STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BAYFRONT MEDICAL CENTER, INC.; CAPE MEMORIAL HOSPITAL, INC., d/b/a CAPE CORAL HOSPITAL; CGH HOSPITAL, LTD., d/b/a CORAL GABLES HOSPITAL; DELRAY MEDICAL CENTER, INC., d/b/a DELRAY MEDICAL CENTER; LEE MEMORIAL HEALTH SYSTEM, ET AL.,	)	
Petitioners,	)	
vs.	)	Case No. 12-2757RU
AGENCY FOR HEALTH CARE ADMINISTRATION,	)	
Respondent.	)	

FINAL ORDER

Administrative Law Judge John D. C. Newton, II, with the Division of Administrative Hearings heard this case on October 9 and 10, 2012, in Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

Is the practice of the Respondent, Agency for Health Care Administration (Agency), to decline Medicaid-funded compensation for emergency medical services provided to undocumented aliens once the patients have reached a point of stabilization an unpromulgated rule?

The Petitioners' Proposed Final Order identifies the Agency's use of limited InterQual criteria to determine medical necessity as an issue in this proceeding. But the Petition for Determination of Invalidity of Non-Rule Policy does not raise this issue. Neither party's pre-hearing statement identifies it as an issue. Consequently, this Order does not consider or determine whether the Agency's limitation on the use of InterQual criteria is an "unpromulgated rule."

PRELIMINARY STATEMENT

On August 15, 2012, the Petitioners, a group of acute care hospitals enrolled as providers in the Florida Medicaid Program, filed a Petition for Determination of Invalidity of Non-Rule Policy.[1/] The Petition alleged that effective July 1, 2010, the Agency changed which medical treatment provided to undocumented

aliens it would compensate for through the Medicaid program. The Petition further alleged that the Agency made the change through implementation of "a new policy of general application under which it [the Agency] would only pay for emergency services provided to eligible undocumented aliens until the emergency medical condition had been 'stabilized.'"

On August 20, 2012, the undersigned conducted a scheduling conference by telephone conference call. Counsel for both parties requested that the hearing be set on a date beyond the 30-day period established by section 120.56(5), Florida Statutes (2012).[2/] The undersigned scheduled the final hearing to begin October 9, 2012, and issued an Order of Pre-hearing Instructions requiring initial disclosures of information, shortening time periods for responses to discovery requests, establishing discovery deadlines, and requiring submission of a pre-hearing statement.

On October 2, 2012, Petitioners filed a Motion in Limine asking to prohibit testimony from an as yet undetermined physician and from Marta Gonzalez because of failure to disclose the information required by the Order of Pre-hearing Instructions. Respondent replied to the motion on October 3, 2012. The undersigned conducted a telephone hearing on the motion on October 4, 2012, and entered an Order that same day excluding testimony from any physician witness, but permitting

the testimony of Marta Gonzalez, if she were promptly presented for deposition.

On October 5, 2012, the Agency filed a Motion in Limine seeking to exclude the testimony of Diane Castro, R.N., and Lou Ann Watson BS, CPAM. Petitioners filed their response on October 8, 2012. That same day the undersigned conducted a telephone conference hearing on the motion. The Order denying the motion was entered October 8, 2012.

The hearing convened as scheduled. Petitioners presented the testimony of: Michael Bolin; Diane Castro, R.N; Shevaun Harris; Beth Kidder; Johnnie Shepherd; and Lou Ann Watson. Petitioners' Exhibits 1, 3 through 10, 12, 14, 15, 18, 19, 21, 23, 28 through 30, 32 through 49, 52, and 53 were accepted into evidence.

The Agency presented the testimony of Marta Gonzalez, Shevaun Harris, and Johnnie Shepherd. Agency Exhibit 1 was accepted into evidence. The parties requested and were granted additional time to file recommended orders. The court reporter filed a Transcript of the hearing on October 30, 2012. The parties timely filed recommended orders which have been considered in the preparation of this Final Order.

FINDINGS OF FACT

1. Title XIX of the Social Security Act establishes Medicaid as a collaborative federal-state program in which the

state receives federal financial participation from the federal government for services provided to Medicaid-eligible recipients in accordance with federal law.

2. The Agency is the state agency designated to administer the Medicaid program in Florida. The Florida Medicaid Program provides medical care for indigent people in Florida. Federal and state laws, federal regulations, and state rules, including Medicaid handbooks incorporated by reference into the rules, govern eligibility for, participation in, and payment by the program.

