STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA INSTITUTE FOR NEUROLOGIC REHABILITATION,	)	
Petitioner,	)	
vs.	)	Case No. 12-3463RX
DEPARTMENT OF HEALTH,	)	
Respondent.	)	

FINAL ORDER

Pursuant to notice, a formal hearing in this case was held on November 15, 2012, before Suzanne Van Wyk, duly-appointed Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioners: Jay Adams, Esquire
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For Respondent: Tiffany A. Harrington, Esquire
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STATEMENT OF THE ISSUE

Whether Florida Administrative Code Rule 64I-1.005(1)(b) enlarges, modifies or contravenes the specific provisions of law implemented, or is arbitrary or capricious, and thus constitutes an invalid exercise of delegated legislative authority pursuant to section 120.52(8), Florida Statutes.

PRELIMINARY STATEMENT

On October 19, 2012, Florida Institute for Neurologic Rehabilitation (FINR) filed a Petition for Determination of Invalidity of Existing Rule to challenge the validity of rule 64J-2.010.

This matter was set for hearing on November 15, 2012. On November 8, 2012, Respondent, Department of Health, filed a Motion for Summary Final Order, which was denied.

On November 14, 2012, Respondent filed a Motion to Exclude Evidence, a Motion to Exclude Witness, and a Motion for Oral Argument on Motions to Exclude Evidence and Witness Testimony. The undersigned held a telephonic hearing on the motions on November 14, 2012, granting both motions, in part.

The final hearing was held as scheduled on November 15, 2012, in Tallahassee, Florida. At hearing, Petitioner presented the testimony of Jeffrey Walden, Ph.D, a neuropsychologist and director of FINR Community Integration Program, accepted as an expert in clinical neuropsychology; Jorge Villalba, M.D., FINR

Chief Medical Officer, accepted as an expert in psychiatry and brain injury rehabilitation; and Joseph Brennick, owner of FINR. Petitioner's Exhibits numbered 1 through 6 were accepted into evidence at hearing.

Respondent presented no evidence or testimony at the final hearing.

The undersigned held the record open until November 20, 2012, for late-filed exhibits. Respondent's Exhibits numbered 8, 9, and 10 were timely submitted on November 16, 2012.

At the final hearing, the undersigned denied Petitioner's request to introduce into evidence an excerpt from the deposition of Thom DeLilla, Respondent's agency representative, and Petitioner proffered the exhibit. Upon further reflection, the undersigned issued an Order on Proffered Exhibit on November 16, 2012 reversing that ruling, requiring the exhibit be filed by November 20, 2012 and requesting Respondent to notify the undersigned in writing by November 20, 2012 should they require additional evidentiary time in rebuttal. Petitioner timely filed the deposition excerpt as Exhibit 11 on November 16, 2012. Respondent did not file a request for additional evidentiary time.

The final hearing Transcript, comprising one volume, was filed with the Division on December 4, 2012. Both parties timely filed Proposed Final Orders on December 14, 2012, which

have been carefully considered in the preparation of this Final Order.

FINDINGS OF FACT

The Parties

1. FINR is licensed by the Florida Agency for Health Care Administration (AHCA) as a "Transitional Living Facility" (TLF), pursuant to both the "Health Care Licensing Procedures Act," section 408.801 et seq., Florida Statutes, and section 400.805, Florida Statutes (2011).[1/]

2. FINR is located in Wauchula, Florida, and, as of the date of the final hearing, was treating 84 patients, approximately 45 of whom suffered from non-traumatic brain or spinal cord injury, while the remainder suffered from traumatic brain or spinal cord injuries.

3. Traumatic brain injuries are those resulting from external trauma, such as rapid deceleration in an automobile accident or a fall, or a penetrating injury such as a gunshot.

4. Non-traumatic brain injuries result from internal phenomena, such as stroke, anoxia, or disease.

5. Respondent, Department of Health (the Department), is the state agency charged with adoption of rules governing the services provided to clients of TLFs, and enforcing all requirements for providing services to TLF clients. See § 400.805(3)(b), Fla. Stat.

6. Both the Department and AHCA are authorized to conduct inspections, or site surveys, of licensed TLFs. See §§ 400.805(4) and 408.811, Fla. Stat.

7. The Department is also the state agency charged with administering the Brain and Spinal Cord Injury Program (BSCIP), a multi-level treatment program for persons with traumatic brain and spinal cord injuries, pursuant to the Charlie Mack Overstreet Brain or Spinal Cord Injuries Act, sections 381.739-381.79, Florida Statutes.

8. The Department requires TLFs to be accredited by the Council on the Accreditation of Rehabilitation Facilities ("CARF") as a prerequisite to approval under the BSCIP.

9. All programs and services seeking CARF accreditation must meet the standards promulgated by CARF through its Medical Rehabilitation Standards Manual (CARF Manual).

10. The CARF manual defines "acquired brain injury" to encompass both traumatic and non-traumatic etiologies, or causes, of brain injury.

11. While every patient suffering from acquired brain injury has different medical needs, when a patient is ready for rehabilitation there is little, if any, difference in the management strategies for persons with traumatic and non-traumatic brain injuries.

12. In Florida, persons with acquired brain injury may receive rehabilitation services at a variety of facilities, including transitional living facilities, nursing homes, and assisted living facilities. Persons not requiring residential care may be outpatients, may be in a day treatment program, or may be receiving supportive services in their home.

FINR Site Surveys

13. FINR has been licensed by AHCA as a TLF since November 1993, and as such, has been surveyed by the Department and AHCA from time to time.

14. On December 6, 2005, the Department and AHCA conducted a site survey at FINR, and, based on the results of the survey, recertified FINR as "a state designated Brain and Spinal Cord Injury Transitional Living Facility."

