STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

G. B., Z. L., THROUGH HIS GUARDIAN K. L., J. H., AND M. R.,

Petitioners,

vs. Case No. 13-1849RP

AGENCY FOR PERSONS WITH DISABILITIES,

Respondent.
_____/

FINAL ORDER

Pursuant to notice to all parties, the final hearing was conducted in this case on July 9-11, 2013, in Tallahassee, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether proposed rules 65G-4.0210 through 65G-4.027 (the "Proposed Rules") are an invalid exercise of delegated legislative authority as defined in section 120.52(8), Florida Statutes. (Unless specifically stated otherwise herein, all references to Florida Statutes shall be to the 2012 codification.) Specifically, Petitioners assert that the Proposed Rules (1) enlarge, modify, and contravene the specific provisions of the law they purport to implement; (2) contain vague and inadequate standards that vest unbridled discretion in the Agency for Persons with Disabilities (the "Agency" or "APD"); (3) are arbitrary and capricious; and (4) exceed the grant of rulemaking authority in section 393.0662(9), Florida Statutes. Petitioners further argue that, (5) APD failed to follow applicable rulemaking procedures required by sections 120.54(3) and 120.541, Florida Statutes, because APD failed to provide a Statement of Estimated Regulatory Costs ("SERC") as a part of the rulemaking process.

PRELIMINARY STATEMENT

In 2007, the Florida Legislature amended section 393.0661, Florida Statutes, and instructed APD to develop and implement a comprehensive redesign of the home and community-based delivery system for persons with developmental disabilities. APD implemented a four-tiered waiver system. Rules implementing the four-tiered system were struck by the court in Moreland ex rel. Moreland v. Agency for Persons with Disabilities, 19 So. 3d 1009 (Fla. 1st DCA 2009). APD restructured the tier assessment process resulting in the system under which Petitioners received services under the federally approved Home and Community-Based Services Medicaid Waiver Program for persons with developmental disabilities (the "DD waiver program").

In 2010, the Florida Legislature directed APD to develop and implement another comprehensive redesign of the DD waiver service delivery system using individual budgets (called "iBudgets"). The Proposed Rules were developed to implement the new iBudget system. Petitioners challenge the Proposed Rules as being an invalid exercise of delegated legislative authority.

At the final hearing in this matter, Petitioners called six witnesses: Dr. Jim McClave, accepted as an expert in the fields of statistics and econometrics; Susan Chen, data analyst; Hillary Brazzell, management analyst; Catherine Bedell, deputy general counsel for APD; K.L., parent of Petitioner, Z.L.; and

Denise Arnold, deputy director of programs for APD. Petitioners' Exhibits 1-14 were admitted into evidence. Respondent called two witnesses: Denise Arnold and Dr. Xufeng Niu, accepted as an expert in statistics. Respondent's Exhibits 1-3 were admitted into evidence. The parties also submitted Joint Exhibits 1-25, all of which were admitted into evidence.

FINDINGS OF FACT

1. Each of the Petitioners is a recipient of services under the DD Waiver Program. For example, Petitioner Z.L. is a 26-year-old male who was born with Cri-du-Chat syndrome, a fifth chromosome abnormality. As a result, Z.L. is low-functioning, with a non-measurable IQ level (but likely well below the level designating mental retardation). Z.L. speaks only a few words and communicates with some sign language. He is ambulatory, but he is totally dependent on others for all activities of daily living. Z.L. also has some extreme behavioral issues, including self-abuse and physical abuse of others. He lives in a private residence with two other developmentally disabled men. The home where they reside belongs to the family of K.L. (Z.L.'s father and legal guardian). K.L. rents the home for Z.L. and the other two men at less than its actual market value. (The home is a 1,500 square foot home located on 15 acres. K.L. pays about $600 per month rent; the home could rent for two or three times that much.)

2. Z.L. receives the following services under the DD Waiver Program: 24-hour assistance with activities of daily living; behavioral analysis through a certified behavior analyst; and personal care assistance. The cost of his care plan for the previous year was $61,824.22 (i.e., that was the amount paid by the DD Waiver Program).

3. Z.L.'s father and mother are unable to care for Z.L. in their home. The father is CEO of a bank and is involved in other businesses as well. The mother recently suffered closed head injuries as a result of a bicycle accident. She must be cautious about any further head injuries and fears that Z.L.'s aggression could result in physical harm to her.

4. As a result of the implementation of the iBudget process, APD is proposing to reduce Z.L.'s care plan by the sum of $8,175.98. Under the iBudget process, Z.L. has the right to challenge the reduction of his care plan amount in a Fair Hearing before a Department of Children and Families Hearing Officer, which he has done. K.L. has expended about $6,000 in legal fees to contest the reduction of Z.L.'s care plan amount under the new iBudget system. He expects that if the matter goes to appeal, he will expend as much as $70,000 more in legal fees. K.L. has also hired a lawyer for one of Z.L.'s roommates.[1/]

5. APD is the state agency responsible for distributing funds from the DD Waiver Program. Prior to implementation of the

iBudget process, APD used a four-tier system to provide the level of funds each client would receive.[2/] The tier system was more rigid in its application than the iBudget system. Under the tier system, there were strict funding policies in place. For example, if dollars were allocated toward a specific service, e.g., transportation, those dollars could not be used for any other service, such as companion care or personal care. As will be discussed more fully below, the funds provided in the iBudget process are more flexible regarding services they can purchase.

6. The DD Waiver funds administered by the Agency are the funds of last resort. If a service received by a client can be paid for by another agency or source of payment, those must be utilized before the Agency can allocate funds for the service.