3. Federal law broadly prohibits compensating a state through federal financial participation under the Medicaid program "for medical assistance furnished to an alien who is not lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law [undocumented aliens]." 42 U.S.C. § 1396b(v)(1). But it permits federal financial participation for services provided undocumented aliens that "are necessary to treat an emergency medical condition" if the individual otherwise meets the conditions for participation in the Medicaid program. 42 C.F.R. § 40.255(a). See also 42 U.S.C. § 1396b(v)(2).

4. For purposes of eligibility of undocumented aliens, title 42 U.S.C. section 1396b(v)(3) defines "emergency medical condition" as:

> [A] medical condition (including emergency labor and delivery) manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in-- (A) placing the patient's health in serious jeopardy, (B) serious impairment to bodily functions, or (C) serious dysfunction of any bodily organ or part.

5. Florida statutes and rules, with minor variations, incorporate the federal standards limiting the eligibility of undocumented aliens to treatment for emergency medical conditions.

6. The Florida Medicaid Hospital Services Coverage and Limitations Handbook, June 2005, incorporated by reference into Florida Administrative Code Rule 59G-4.160(2) as amended January 2006 and currently in effect, states on page 2-7 the limits on reimbursement for services provided undocumented aliens as follows:

> The Medicaid Hospital Services Program reimburses for emergency services provided to aliens who meet all Medicaid eligibility requirements except for citizenship or alien status.
>
> Eligibility can be authorized only for the duration of the emergency. Medicaid will not pay for continuous or episodic services after the emergency has been alleviated.

7. The Florida Medicaid Provider General Handbook, October 2003, also incorporated by rule, repeats this limitation. So

does the Florida Medicaid Provider Reimbursement Handbook, UB92, October 1998.

8. Although the Agency is responsible for administering Florida's Medicaid program from 2005 to present, section 409.902(1), Florida Statutes, makes Florida's Department of Children and Families (Department) responsible for determining an individual's eligibility for Medicaid.

9. Section 409.904(4) authorizes the Department to find an undocumented alien eligible for Medicaid, but limits the duration of the eligibility for undocumented aliens. It states:

> A low-income person who meets all other requirements for Medicaid eligibility except citizenship and who is in need of emergency medical services. The eligibility of such a recipient is limited to the period of the emergency, in accordance with federal regulations.

10. From 2005 to 2012, the definitions of section 409.901 for "emergency medical condition" and "emergency services and care" have remained unchanged although the subsection numbering for them has changed.

11. "Emergency medical condition" is defined as:

> (a) A medical condition manifesting itself by acute symptoms of sufficient severity, which may include severe pain or other acute symptoms, such that the absence of immediate medical attention could reasonably be expected to result in any of the following:

1. Serious jeopardy to the health of a patient, including a pregnant woman or a fetus.

2. Serious impairment to bodily functions.

3. Serious dysfunction of any bodily organ or part.

(b) With respect to a pregnant woman:

1. That there is inadequate time to effect safe transfer to another hospital prior to delivery.

2. That a transfer may pose a threat to the health and safety of the patient or fetus.

3. That there is evidence of the onset and persistence of uterine contractions or rupture of the membranes.

12. "Emergency services and care" is defined as:

[M]edical screening, examination, and evaluation by a physician, or, to the extent permitted by applicable laws, by other appropriate personnel under the supervision of a physician, to determine whether an emergency medical condition exists and, if it does, the care, treatment, or surgery for a covered service by a physician which is necessary to relieve or eliminate the emergency medical condition, within the service capability of a hospital.

13. The Department's Emergency Medical Services for Aliens, Florida Administrative Code Rule 65A-1.715, provides:

(1) Aliens who would be eligible for Medicaid but for their immigration status are eligible only for emergency medical services. Section 409.901(10), F.S., defines emergency medical conditions.

(2) The Utilization Review Committee (URC) or medical provider will determine if the medical condition warrants emergency medical services and, if so, the projected duration of the emergency medical condition. The projected duration of the emergency medical condition will be the eligibility period provided that all other criteria are continuously satisfied.

(3) Emergency services are limited to 30 consecutive days without prior approval. For continued coverage beginning with the 31st day prior authorization must be obtained from the Agency for Health Care Administration (Medicaid Program Office).