15. The survey report from the 2005 inspection, issued February 22, 2006, notes as follows:

> The site review revealed that the program has many consumers with various disabling conditions occupying designated TLF beds. Many of the consumers have an acquired related brain injury, i.e., stroke, anoxia, birth defects, and disease. A large number do have traumatic brain injury as defined by the state definition in the 'Facility Designation Standards' revised April 2005.
>
> It is recommended that the Florida Institute for Neurological Rehabilitation reevaluate its need for having so many designated TLF beds vs. the actual number of true

> 'traumatic' brain injured consumers in their program.

16. FINR was surveyed by a team from AHCA and the Department more recently on August 2 and 3, 2012, following adoption of Florida Administrative Code Rule 64I-1.005(1)(b).

17. The 2012 survey report notes the following licensee deficiency:

> Pursuant to Section 400.805(1)(c), F.S., the facility failed to ensure each resident admitted to the facility met the criteria for admission to a transitional living facility. A review of the monthly summary report for the 98 residents that included the admitting diagnosis revealed that 50 did not include an appropriate admitting diagnosis of spinal-cord-injured or head-injured.

The Rule

18. Petitioner challenges Florida Administrative Code Rule 64I-1.005(1)(b) (the Rule), which reads as follows:

> 64I-1.005 Transitional Living Facility (TLF) Services.
>
> (1) Services:
>
> * * *
>
> (b) TLF services are solely for persons who have sustained brain or spinal cord injury as defined in Section 381.745(2), F.S.;

19. Section 381.745(2) defines "brain or spinal cord injury" to mean only those injuries resulting from external trauma.

20. The term "services" is not statutorily limited for purpose of licensing TLFs. Section 400.805(1)(c) provides that specialized health care services provided by TLFs include "but [are] not limited to, rehabilitative services, community reentry training, aids for independent living, and counseling."

21. FINR provides to its patients rehabilitative services, community reentry training, aids for independent living, and counseling.

22. Pursuant to section 381.75, TLFs must provide "at least the following therapies" to persons suffering from traumatic brain or spinal cord injury: "physical, occupational, speech, neuropsychology, independent living skills training, behavior analysis for programs serving brain-injured individuals, health education, and recreation." § 381.75(6)(c), Fla. Stat.

23. FINR provides to its patients occupational, physical and speech therapies; neuropsychological assessment; nursing and psychiatric services; counseling; vocational and community integration training; as well as recreational activities.

24. The effect of the Rule is to prohibit FINR from providing services to its patients who suffer <u>non</u>-<u>traumatic</u> brain and spinal cord injury.

25. FINR is substantially affected by the Rule.

The TLF Statute

26. Statutory regulation of TLFs in Florida began in 1990, when the Legislature added TLFs to chapter 400, Part I, Florida Statutes, regulating Nursing Homes. See ch. 90-330, § 1, Laws of Fla.

27. The law defined TLF as follows:

> 'Transitional Living Facility' means a related health care facility which provides specialized health care services, including, but not limited to, rehabilitation services, community reentry training, aids for independent living, and counseling to spinal-cord-injured persons and head-injured persons. Any hospital licensed under chapter 395 is exempt from the provisions of this definition.

§ 400.021, Fla. Stat. (1991).

28. The law charged the Department of Health and Rehabilitative Services (HRS), in consultation with the Division of Vocational Rehabilitation, Department of Labor and Employment Security (the Division), to develop rules for licensing TLFs. See ch. 90-330, § 2, Laws of Fla.

29. In 1993, the Legislature created section 400.805, Florida Statutes, "Transitional Living Facilities," relocating TLF provisions from Part I, Nursing Homes, to Part VIII, Intermediate, Special Services, and Transitional Living Facilities. See ch. 93-217, § 36, Laws of Fla. The law transferred licensure of TLFs to the Agency for Health Care

Administration from its predecessor, HRS, and set forth the process and fees for licensure, as well as penalties for violations of the licensing statute. However, the definition of TLF remained essentially unchanged.[2/]

30. The section was amended again in 1998, when the Legislature added detailed provisions regarding the right of entry and inspection of TLFs, warrant requirements, and legal remedies for violations that affect the health, safety, or welfare of TLF residents. See ch. 98-12, Laws of Fla.

31. In 1999, the TLF statute was amended again to transfer, from the Division to the Department of Health, the duty to adopt rules governing the services provided to clients of TLFs. See ch. 99-240, Laws of Fla.

32. In 2006, the Florida Legislature enacted the "Health Care Licensing and Procedures Act," Part II, chapter 408, Florida Statutes (the Act), to "provide a streamlined and consistent set of basic licensing requirements for all [health care] providers in order to minimize confusion, standardize terminology, and include issues that are otherwise not adequately addressed in the Florida Statutes pertaining to specific providers." § 408.801, Fla. Stat. Part II governs the licensing requirements, procedure, and fees for an exhaustive list of health care facilities, including TLFs. See § 408.801, et seq., Fla. Stat. (2005).

33. Section 400.805 was significantly amended in 2007, following adoption of the Act. The Legislature deleted all the detailed licensure provisions from 400.805 and replaced them with a specific cross-reference to part II of the Act, incorporating the licensing requirements and licensing procedures of the Act into the TLF statute. See ch. 2007-230, Laws of Fla.

34. The TLF statute was not amended again until 2010 when the Legislature revised regulations relating to background screening of employees at TLFs. See ch. 10-114, § 11, Laws of Fla.

35. The current TLF licensing statute reads, in pertinent part, as follows:

> 400.805 Transitional living facilities.—
> (1) As used in this section, the term:
> (a) "Agency" means the Agency for Health Care Administration.
> (b) "Department" means the Department of Health.
> (c) "Transitional living facility" means a site where specialized health care services are provided, including, but not limited to, rehabilitative services, community reentry training, aids for independent living, and counseling to spinal-cord-injured persons and head-injured persons. This term does not include a hospital licensed under chapter 395 or any federally operated hospital or facility.
>
> * * *
>
> (3)(a) The agency shall adopt rules in consultation with the department governing

> the physical plant of transitional living facilities and the fiscal management of transitional living facilities.
> (b) The department shall adopt rules in consultation with the agency governing the services provided to clients of transitional living facilities. The department shall enforce all requirements for providing services to the facility's clients. The department must notify the agency when it determines that an applicant for licensure meets the service requirements adopted by the department.

