH October 29, 1992), aff'd, 632 So. 2d 1030 (Fla. 1st DCA 1994).

32. With respect to the other two challenged statements, Respondent stipulated that Training Module 4 contains agency statements of general applicability[4/] and describes the practice or procedure requirements of the agency. Respondent also stipulated that the Medicaid Terminology contains agency statements of general applicability and interprets or prescribes law or policy. In denying that Training Module 4 and the Medicaid Terminology constitute rules, Respondent is evidently contending that the statements are "internal management memoranda" as that term is defined in Section 120.52(16)(a), Florida Statutes.

33. In Department of Revenue v. Vanjaria Enterprises, Inc., 675 So. 2d 252, 255 (Fla. 5th DCA 1996), the court held that the Department of Revenue's training manual used for the tax assessment procedure was a statement of general applicability because it was the sole guide for the auditors and was not applied on a case-by-case basis. In Vanjaria, the auditors had no discretion to act outside of the procedure.

34. Like Vanjaria, DCF's Training Module 4 appears to set forth mandatory policies for case workers to use in determining eligibility for benefits under the Medicaid AL Waiver Program. For example, Training Module 4 states that "Only the following types of Veteran's Benefits are excluded as income for all programs." Clearly, the Training Module does not vest discretion

in caseworkers as to the categories of VA benefits that may be excluded for purposes of determining eligibility.[5/]

35. Similarly, the "Medicaid Terminology" document includes express directives to Medicaid caseworkers as to how VA payments are to be treated in determining income eligibility under the Medicaid waiver programs. For example, the Aid and Attendance term includes the statement: "VA AA payments do not count in the Medicaid eligibility test or post-eligibility budget, but do count in State Funded Programs." Additionally, the Un-reimbursed Medical Expense term includes the statement: "VA UME is not counted in the Medicaid eligibility test or post-eligibility budget, but it counts for State Funded Programs." Respondent has stipulated that the Medicaid Terminology contains statements of general applicability that interpret or prescribe law or policy. And like the Training Module, the Medicaid Terminology does not vest discretion in caseworkers as to the categories of VA benefits that may be excluded for purposes of determining eligibility.

36. The challenged statements do not fall within the "internal management memoranda" exception. The statements are uniformly relied upon by DCF employees when making Medicaid program eligibility determinations, including evaluating Petitioner's eligibility for the AL Waiver Program. Dep't of Bus. & Prof'l Reg. v. Harden, 10 So. 3d 647 (Fla. 1st DCA 2009).

37. In determining whether an agency statement is an unpromulgated rule, the effect of the statement must be taken into consideration. See Vanjaria, 675 So. 2d at 255. An agency statement that requires compliance, creates certain rights while adversely affecting others, or otherwise has the direct and consistent effect of law, is a rule. Id.

38. Training Module 4 and Medicaid Terminology are used by DCF caseworkers to determine eligibility for Medicaid waiver programs. The determination as to what VA benefits qualify for exclusion from an applicant's income is made by DCF caseworkers while applying the policies set forth in the Training Module and Medicaid Terminology. Application of the policies contained in the Training Module and Medicaid Terminology directly affect the determination of whether an applicant's "income" exceeds the allowable limit, and consequently, whether an applicant (including Petitioner) is entitled to participate in the Medicaid waiver program.[6/] The statements have the potential to directly affect the private interests of Petitioner and the public at large.

39. There are other instances in which agency statements similar to the Training Module and Medicaid Terminology have been held to be rules. In McCarthy v. Dep't of Ins. and Treasurer, 479 So. 2d 135 (Fla. 2d DCA 1985) a letter setting forth eligibility qualifications for an exam was found to be a rule because agency employees were required to comply with categorical

requirements. And in Department of Transportation v. Blackhawk Quarry, 528 So. 2d 447 (Fla. 5th DCA 1985) a standard operating procedure was held to be a rule because the agency required third parties to meet certain specific criteria before they could be permitted to bid on a state project.

40. It is concluded that the four challenged statements each constitute a "rule," as defined in section 120.52(16), and they have not been adopted in accordance with the rulemaking procedures set forth in section 120.54, (nor has the rulemaking process commenced). Although DCF has argued that engaging in such rulemaking is not feasible or practicable, the obstacle to rule promulgation (Executive Order 11-01) is not among the justifications circumscribed by section 120.54(1)(a). Accordingly, the existence of the challenged statements violates section 120.54(1)(a) and therefore, pursuant to section 120.56(4)(d), DCF must "immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action."

41. Section 120.595(4) provides:

> (4) CHALLENGES TO AGENCY ACTION PURSUANT TO SECTION 120.56(4).—
> (a) If the appellate court or administrative law judge determines that all or part of an agency statement violates s. 120.54(1)(a), or that the agency must immediately discontinue reliance on the statement and any substantially similar statement pursuant to s. 120.56(4)(e), a judgment or order shall be entered against the agency for reasonable costs and reasonable attorney's fees, unless the agency demonstrates that the statement is

> required by the Federal Government to implement or retain a delegated or approved program or to meet a condition to receipt of federal funds.

42. There having been no showing made that the challenged statements are "required by the Federal Government to implement or retain a delegated or approved program or to meet a condition to receipt of federal funds" Petitioner is entitled, pursuant to section 120.595(4)(a), to recover a reasonable sum for the attorneys' fees and costs she has incurred in the prosecution of this action. See Security Mutual Life Ins. Co. v. Dep't of Ins., 707 So. 2d 929, 930 (Fla. 1st DCA 1998).

ORDER

Based on the foregoing, it is

ORDERED:

The relief requested by Petitioner in its petition filed with DOAH pursuant to section 120.56(4), Florida Statutes (to wit: an administrative determination that the challenged statements violate section 120.54(1)(a), Florida Statutes, and an award pursuant to section 120.595(4), Florida Statutes) is granted.

The undersigned reserves jurisdiction to determine, if necessary, the amount of attorneys' fees and costs Petitioner should be awarded. Should the parties be unable to amicably resolve this issue, Petitioner shall file with the Division of Administrative Hearings a written request that the undersigned

resolve the matter. No such request filed more than 60 days of the date of this Final Order will be considered.

DONE AND ORDERED this 22nd day of March, 2011, in Tallahassee, Leon County, Florida.

W. DAVID WATKINS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of March, 2011.

ENDNOTES

[1/] The single-digit difference in the numbering of the two sections may be attributable to more recent updating of Training Module 4, which bears the date "10/05/2010".

[2/] At hearing, DCF witness Florence Hollinghead testified that a request to proceed with rulemaking had been filed by DCF with OFARR, but that no authorization had yet been received.

[3/] It is notable that one of the challenged agency statements (Form CF-ES 2262) has been in existence since October, 2005, and another (Medicaid Terminology) since December, 2006.

[4/] Statements of general applicability, as referred to in Section 120.52(16), Florida Statutes, are statements that are intended by their own effect to create rights or require compliance, or otherwise have the direct and consistent effect of law. McDonald v. Dep't of Banking & Fin., 346 So. 2d 569, 581 (Fla. 1st DCA 1977).

[5/] It is notable that the cited authority for the policies appearing on pages I-49 through I-51 of the Training Module are contained in the Policy Manual, which DCF concedes, is itself an unpromulgated rule.

[6/] This proceeding was brought pursuant to section 120.56(4), rather than section 120.57(1)(e). Accordingly, although this Order determines that the challenged statements constitute unpromulgated rules which may no longer be relied upon by Respondent, the effect of the invalidation of the statements upon Petitioner's ultimate entitlement to participation in the Medicaid AL Waiver Program has not been determined herein.

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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.