14. The Department's rule 65A-1.702(2)(c), implementing Title XIX in its provisions for establishing a patient's date of eligibility, states: "Coverage for individuals eligible for the Emergency Medicaid for Aliens program begins the first day of a covered emergency and ends the day following the last day of the emergency medical situation."

15. None of the rules or statutes permitting or limiting Medicaid payment for emergency medical services to undocumented aliens use any variant of the word "stabilize".

16. Until July 1, 2010, neither the Department nor the Agency had a system, procedure, or practice for determining when the duration of an undocumented alien's emergency ended or when the emergency was alleviated, other than the initial determination of eligibility.

17. The Department's consistent practice was to make its eligibility determination based upon a review of the information provided by healthcare providers on DCF Form 2039 after discharge of the patient. The providers usually provided additional information and documents including information about the diagnosis and treatment and the projected or actual duration of the emergency.

18. The Department's practice since 2002 has been to routinely accept the information and documents submitted by the provider and base the eligibility determination on them. The Department's consistent practice was to not allow providers to submit any documentation until after the patient was discharged. Consequently, the information upon which the Department based its eligibility determination for undocumented aliens was actual, not projected.

19. The Department notifies providers of the eligibility decision by sending a completed DCF Form 2039 or making the information available online. The information contains the specific period of eligibility for the undocumented alien, including the beginning and ending date of the eligibility period. This is the duration of the emergency medical condition determined by the Department.

20. Until July 1, 2010, the Agency reviewed requests for Medicaid reimbursement from providers solely to determine if the

services provided were medically necessary. This is the same standard used to determine if Medicaid will pay for services provided to citizens and documented aliens.

21. In 2002, as required by statute, the Agency began a prior authorization program for Medicaid inpatient hospital services. The purpose was to determine, before payment, if services were medically necessary.

22. The Agency contracted with KePRO to perform the prior authorization reviews for medical necessity. In the case of services to undocumented aliens, the prior authorization review and medical necessity determination was not made, despite the name, until the patient was discharged.

23. The Agency's Bureau of Medicaid Services performed a separate review of claims for payment of services to undocumented aliens to determine if the services were for the treatment of an emergency medical condition. The Bureau conducted this review after the Department had determined that the patients were eligible for Medicaid and after KePRO had authorized the services.

24. Nurses employed by the Agency reviewed the claims and accompanying records to determine if the services were for treatment of an emergency medical condition. The review did not include examination of the number of days appropriate for treatment or the duration of the emergency.

25. Before July 1, 2010, the Agency implemented and applied the rule, statute, and regulation provisions permitting payment for emergency medical services to eligible undocumented aliens by paying claims for the period of eligibility determined by the Department for services that KePRO determined were medically necessary and that the Bureau had determined to be necessary for treatment of an emergency medical condition.

26. The Agency did not conduct a targeted review to determine when the emergency ended or when the emergency was alleviated.

27. Neither state nor federal law or rules imposes specific service limits on the emergency medical services provided undocumented aliens.

28. In August 2009, the federal Centers for Medicare and Medicaid Services (CMS) presented the Agency with its Review of Florida's Medicaid Payments for Emergency Services to Undocumented Aliens.

29. CMS "determined that the Agency for Health Care Administration (AHCA) claimed Federal Financial Participation (FFP) for emergency services to beneficiaries that did not meet the Federal Definition of undocumented alien. In addition, AHCA claimed FFP for additional medical services that did not qualify as emergency care after the patient was stabilized." Finding

no. 2 and recommendations no. 5 and 6 of the report resulted in the Agency actions that gave rise to this proceeding.

30. Finding no. 2 stated: "AHCA is claiming FFP for emergency medical services to undocumented aliens provided beyond what Federal statutes and regulations define to be an emergency." Recommendation five stated:

> AHCA should review all emergency services for undocumented alien amounts claimed for FFP during Federal Fiscal Years 2005, 2006 and 2007 and re-determine allowability of these claims utilizing the required Federal criteria. Based on this review and re-determination, AHCA should revise previous FFP amounts claimed on the From CMS-64 quarterly statement of expenditures report to reflect only emergency services to undocumented aliens (supported by SAVE and IVES research) up to the point of stabilization. Upon completion, please report the results of your review to CMS.

31. Recommendation no. 6 states that: "AHCA promptly implement the necessary system edits so that services provided as emergent care can be differentiated from services provided after the point the patients are stable, and then bill to the proper Federal programs."