§ 408.805, Fla. Stat. (2011)(emphasis added).

36. The Department adopted no rules to implement this mandate until 2011. One of those rules is the subject of the instant rule challenge.

Florida Brain and Spinal Cord Injury Program

37. The Department relies, in large part, upon its rulemaking authority under the BSCIP in support of its adoption of the Rule. Some background of the BSCIP is essential to an understanding of this case.

38. The Legislature first addressed statewide assessment and treatment of brain and spinal cord injuries in 1974, well before enactment of TLF statute. The Legislature created sections 413.504 through 413.604, Florida Statutes, expressing the intent to provide for development of a coordinated rehabilitation program for persons with spinal cord injuries. See ch. 74-254, § 4, Laws of Fla. The law required HRS to develop a plan for establishing a multi-level treatment program

for persons with spinal cord injuries and present the plan to the secretary for review by March 1, 1977. § 413.603, Fla. Stat. (1985). The Legislation required HRS to include the following components in the plan:

- An emergency medical evacuation system to ensure persons with spinal cord injuries would be transported to an intensive trauma care center in a timely manner. See § 413.603(1).
- A system of intensive trauma care centers, a number of which to be based on need, equipped to treat spinal-cord-injured persons to prevent paralysis and transfer the person to rehabilitation as soon as possible. See § 413.603(2).
- A system of rehabilitation centers to provide services for persons transferred from the trauma centers and for other persons with spinal cord injuries requiring rehabilitation services. The number of centers was to be based on need and each center was to consist of a special medical unit with appropriate professional personnel and expertise. See § 413.603(3).
- A system of "half-way houses" for individuals "who need attendant care, who are in adjustment periods, who require a structured environment, or who are in retraining or educational programs." § 413.603(4), Fla. Stat. (1985)(emphasis added).
- A system for assessing a fee for residents of said facilities, based on ability to pay. See § 413.603(5).

39. The legislation also required HRS to survey nursing homes and identify residents 55 years of age and younger with spinal cord injuries, evaluate their fitness for rehabilitation, and offer them the opportunity to participate in the program.

See § 413.604, Fla. Stat. (1985). Finally, the legislation created an advisory council on spinal cord injuries to provide advice and expertise to HRS in preparation, implementation, and periodic review of the rehabilitation program. See § 413.605, Fla. Stat. (1985)

40. As to persons with head injuries, the 1974 legislation created sections 413.611 and 413.612, Florida Statutes. The legislation defined "head injury" as "an insult to the skull, brain, or its covering, resulting from external trauma which produces an altered state of consciousness or anatomic, motor, sensory, or cognitive/behavioral deficits." § 413.612, Fla. Stat. (1985)(emphasis added). The legislation expressed the intent to collect information on head-injured persons, to develop head injury treatment and rehabilitation programs, and ensure the referral of head-injured persons to HRS in order to ensure they obtain "appropriate rehabilitative services" either through HRS or other providers. The legislation also created an Advisory Council on Head Injury to assist HRS in developing a coordinated multi-level plan of care to be presented to the secretary for review and approval by July 1, 1986. See § 413.605, Fla. Stat.

41. In 1987, the programs (both spinal cord and head injury) were transferred from HRS to the Department of Labor and Employment Security, Division of Vocational Rehabilitation (the

Division). See ch. 87-320, Laws of Fla. Otherwise, the provisions remained essentially unchanged.

42. In 1990, the legislature replaced the term "half-way house" in section 413.603(4) with the term "transitional living facility", revising the multi-level system for treatment of persons with traumatic spinal cord and head injury to include (1) intensive trauma care centers, (2) rehabilitation centers, and (3) transitional living facilities. See ch. 90-330, § 7, Laws of Fla.

43. The 1990 legislation defined TLF by direct cross-reference to section 400.021(16), the definition of TLF added the same year in the Nursing Home licensing statute. See ch. 90-330, § 5, Laws of Fla.

44. In 1994, the year after the Legislature adopted the TLF statute, the Legislature enacted an omnibus bill relating to rehabilitation of persons with disabilities. See ch. 94-324, Laws of Fla. The bill created the "Charlie Mack Overstreet Brain and Spinal Cord Injury Act" at section 413.456 et seq. (the Act), consolidating the former provisions, relating separately to spinal cord injury and head injury, into the state Brain and Spinal Cord Injury Program (BSCIP or the Program). See ch. 94-324, §§ 32-34, Laws of Fla. The Program retained the characteristics of a multi-level treatment program, requiring creation and maintenance of a central registry of injured

persons, referral to the registry, emergency evacuation of injured persons, and progressive treatment of injured persons, beginning with trauma centers, and including continuing treatment in inpatient and outpatient rehabilitation centers. See Id.

45. The Act covered treatment of persons with "brain injury," rather than the term "head injury" used in prior statutes. See Id. However, as enacted in 1994, the Act did not define "brain injury."

46. The Act limited Program eligibility to persons suffering "traumatic injury," which was defined as follows:

> (a) A lesion to the spinal cord or cauda equina with evidence of significant involvement of two of the following deficits or dysfunctions:
>
> 1. Motor deficit.
>
> 2. Sensory deficit.
>
> 3. Bowel and bladder dysfunction; or
>
> (b) An insult to the skull, brain, or its covering, resulting from external trauma, which produces an altered state of consciousness or anatomic motor, sensory, cognitive, or behavioral deficits.

ch. 94-324, § 4, Laws of Fla.

47. The Act defined "transitional living facilities" to mean "state approved facility[ies] as defined and licensed pursuant to chapter 400 and division-approved in accord with

this part." ch. 94-324, § 4, Fla. Laws. (emphasis added). The 1994 Act gave AHCA the duty of adopting rules for licensure of transitional living facilities for persons who have brain or spinal cord injuries, but did not amend any provision of the TLF licensing statute enacted the prior year. See ch. 94-324, § 34, Laws of Fla. The bill required the Division to "develop standards for designation of transitional living facilities to provide individuals the opportunity to adjust to their disabilities and to develop physical and functional skills in a supported living environment." ch. 94-324, § 34, Laws of Fla.

48. In 1998, the Legislature amended the BSCIP Act by adding to section 413.49 the duties of transitional living facilities with respect to patients in the Program. See ch. 98-12, § 2, Laws of Fla. The amendment required TLFs to offer "at least the following therapies: physical, occupational, speech, neuropsychology, independent living skills training, behavior analysis for programs serving brain-injured persons, health education, and recreation." Id. The amendment also required TLFs to develop an initial treatment plan for each resident, as well as a comprehensive plan of treatment and discharge within 30 days after admission. See Id.

49. In 1999, the Program was transferred in its entirety from the Division to the Department of Health and renumbered as sections 381.73-381.79, Florida Statutes, without substantive

change. See ch. 99-240, §§ 16-23, Laws of Fla. The revision states as follows:

> Effective January 1, 2000, the brain and spinal cord injury program established in sections 400.805 and 413.48, Florida Statutes, and the Office of Disability Determinations administered by the Department of Labor and Employment Security are transferred by a type two transfer, as defined in section 20.06, Florida Statutes, to the Department of Health.

ch. 99-240, § 15, Laws of Fla.

50. The law retained a cross-reference to the definition of "traumatic injury" in section 413.20, which had been renumbered. See ch. 99-240, § 20, Laws of Fla. The following year, the Legislature corrected this glitch, striking the reference to 413.20 and creating a new set of definitions for the Program, many of which were identical to the prior definitions in 413.20. See ch. 00-367, § 15 and 18, Laws of Fla. The 2000 Legislature also replaced the definition of "traumatic injury" with "brain and spinal cord injury" for purposes of determining Program eligibility. See ch. 00-367, § 15, Laws of Fla. The substantive difference was the addition of the phrase "resulting from external trauma" to the description of spinal cord injuries. See Id. Thus, the Legislature aligned Program eligibility for spinal-cord-injured persons with Program eligibility for brain-injured persons -- external trauma is required for participation in the Program.

51. In 2000, the Legislature also redefined "transitional living facility" as "a state-approved facility, as defined and licensed under chapter 400, or a facility approved by the brain and spinal cord injury program in accordance with this chapter." Id. (emphasis added).

52. Notably, the definition of TLF was amended again in 2006 to read as follows: "a state-approved facility, as defined and licensed under chapter 400 or chapter 429, or a facility approved by the brain and spinal cord injury program in accordance with this chapter." ch. 06-745, § 14, Laws of Fla.

53. Chapter 429, Florida Statutes, is titled "Assisted Care Communities" and governs licensing of Assisted Living Facilities, Adult Family-Care Homes, and Adult Day Care Centers.

54. The statutes governing eligibility for the Program, as well as designation of TLFs, and the role and responsibilities of TLFs in the Program, have remained unchanged since 2006.

CONCLUSIONS OF LAW

Jurisdiction and Standing

55. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding. See §§ 120.56(1)(c), 120.569 and 120.57(1), Fla. Stat. Section 120.56(1)(a) provides:

> Any person substantially affected by a rule or a proposed rule may seek an administrative determination of the

> invalidity of the rule on the ground that the Rule is an invalid exercise of delegated legislative authority.

56. Jurisdiction attaches when a person who is substantially affected by a rule claims that it is an invalid exercise of delegated legislative authority. The party challenging an existing agency rule has the burden to prove by a preponderance of the evidence that the Rule constitutes an invalid exercise of delegated legislative authority as to the objections raised. § 120.56(3)(a), Fla. Stat. Cortes v. State Bd. of Regents, 665 So. 2d 132 (Fla. 1st DCA 1995). The challenger's burden is a stringent one. Id.; Charity v. Fla. State Univ., 680 So. 2d 463 (Fla. 1st DCA 1996).

57. Substantial interest jurisdiction under section 120.569(1) does not require that a party prevail on the merits. See Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co., 18 So. 3d 1079, 1082-85 (Fla. 2d DCA 2009); Palm Beach Cnty. Envt'l Coal. v. Dep't of Envtl. Prot., 14 So. 3d 1076 (Fla. 2009). If a party's substantial interests "could be affected" or "could reasonably be affected," then that is enough to establish the substantial interests needed to obtain standing. See Peace River, 18 So. 3d at 1084; Palm Beach Cnty. Envt'l Coal., 14 So. 3d at 1078. The standing requirement is a "forward-looking concept [that] cannot 'disappear' based upon

the ultimate outcome of the proceeding." See Id., 18 So. 3d at 1083; 14 So. 3d at 1078.

58. Respondent has not contested Petitioner's standing to bring the instant rule challenge. Based on Findings of Fact numbered 1 through 25 above, Petitioner has demonstrated standing as a licensed TLF subject to rule 64I-1.005.

Invalid Exercise of Delegated Legislative Authority

59. Petitioner brought this rule challenge pursuant to section 120.56(1) and (3), Florida Statutes. Section 120.56(3)(a) provides:

> A substantially affected person may seek an administrative determination of the invalidity of an existing rule at any time during the existence of the rule. The petitioner has the burden of proving by a preponderance of the evidence that the existing rule is an invalid exercise of delegated legislative authority as to the objections raised.