32. CMS did not recommend that Florida change its statutes or rules governing Medicaid eligibility of undocumented aliens. It only recommended enforcement of existing law.

33. The Agency began working to implement the recommendations. KePRO presented a proposal to expand the scope of its services that it described in this fashion:

> It is our understanding that the Agency for Health Care Administration used internal resources to conduct such [emergency care for undocumented aliens] reviews. Previously, cases were authorized for payment using medical necessity criteria verses [sic] 'point of stabilization.' Approximately 12,000 cases dating back to 2006 fall into this category. This presents the Agency with an opportunity to recoup payments for hospital days that exceeded the "point of stabilization".

34. The Agency and KePRO amended their Contract No. MED075 to include review of claims for emergency services to undocumented aliens to determine if the services continued beyond the duration of the emergency. Among other things, Amendment 3 to the contract, using the language of the federal regulation, provided:

> All services that are approved by the Vendor for undocumented non-citizens, or aliens, must comply with the federal requirements for Medicaid coverage of emergency services. Authorization for this population shall be limited to the duration of the emergency, as cited in § 42 CFR 440.255.

35. But Amendment 3 also included this requirement:

> When reviewing requests for inpatient admissions for undocumented non-citizens or aliens (individual who meet all the requirements for Medicaid eligibility except for citizenship or alien status) the Vendor shall utilize InterQual ISD-AC® (Intensity

> of Service and Severity of Illness for Critical Care) Review Criteria to determine the point at which the emergency no longer exists and the patient is medically stable. The Vendor shall develop modifications to the criteria based on Medicaid policy. The Agency shall have prior approval of any changes made to the inpatient review criteria.

36. The Agency and KePRO began the review process. The requirements are included in the Agency's contracts with KePRO's successors.

37. The contract required KePRO to conduct a campaign to educate providers about the new review criteria and standards. KePRO and the Agency both embarked on an education campaign.

38. The Agency began advising providers of the coming changes in review and authorization of Medicaid services for undocumented aliens.

39. The Chief of the Bureau of Medicaid Services advised hospital services providers in a May 28, 2010, letter that, beginning July 1, 2010, KePRO would "implement revised review processes for authorization of inpatient admissions for undocumented aliens." The letter included this cautionary sentence: "Medicaid will not pay for continuous or episodic care after the emergency has subsided and the person is stabilized."

40. A July 1, 2010, letter to all Medicaid providers from the chief of the Bureau of Medicaid Services advised of upcoming

changes to the Agency's procedure and practice for reviewing claims for undocumented aliens. It stated:

> **Beginning July 1, 2010,** the Keystone Peer Review Organization (KePRO), Medicaid's contractor for utilization management of inpatient services, will implement revised review processes for inpatient admissions for undocumented aliens. KePRO will review these requests to determine whether conditions requiring hospitalization are an emergency, defined in 42 CFR 440.255 as follows:
>
> The sudden onset of a medical condition (including emergency labor and delivery) manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in:
>
> - Placing the patient's health in serious jeopardy;
> - Serious impairment to bodily functions; or
> - Serious dysfunction of any bodily organ or part.
>
> Medicaid will not pay for continuous or episodic care after the emergency has subsided and the patient is stabilized.

41. The letter also stated:

> **Professional services provided to an inpatient alien on or after the date that the patient has been stabilized will not be reimbursed by Medicaid.** From the point of patient stabilization, the patient may continue to require medically necessary treatment; however, Medicaid cannot reimburse medically necessary treatment for aliens, only emergency treatment.

42. The Agency described the changes, using similar language in Health Care Alerts and Provider Alerts Messages to

providers in July 2010, used to advise providers of "late-breaking" information included in Medicaid policy clarifications. Many Agency e-mails and memoranda, both internal and external, used much the same language to describe the changes.

43. KePRO started the required training in June 2010. An August 17, 2010, KePRO memorandum to all providers says: "As you are aware, on July 1, 2010, a change in the review of undocumented aliens occurred."

44. The Power Point presentation for a KePRO provider training program on June 8, 2010, is representative of the message in the training and education programs.

> Stabilization vs. Medical Necessity
> How will these requests be different?
>
> Medical services for aliens will be reviewed to the point of stabilization not medical necessity as eligibility can be authorized only for the duration of the emergency
>
> Any request for undocumented aliens submitted on or after 7/1/10 will be reviewed for medical stability as opposed to medical necessity.