60. Specifically, Petitioner challenges the Rule as an "invalid exercise of delegated legislative authority" pursuant to sections 120.52(8)(c) and (8)(e), which provide as follows:

> 'Invalid exercise of delegated legislative authority' means 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 if any one of the following applies:
>
> * * *

> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by section 120.54(3)(a)1.;
>
> * * *
>
> (e) The Rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational;
>
> * * *
>
> 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.

Added in 2008, section 120.52(17) provides:

> '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.'

61. This definition does not add new restrictions to agency rulemaking authority, but it does emphasize the existing restrictions cited in the definition of an "invalid exercise of delegated legislative authority." See Fla. Elec. Comm'n v. Blair, 52 So. 3d 9 (Fla. 1st DCA 2010). The term "law implemented" is also defined by Florida Statutes as "the language of the enabling statute being carried out or interpreted by an agency through rulemaking." See § 120.52(9), Fla. Stat.

62. Petitioner asserts that the Rule enlarges, modifies or contravenes the law it purports to implement because it improperly applies the eligibility criteria of the BSCIP -- traumatic head and spinal cord injury -- to all clients of TLFs. Pet. PFO, ¶ 36. Petitioner argues that the Rule is arbitrary or capricious because it imposes limitations that are contrary to the accreditation standards imposed by the Department itself; arbitrarily forecloses treatment options for persons with non-traumatic brain and spinal cord injuries; and negatively affects businesses and consumers, contrary to the statements made by Department staff at rule development workshops.[3/]

63. There is no dispute that eligibility for the BSCIP is limited to those patients who have suffered brain or spinal cord injury resulting from external trauma. See §§ 381.745(2) and 381.76, Fla. Stat. The essential question in this case is

whether the statutes cited by the Department as authority to adopt the Rule prohibit TLFs from serving patients suffering from non-traumatic brain and spinal cord injury.

64. Analysis of the issue must begin with an understanding of the Rule itself. The Rule governs services provided by TLFs: "TLF services are solely for persons who have sustained brain or spinal cord injury as defined in Section 381.745(2), F.S." Fla. Admin. Code R. 64I-1.005(1)(b). Notably, as promulgated by the Department, the Rule explicitly applies to services provided by TLFs outside the Program. See Fla. Admin. Code R. 64I-1.001(2)(h) ("'Services' means Services provided by the General Program"). Yet the definition of Services in Florida Administrative Code Rule 64I-1.001(2)(h) does not apply to the challenged Rule. See Fla. Admin. Code R. 64I-1.001(1)(applying the definitions therein only to sections 381.739 through 381.79 and rules 64I-1.001 through 64I-1.003).

Enlargement of Specific Law Implemented

65. At the outset, the undersigned notes that an agency's interpretation of an operable statute, which the agency is charged with administering, is entitled to deference. Kessler v. Dep't of Mgmt. Servs., 17 So. 3d 759, 762 (Fla. 1st DCA 2009). However, that deference is not absolute, and will not be afforded where the agency's view is contrary to the statute's plain meaning. See Id.

66. The Department cites sections 381.75 and 400.805, Florida Statutes, as the laws implemented by the Rule.

67. Under section 381.75 of the Act, the Department has the following authority with respect to TLFs: "The department shall develop standards for designation of transitional living facilities to provide individuals the opportunity to adjust to their disabilities and to develop physical and functional skills in a supported living environment." § 381.75(6), Fla. Stat. (emphasis added).

68. A "designated facility" under the Act means "a facility approved by the brain and spinal cord injury program which meets the criteria and standards of care of the brain and spinal cord injury program for individuals who have sustained a brain or spinal cord injury." § 381.745(6), Fla. Stat.

69. By definition since 2006, the Legislature has recognized a broad base from which the Program may designate TLFs to serve persons eligible for services provided by the Program. The Program definition of a TLF is "a state-approved facility, as defined and licensed under chapter 400 or chapter 429, or a facility approved by the brain and spinal cord injury program in accordance with this chapter." § 381.745(9), Fla. Stat. (emphasis added). When clauses in a statute are connected by the disjunctive "or" the application of the statute is not limited to cases falling within all clauses, but will

apply to cases falling within any of the clauses. See 73 Am. Jur. 2d, § 147, Statutes. Thus, a TFL serving patients in the Program is not limited to TLFs licensed under chapter 400, but may also include Assisted Living Facilities, Adult Family-Care Homes, and Adult Day Care Centers, as well as any facility otherwise approved by the Program.

70. The statutory direction to the Department in section 381.75 is to develop standards to designate, from the broad range of available TLFs, facilities to provide rehabilitation services required by persons with traumatic brain and spinal cord injuries.[4/]

71. However, the Rule does not provide any standard for designation of TLFs to serve individuals in the Program. As admitted by the Department in its Proposed Final Order, the Rule "prescribes that Transitional Living Facilities may only provide services to persons who have sustained traumatic brain and spinal cord injuries." Resp. PFO, p.2 (unnumbered introduction). As such, the Rule improperly expands the scope of the cited statute from TLF standard-setting to TLF client acceptance.

72. Furthermore, the authority provided the Department by section 381.75 is limited to standard setting for the Program. As concluded in paragraph 64 above, the Rule is clearly an exercise of the Department's authority outside the Program.

Section 381.75 does not confer any rulemaking authority to the Department outside of the Program. As such, section 381.75 is not law implemented by adoption of the Rule.

73. The Department's authority to govern services provided by TLFs is in section 400.805, the second statutory section cited by the Department as law implemented by the Rule. This provision is found in the TLF licensing statute and reads, "The department shall adopt rules in consultation with the agency governing the services provided to clients of transitional living facilities." § 400.805(3)(b), Fla. Stat.

74. TLF is defined in the licensing statute as "a site where specialized health care services are provided, including, but not limited to, rehabilitative services, community reentry training, aids for independent living, and counseling to spinal-cord-injured and head-injured persons." § 400.805(1)(c), Fla. Stat.

75. Yet, the Rule bears no relationship to the services to be provided by a TLF. The Rule does not govern the provision of rehabilitative services, community reentry training, aids for independent living, counseling, or any other service to patients.[5/] Instead, the Rule limits TLFs to treating only patients with traumatic brain and spinal cord injuries -- in essence, Program participants. As such, the Department carries over a Program eligibility restriction from the BSCIP into the

TLF licensing statute, arguing, in essence, that the term "head-injured" in the TLF licensing statute has the same meaning as "brain injury" used in the BSCIP.

76. Whether the two terms have the same meaning is a question of statutory construction. In matters of statutory construction, "legislative intent is the polestar that guides the Court." School Bd. of Palm Beach Cnty. v. Survivors Charter School, 3 So. 3d 1220, 1232 (Fla. 2009)(citing Bautista v. State, 863 So. 2d 1180, 1185 (Fla. 2003)). Any case of statutory construction must begin with the actual language of the statute, "because legislative intent is determined primarily from the statute's text." Mendenhall v. State, 48 So. 3d 740, 748 (Fla. 2010)(citations omitted).

77. TLFs are licensed by AHCA to serve "spinal-cord-injured and head-injured persons." Unlike the BSCIP statute, which defines "brain injury" as resulting from trauma, the TLF licensing statute does not define "head-injured." Where a statute does not define a term at issue, the term must be given its plain and ordinary meaning. See Nehme v. Smithkline Beecham Clinical Labs, Inc., 863 So. 2d 201, 204 (Fla. 2003). When necessary, the plain and ordinary meaning of words can be ascertained by reference to a dictionary. Id. at 205.

78. The term "injury" means "an act that damages or hurts". MERRIAM WEBSTER 2D www.merriam-webster.com/dictionary. The

term "injury" is broader than the definition of "trauma," which means "an injury (as a wound) to living tissue caused by an extrinsic agent." Id. In plain and ordinary language, a traumatic injury is a specific subset of injury, and does not have the same meaning. Thus, based on the plain language of the statute, traumatic injury is not a prerequisite to treatment of patients by AHCA-licensed TLFs.

79. It is axiomatic that when the legislature uses a term in one section of the statute, but omits it in another section of the same statute, courts should not imply it where it has been excluded.[6/] See Beshore v. Dep't. of Fin. Servs., 928 So. 2d 411, 412 (Fla. 1st DCA 2006)(citing Leisure Resorts, Inc. v. Frank J. Rooney, Inc., 654 So. 2d 911, 914 (Fla. 1995)); Staff Leasing and Liberty Mutual v. Special Disability Trust Fund, 784 So. 2d 512, 514 (Fla. 1st DCA 2001)(citing Beach v. Great Western Bank, 692 So. 2d 146, 152 (Fla. 1997), aff'd, 523 U.S. 410 (1998)). The definition of the term "brain injury" from section 381.745, and consequently the limitation of traumatic injury therein, cannot be inserted by implication in the licensing statute.

80. Further, as related statutes, the BSCIP statute and the TLF licensing statute must be read in pari materia and construed in such a manner to give effect to each part. See McDonald v. State, 957 So. 2d 605, 610 (Fla. 2007). One

provision of a statute should not be read in such a way that renders another provision meaningless. See Katherine's Bay v. Fagan, 52 So. 3d 19, 21 (Fla. 1st DCA 2010). As astutely argued by Petitioner, the Department's interpretation that the statutes limit TLFs to serving only patients with "brain injury" as defined in the BSCIP would render meaningless the phrase "for individuals who have brain and spinal cord injuries" modifying "transitional living facility" in the BSCIP Act. See § 381.75(6)(a), (b), and (c), Fla. Stat. If the Legislature created TLFs solely to serve persons eligible for the BSCIP, there would be no reason to direct AHCA to license TLFs to serve individuals with brain and spinal cord injuries. The Department's interpretation cannot stand. See also State v. Bradford, 787 So. 2d 811, 819 (Fla. 2001)("the concept of reading statutes in pari materia does not require that elements from one subsection be carried over and inserted into another subsection even if the statutes are related.").

81. The Legislature created the phrase "brain and spinal cord injury" when it enacted the BSCIP in 1994, abandoning the phrase "head-injured and spinal-cord injured" used in all previous versions of the statute creating a multi-level treatment system for persons with head and spinal cord injuries. Yet, the Legislature did not amend the same term in the TLF licensing statute created the prior year. The Legislature's

inaction cannot be interpreted as a mere oversight, as a legislative body is presumed to pass statutes with full knowledge of prior existing statutes. See Knowles v. Beverly Enterprises-Florida, Inc., 898 So. 2d 1, 9 (Fla. 2004); Ag. for Health Care Admin v. In re Estate of Johnson, 743 So. 2d 83, 86-87 (Fla. 3d DCA 1999).

82. The conclusion that the Legislature intended different meanings for the terms "head-injured" and "brain-injured" is bolstered by the fact that the Legislature has amended the TLF licensing statute five separate times over a span of 16 years since adopting the BSCIP but has not substituted the term "brain-injured" for "head-injured." The Legislature was well aware of how to incorporate trauma as a limitation on clients served by TLFs, but declined to do so. See State v. Bradford, 787 So. 2d 811, 820 (Fla. 2001)(finding, based upon the legislature's use of the term "fraud" in certain sections of the statute and its exclusion in the section defining "unlawful insurance solicitation," as well as the legislative history of the statute, that the legislature was well aware of how to incorporate "fraud" as an element of the offense, but declined to do so).

83. The Department makes two arguments to support its interpretation that TLFs are limited to serving patients with traumatic head and spinal cord injuries.