45. A December 20, 2010, KePRO Presentation titled, "Undocumented Alien Inpatient Review Project" asks, "What does this mean for the project?" It answers: "Cases previously reviewed for medical services provided to aliens during the years 2006-2010 will be re-reviewed to the point of stabilization, as

eligibility can be authorized only for the duration of the emergency."

46. The presentation also advises: "Reviews will be completed utilizing InterQual criteria critical care subsets for adults and children."

47. It goes on to say: "Only the 1 intensity of Services (IS) treatments/interventions category will be applied for stabilization reviews . . . 3 starred IS will not be utilized in determining approval."

48. KePRO's KeNotes Summer Edition tells providers:

> Beginning July 1, 2010, in conjunction with the Agency for Health Care Administration (Agency), KePRO will implement revised review processes for authorization of inpatient admissions for undocumented aliens in order to ensure compliance with federal requirements. KePRO will begin to review these requests to determine whether the condition is an emergency as defined in 42 CFR 440.255.
>
> Medicaid will not pay for continuous or episodic care after the emergency has subsided and the person is stabilized.

49. The record does not establish the reasoning for the Agency and KePRO choosing to add "point of stabilization" and "emergency has subsided" as the standards, rather than simply use the language of the governing federal and state statutes and rules.

50. "Stabilization" is not a common medical term with a uniform, generally understood meaning. The persuasive weight of the credible evidence, including testimony from the Agency's physician experts reviewing claims for reimbursement for emergency medical services and attempting to identify a point of "stabilization," establishes that "alleviation," used in the rules, and "stabilization" are not necessarily the same thing from a medical standpoint and are certainly not identical.

51. For instance, Adam Berko, D.O., distinguished "alleviate" as meaning lessen or relieve while "stabilize" would be to keep from changing. The point of alleviation and stabilization can be two different dates.

52. Another doctor, Douglas Baird, D.O., views "stable" as meaning the patient is no longer in danger of death or significant bodily harm, while "alleviate" means the symptoms were "reversed, removed, corrected, made more bearable . . . ."

53. The testimony of Jack Wilson, M.D., is another example. He testified that "stabilization" is not how he determines the end of a medical emergency.

54. This testimony, among other evidence, established that the "point of stabilization" standard was an interpretation or an implementation of the existing statutes and rules not merely a re-statement of them. The "point of stabilization" was not just

saying the same thing a different way. The Agency's descriptions of the new process confirm this conclusion.

55. In 2010 and 2011, the Agency advised the Executive Office of the Governor of the changes in the review of claims for Medicaid reimbursement for emergency services to undocumented aliens.

56. A report to the Governor titled, "The State's Efforts to Control Medicaid Fraud and Abuse FY2009-2010, Submitted by the Agency for Health Care Administration and Medicaid Fraud Control Unit Department of Legal Affairs (December 2010)," at page 21, discussed the Agency's efforts and achievement in the "Utilization Norm and Utilization Management" section. It states:

> Developed an authorization process for inpatient emergency services for undocumented aliens to determine the point of stabilization, including prospective and retrospective reviews of hospital admissions for undocumented aliens to determine whether the stay meets standardized criteria for emergency services. This process was implemented on July 1, 2010. By applying these more stringent criteria, the opportunity for overpayments is reduced.

57. The next year's edition of "The State's Efforts to Control Medicaid Fraud and Abuse FY2010-2011, Submitted by the Agency for Health Care Administration and Medicaid Fraud Control Unit Department of Legal Affairs" (December 2011), at page 21, again discussed the Agency's efforts and achievement in the

"Utilization Norm and Utilization Management" section. It states:

> Implemented, on July 1, 2010, an authorization process for inpatient emergency services for undocumented aliens to determine the point of stabilization, including prospective and retrospective reviews of hospital admissions for undocumented aliens to determine whether the stay meets standardized criteria for emergency services. By applying these more stringent criteria prior to payment, the opportunity for overpayments is significantly reduced.

58. The weight of the persuasive, credible evidence proves that effective July 1, 2010, the Agency began applying a new uniform, generally applied interpretation and implementation of the statutes, rules, and regulations limiting the eligibility of undocumented aliens for Medicaid payment for emergency services and that the Agency intended for the interpretation to have the direct and consistent effect of law.