84. First, the Department argues that the Rule merely tracks the language of the statute which defines "brain injury" to mean "an insult to the skull, brain, or its covering, resulting from external trauma." § 381.745(2)(b), Fla. Stat. The Department reasons that, as an agency vested with "only such powers as statutes confer," to adopt a rule that allowed TLF services to be provided to persons with non-traumatic brain injury would expand its authority beyond that authorized by law. Resp. PFO, ¶ 5.

85. The Department's argument is defeated by the plain language of the statute.[7/] The definitions in section 381.745 clearly apply only to administration of the Program. See § 381.745 (Title)("As used in ss.381.739-381.79, the term:") Yet, the Rule, as promulgated by the Department, explicitly applies to services provided by TLFs outside the Program. See Fla. Admin. Code R. 64I-1.001(1)(h) ("Services" means Services provided by the General Program"). The Department adopted a rule that directly applies to services provided outside the Program, yet cites as authority a statute limited in application to the Program. As such, the argument fails.

86. Second, the Department maintains its interpretation is appropriate under the principle of statutory construction providing that the more specific statute on a particular subject matter always controls over a general statute governing the same

matter. Resp. PFO ¶ 11. The Department argues that the BSCIP statute "mandating the department to create standards for TLFs is undoubtedly the more specific statute in comparison to the Agency for Health Care Administration's statute relating to their statutory obligations over the physical plant and fiscal accountability of a TLF. As such, the department's definition of 'brain injury' is the controlling statute." Id. at ¶ 12.

87. As a general rule, when two statutory provisions are in conflict, the specific statute controls over the general statute. See Mendenhall v. State, 48 So. 3d 740, 748 (Fla. 2010)(where the specific minimum mandatory sentencing provisions of the "10-20-Life" statute conflict with the mandatory maximum sentencing for first degree felonies in the more general sentencing statute, the "10-20-Life" statute prevails"); Sch. Bd. of Palm Beach Cnty. v. Survivors Charter Sch., 3 So. 3d 1220, 1236 (Fla. 2009)(procedures in section 1002.33(8)(d) for terminating a charter school charter "immediately" in emergency situations governs over conflicting statutory procedures governing decisions determining substantial interests in the Administrative Procedures Act); McKendry v. State, 641 So. 2d 45, 46 (Fla. 1994)(specific mandatory minimum sentence in 790.221(2) for possession of a short-barreled shotgun prevails over section 948.01 which generally gives a trial judge discretion to suspend criminal sentences).

88. Application of the principle is unnecessary where there is no conflict between statutory provisions. See Sherman v. Daly, 74 So. 3d 165, 167-68 (Fla. 1st DCA 2011)(where statute authorizes court to deviate no more than five percent from the child support guidelines "except in certain circumstances," and subsequent statutory subsections spell out the circumstances which allow deviation, there is no conflict between the provisions); Chavez v. State, 25 So. 3d 49 (Fla. 1st DCA 2009)(no internal conflict in Florida Evidence Code which holds hearsay inadmissible absent a statutory exception, yet grandfathers common law provisions not in conflict therewith); cf. McDonald v. State, 957 So. 2d 605, 610-11 (Fla. 2007)(applying the principle to resolve "any perceived conflict" between the "10-20-Life" statute and the Prison Release Reoffender Act, even though the plain language of the "10-20-Life" statute mandates the mandatory minimum sentences under "10-20-Life" statute and the PRR statute be imposed concurrently).

89. In the case at hand, there is no conflict between the BSCIP statute and the TLF licensing statute. The BSCIP statute governs a multi-level treatment program for persons with traumatic brain and spinal cord injuries. Treatment at a TLF is but one element in the Program. On the other hand, the TLF statute governs licensing of all TLFs in the state to serve

head-injured and spinal-cord-injured persons, a broader classification of patient.

90. Assuming, arguendo, there is conflict between the statutes, the Department's argument that the BSCIP statute is the more specific is not persuasive. As discussed earlier, since the Rule directly governs TLF services outside the Program, it cannot be derived from a statute limited to administration of the Program.

91. Although not cited by the Department as support for its interpretation of the statute, the legislative history does provide a sliver of intent to join the licensing statute exclusively with the Program. In 1999, when the Program was transferred from the Division to the Department of Health, the chapter law referenced the "brain and spinal cord injury program established in sections 400.805 and 413.48, Florida Statutes." ch. 99-240, § 15, Laws of Fla. The undersigned does not find the statement dispositive of the issue in this case.

92. First, the statement is consistent with the Act as it existed in 1999, which specifically recognized TLFs licensed pursuant to chapter 400 as the only facilities which could be designated as TLFs to serve patients in a then-undefined multi-level treatment program for persons with traumatic injuries. See ch. 94-324, § 4 Fla. Laws ("'Transitional living facility' means a state-approved facility as defined and licensed pursuant

to chapter 400 and division-approved in accord with this part")(emphasis added). Thus, the transfer language correctly expressed that the program depended on facilities licensed under chapter 400. Notably, the definition was amended in 2006 to add to the list of facilities available for designation to serve patients in the Program: those licensed under chapter 429. As such, the 1999 statement provides no evidence of legislative intent with respect to the statutes as they existed when the Rule was adopted in 2011.

93. Second, the reference is not a substantive provision of the chapter law, but rather a statement relating to transfer of budgetary authority from one agency to another. Id. As such, its value in statutory construction is limited. The greater weight of the evidence, including both the plain language and principles of statutory construction, does not support a conclusion that TLFs are limited in scope to serving persons with traumatic injuries.

94. In sum, the Department's construction enlarges and contravenes the statutory authority provided the Department by sections 400.805 and 381.739-381.79, and is not supported by either the plain and unambiguous language of the statutes at issue or basic rules of statutory construction.

Arbitrary and Capricious

95. Petitioner asserts that the Rule is an invalid exercise of delegated legislative authority because it is arbitrary and capricious. Pet. PFO, ¶ 52. Petitioner maintains the Rule is based on unsupported assumptions, lacks logic, and does not advance the purposes for which it was purportedly adopted. Id.