59. The weight of the persuasive, credible evidence also proves that effective July 1, 2010, the Agency began generally applying and implementing a uniform interpretation of the "duration of the emergency" limitation upon Medicaid payment for emergency services that the Agency intended to have the direct and consistent effect of law.

60. The evidence does not prove and the Agency does not claim that rulemaking was impractible or not feasible. The

effort that went into organizing the changes that took effect July 1, 2010, and the time that passed after the August 2010 memorandum from CMS establish that rulemaking was practible and feasible.

CONCLUSIONS OF LAW

61. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.56(4), 120.569 and 120.57(1), Florida Statutes (2012).

62. An "unpromulgated rule challenge" like this presents a narrow and limited issue. That issue is whether an agency has by declaration or action established a statement of general applicability that is a "rule," as defined in section 120.52(16), without going through the required public rulemaking process required by section 120.54. The validity of the agency's statement is not an issue decided in an "unpromulgated rule challenge." The Petitioners bear the burden of establishing by a preponderance of the evidence that the challenged agency statements are unpromulgated rules. See Bravo Basic Material Co., Inc. v. Dep't of Transp., 602 So. 2d 632 (Fla. 2d DCA 1992); Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

63. Here the Petitioners claim that the review process relying on the "point of stabilization" standard was an

unpromulgated rule. The Agency maintains that the process was only enforcement of existing standards that it had not been enforcing before July 1, 2010. Effectively, the Agency argues that "point of stabilization" is just another way of describing what governing rules and statutes describe as the end of services necessary to treat an emergency medical condition or alleviation of an emergency.

64. Section 120.52(16) defines rule, with exceptions that do not apply here, as:

> "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.

65. The question is does the Agency's "stabilization" standard implement, interpret, or prescribe law or policy. Rules are:

> "[T]hose statements which are intended by their own effect to create rights, or to require compliance, or otherwise to have the direct and consistent effect of law." Agency for Health Care Admin. v. Custom Mobility, 995 So. 2d 984, 986 (Fla. 1st DCA 2008)(quoting McDonald v. Dep't of Banking & Fin., 346 So. 2d 569, 581 (Fla. 1st DCA 1977). If the effect of an agency statement is to create certain rights or adversely affect other rights, it is a rule. Dep't of

> Admin. v. Harvey, 356 So. 2d 323, 325 (Fla. 1st DCA 1977).

Coventry First, LLC v. Off. of Ins. Reg., 38 So. 3d 200, 203 (Fla. 1st DCA 2010).

66. Judge Rowe's opinion emphasizes that the effect of the standard is a consideration in answering the question. If the effect is to create certain rights or adversely affect other rights, the statement is a rule. Id. at 204.

67. The Agency's "stabilization" standard limited the right of providers to Medicaid payment for services given to undocumented aliens. It did not track the language of the governing statutes and rules. It was not a case-by-case guide for decision making. It was consistently applied for all patients, all emergency services, and all providers. The educational material, the Agency's own reports, testimony at the hearing, and the instructions given physician reviewers established this. The "stabilization" standard differs markedly from the facts in Coventry, which did not establish the existence of an unpromulgated rule.

68. The practice examined in Coventry was the Office of Insurance Regulation requesting production of documents and reviewing them to determine whether the licensee's out-of-state transactions violated a prohibition against intentionally facilitating a change of person's state of residency to avoid

Florida's regulation of viatical settlements. The office's internal policies and procedures provided a guideline for examiners, including an outline of items to look for during the examination. The outline tracked the language of the statute. Examiners had authority to deviate from the guidelines. Id.; Coventry First, LLC, v. Off. Ins. Reg., Case No. 09-3944RU (Fla. DOAH Nov. 13, 2009). The Agency's standard is nothing like the practice described in Coventry.

69. The "stabilization" standard instead is like the tax assessment procedure that the Fifth District Court of Appeal determined was an unpromulgated rule in Department of Revenue v. Vanjaria Enterprises, 675 So. 2d 252, 255 (Fla. 5th DCA 1996). In that case, the Department of Revenue implemented a statutory requirement to allocate taxable rental payments on multi-use properties using the proportions of the property's square footage used for exempt and for taxable purposes. The property owner argued that the allocation should be based upon the percentage of property revenue generated by the taxable activity. The statute the Department was applying was silent about how to allocate revenue among the taxable and non-taxable activities. It only directed that the Department determine "that portion of the total rent charge which is exempt from the tax imposed by this section." Vanjaria at 254. The Department's decision to use square footage to determine which rent was exempt from taxation

was not, the court concluded, mere direct application of the statute. It was an interpretation that the law requires be adopted as rule.