> A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational.

§ 120.52(8)(e), Fla. Stat.

96. The analysis for whether a rule is arbitrary and capricious is (1) whether the rule is supported by logic or the necessary facts; and (2) whether the rule was adopted without thought or is irrational. See Las Mercedes Home Care Corp. v. Ag. for Health Care Admin, Case No. 10-0860RX (Fla. DOAH July 23, 2010); aff'd, 67 So. 3d 1262 (Fla. 1st DCA 2011).

97. As explained in Agrico Chemical Co. v. Dep't of Envtl. Prot., 365 So. 2d 759 (Fla. 1st DCA 1979):

> A capricious action is one which is taken without thought or reason and irrationally. An arbitrary decision is one not supported by facts or logic, or despotic. Administrative discretion must be reasoned and based upon competent substantial evidence. Id. at 763.

98. As previously concluded, the Rule enlarges and contravenes the Department's authority in sections 400.805 and 381.739-381.79, Florida Statutes, by extending the qualifying criteria of traumatic injury from the BSCIP to the TLF licensing statute. No such limitation exists under the plain language of the licensing statute.

99. The Department was well aware that FINR was treating patients with non-traumatic injuries for at least six years prior to adoption of the Rule. When conducting the 2005 site survey, the Department acknowledged that FINR designated a portion of beds in the facility for treatment of patients outside of the BSCIP, yet neither noted this as a deficiency nor sanctioned FINR. The Department has argued that the Rule does nothing more than track the plain language of the statute that limits TLF services to persons suffering traumatic injuries. If the BSCIP and TLF licensing statutes were so clear, then the Department was complicit in FINR's violation of the statute for at least six years, if not longer.

100. The Legislature granted the Department rulemaking authority to adopt rules governing the services provided by TLFs in 1999. Yet, the Department waited until 2011 to adopt said rules, and, with full knowledge that licensed TLFs had long served clients outside the BSCIP, only then adopted a rule that prevented said care. The Department presented no evidence

supporting such a change in policy. As such, the Rule is not supported by facts.

101. Assuming the Department's rulemaking authority to adopt rules governing the services provided by TLFs extends to the types of injury treated, the decision to exclude care at TLFs for non-traumatic injuries was arbitrary. Petitioner presented competent, substantial evidence that the etiology of brain disorders makes little, if any, difference in either a patient's deficits or their needs for rehabilitation. For example, patients with both traumatic and non-traumatic brain injury may have communication disorders, problems speaking, and aphasias, and may require speech, language, and physical therapy.

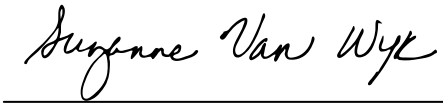
102. The Department offered no testimony as to the factual basis for distinguishing between the causes of brain injury or any rationale, other than its incorrect statutory interpretation, for limiting treatment at TLFs to patients with traumatic injury.

103. Based upon the competent substantial evidence of record, the challenged Rule is an invalid exercise of delegated legislative authority because it exceeds and contravenes the law implemented and because it is arbitrary and capricious.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Florida Administrative Code Rule 64I-1.005 constitutes an invalid exercise of delegated legislative authority.

DONE AND ORDERED this <day> day of <month>, <year>, in Tallahassee, Leon County, Florida.



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ENDNOTES

[1/] All citations to Florida Statutes are to the 2011 version unless otherwise specified.

[2/] The phrase "a related health care facility which provides specialized health care services" was replaced with "a site where specialized health care services are provided." When licensure of TLFs was initiated, "a Related Health Care Facility home" was defined as a "facility for the aged, home for special services, or other home as defined in rules and regulations of the department. See § 400.021(12), Fla. Stat. (1989).

[3/] Petitioner also contends the Rule is an unconstitutional impairment of contracts and an unconstitutional deprivation of liberty or property without due process, prohibited by Article I, Section 10 and Article I, Section 9, of the Florida Constitution, respectively. DOAH is without authority to determine the constitutionality of an existing rule under the Florida Constitution. See Dep't of HRS v. Fla. Med. Ctr, NME Hospitals, Inc., 578 So. 2d 351, 355 (Fla. 1st DCA 1991).

[4/] Similarly, this section charges the Department with the duty to develop standards for an emergency medical evacuation system and standards for designation of rehabilitation centers to provide needed services. See § 381.75(3) and § 381.75(4), Fla. Stat.

[5/] As part of the same rulemaking effort, the Department has in fact promulgated rules addressing services to be provided to persons eligible for the BSCIP. Florida Administrative Code Rule 64I-1.003 provides as follows:

64I-1.003 Services.
(1) All Services must be directed specifically to an individual Applicant or Eligible Individual by prior authorization of the General Program.
(2) Services can be delivered for an Applicant only to the extent necessary to determine eligibility for the General Program and for an Eligible Individual only to the extent necessary to achieve subsection 64I-1.002(2), F.A.C., closure.
(3) Services do not include:
(a) Upgrading, replacement or maintenance of a durable medical device;
(b) Funding for consumables (those items for which the very act of using destroys their further use), except in support of Services, and then for no more than twenty four (24) months beginning with the first time such funding is authorized;
(c) Any required by a change in circumstances not directly related to the Applicant or Eligible Individual's brain or spinal cord injury and capable of repetition throughout their life. Examples of changes in circumstances capable of repetition include moving to another location, obtaining a vehicle or, except in the case of an individual below the age of eighteen, the loss of a caregiver; or
(d) Any requiring approval under federal law, such as human subject research.

[6/] The undersigned finds no precedent prohibiting extension of this basic principle to cases, such as the instant case, where

the terms compared are found in different statutes rather than different sections of the same statute.

[7/] Setting aside the fact that 381.745 is not even the statute cited as law implemented by the 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 one copy of a Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a second 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.