70. The Agency's "stabilization" standard is much the same. It is not merely a direct application of the rules and statutes as the Agency argues. It is an interpretation of the rules and statutes. The Findings of Fact establish this. Two opinions rejecting the validity of a "stabilization" test for determining whether services to an undocumented alien are reimbursable by Medicaid support this conclusion. Scottsdale Healthcare, Inc. v. Ariz. Health Care Cost Containment, 206 Ariz. 1; 75 P.3d 91 (Ariz. 2003); Luna v. Div. of Soc. Servs., 162 N.C. App. 1; 589 S.E. 2d 917 (Ct. Appeals 2004).

71. Whether "stabilization" is a correct standard is not the issue here. But the Scottsdale and Luna opinions are persuasive authority for the conclusion that "stabilization" is an interpretation, not regurgitation, of the standards of title 42 U.S.C. section 1396b(v), 42 C.F.R. section 40.255, and the Florida Statutes and rules flowing from them. See also Michael J. McKeefery, Comment: A Call to Move Forward: Pushing Past the Unworkable Standard that Governs Undocumented Immigrants' Access to Health Care Under Medicaid, 10 J. HealthCare L. & Pol'y 391 (2007) (describing section

1396b(v) as ambiguous and examining various interpretations for its application).

72. The Agency relies upon the "deference to agency expertise and interpretation" principle articulated in cases such as Verizon Fla., Inc. v. Jacobs, 810 So.2d 906, 908 (Fla. 2002). The argument inadvertently supports concluding that the Agency has established a "rule." To defer to the Agency's expertise in this case, one must first accept that the Agency has exercised its expertise to make an interpretation of the eligibility statutes and rules. That is what the Agency has done. And that amounts to a rule.

73. The Agency relies upon the Federal Emergency Medical Treatment and Labor Act to justify its use of "stabilization" in the determination of the duration of an emergency. That federal law deals with a hospital's duty to treat all patients coming to its emergency room, regardless of whether they are Medicaid eligible, and limits transferring the patients until they are stabilized. It does not establish that an emergency condition has ended when a patient is stabilized, and it does not govern determination of the duration of an emergency for purposes of Medicaid eligibility of undocumented aliens under 42 U.S.C. section 1396b(v). Scottsdale Healthcare, Inc. v. Ariz. Health Care Cost Containment, 206 Ariz. 1, 7; 75 P.3d 91, 97 (Ariz. 2003).

74. The Agency's "stabilization" standard for determining which services to undocumented aliens Medicaid will pay for is a statement of general applicability meeting the definition of a rule that has not been adopted pursuant to section 120.54(1)(a).

74. Petitioners seek attorneys' fees and costs pursuant to section 120.595(4)(a) for bringing this proceeding. Section 120.595(4)(a) provides that if an appellate court or an Administrative Law Judge determines that all or part of any agency statement violates section 120.54(1)(a), 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. The Agency has not made, asserted, or proven that the "stabilization" standard is required by the Federal government.

75. Because the Agency statements about and application of the "stabilization" standard violate section 120.54(1)(a), Petitioners are entitled to recover fees and costs in this action pursuant to section 120.595(4)(a).

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Agency's statements about and application of the "stabilization" standard meet the definition

of a rule that has not been adopted pursuant to section 120.54(1). The Agency must immediately discontinue all reliance upon the "stabilization" standard or any substantially similar statement as a basis for agency action.

Jurisdiction is retained for the purpose of determining, if necessary, the amount of reasonable attorneys' fees and costs. If the parties are unable to resolve the amount of the fees and costs to be awarded, Petitioners shall file with the Division of Administrative Hearings a written request for hearing on the issue of the amount of fees. Any such request for hearing must be filed no later than 60 days after the date of this Final Order.

DONE AND ORDERED this 21st day of December, 2012, in Tallahassee, Leon County, Florida.

JOHN D. C. NEWTON, II
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of December, 2012.

ENDNOTES

[1/] The Petitioners' standing is undisputed. The two unilateral pre-hearing statements did not identify standing as an issue in the proceeding. Neither party entered evidence on the issue. Both proposed orders assume the standing of the Petitioners and the facts necessary to establish standing.

[2/] All statutory references are to Florida Statutes (2012), unless otherwise noted.

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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 administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.