Development of the iBudget System

7. The 2010 Florida Legislature mandated creation of an iBudget process for distributing funds from the DD Waiver Program. Section 393.0662(1) states in pertinent part:

> The agency shall establish an individual budget, referred to as an iBudget, for each individual served by the home and community-based services Medicaid waiver program. The funds appropriated to the agency shall be allocated through the iBudget system to eligible, Medicaid-enrolled clients . . . .
>
> (a) In developing each client's iBudget, the agency shall use an allocation algorithm and methodology. The algorithm shall use variables that have been determined by the agency to have a statistically validated

relationship to the client's level of need for services provided through the home and community-based services Medicaid waiver program . . . .

(b) The allocation methodology shall provide the algorithm that determines the amount of funds allocated to a client's iBudget. The agency may approve an increase in the amount of funds allocated, as determined by the algorithm, based on the client having one or more of the following needs that cannot be accommodated within the funding as determined by the algorithm and having no other resources, supports, or services available to meet the need:

1. An extraordinary need that would place the health and safety of the client . . . in immediate, serious jeopardy . . . .

2. A significant need for one-time or temporary support or services . . . .

3. A significant increase in the need for services after the beginning of the service plan year . . . .

The agency shall reserve portions of the appropriation for the home and community-based services Medicaid waiver program for adjustments required pursuant to this paragraph . . . .

(c) A client's iBudget shall be the total of the amount determined by the algorithm and any additional funding provided pursuant to paragraph (b). A client's annual expenditures for home and community-based services Medicaid waiver services may not exceed the limits of his or her iBudget. The total of all clients' projected annual iBudget expenditures may not exceed the agency appropriation for waiver services.

8. In response to the statutory mandate, the Agency sought input from "stakeholders," i.e., individuals and families receiving services, family care counsel groups, various provider groups, and organizations such as the Association of Retarded Citizens and the like. APD also looked at how other states had addressed the issue of fund distribution to developmentally disabled individuals. The Agency hired consultants to help make the process as equitable and fair as possible within the limits of its finite budget.

9. One of the Agency's hired consultants was Dr. Xufeng Niu, chair of the statistics department at Florida State University. Dr. Niu is a recognized expert in the field of statistics and had used his expertise in many areas, including transportation issues such as railroad crossing safety and environmental issues for the Department of Environmental Protection. Dr. Niu has been an academician and consultant since obtaining his Ph.D. in statistics from the University of Chicago in 1991. Dr. Niu's testimony was extremely credible.

10. APD hired Dr. Niu to develop an algorithm which would be the key feature to any individual budget calculation. APD's goal in developing the algorithm was to create a formula fitting data patterns of past expenditures, then to mathematically replicate decisions that were made to establish a client's prior budget amount.

11. Dr. Niu, by way of statistical modeling techniques, developed certain factors which could be utilized by the Agency in determining which clients would receive funds for specific services. Using a catalogue of predictors or variables derived from information provided to him by the Agency, Dr. Niu built a tool to predict what each client's cost for needed services would be. A Bell Curve was used to keep the application of the variables more symmetrical. In order to effectuate this desire, Dr. Niu utilized a form of "transformation" referred to as the Box-Cox Transformation Family. The Box-Cox Method involved raising data to a different mathematical power as a means of analyzing and applying the data.

12. Dr. Jim McClave, who operates a statistical consulting firm, is an expert statistician and econometrician. His work involves regular stints as an expert in legal proceedings such as this rule challenge matter. His testimony was credible, but less persuasive than that of Dr. Niu.[3/] Dr. McClave would have used a log transformation method rather than the Box-Cox method relied upon by Dr. Niu. However, while not discounting the log transformation method, Dr. Niu competently testified that the Box-Cox worked best in this particular case.

13. After the transformation process, it was necessary to narrow down the number of variables to be used. Dr. Niu ultimately decided to use nine specific variables, including:

the client's living setting; whether the client is an adult; the client's score on the six elements set forth in the Questionnaire for Situational Information ("QSI") which was provided to all potential recipients of services; the client's score on the 11 elements in the functional summary section of the QSI; and the client's score on each of three specific elements in the QSI related to transfers (ability to transfer or change position), hygiene, and capacity for self-protection. Not all variables are necessarily useful and having too many variables causes over-fitting, i.e., trying to fit every situation into a perfect model, which simply is not possible. In fact, it is better to have fewer variables as long as sufficient data can be captured. A statistician must reach a balance on the number of variables in order to find the best model for each project. Dr. Niu's affirmation of the variables he used is credible.

14. Dr. Niu utilized the Generalized Information Criterion ("GIC"), a method of finding the best set of predictors when creating an algorithm. GIC is a criterion that tries to balance the model by carefully adding more variables without overpopulating the model with too many variables. GIC was used by Dr. Niu in conjunction with the concept of R-squared. That concept is a statistical measure of how well an algorithm fits the data in order to test how well the model predicts. The algorithm developed for use in the Proposed Rules has an R-

squared value of .6757, meaning that it accounts for about 68 percent of the variation in the population of APD clients' DD Waiver expenditures.

15. By contrast to the GIC and R-squared approach, there is in the field of statistics a tool referred to as Residual Standard Error. This tool helps determine whether a model is predicting within two standard deviations and thus has a measure of certainty. The algorithm proposed by APD did not utilize the Residual Standard Error tool, relying instead on the combination of GIC and R-squared. Based upon Dr. Niu's testimony, APD's reliance on those tools is reasonable.

16. Dr. Niu developed a number of models for possible use in the iBudget process, settling at last on Model 7b. The model was then applied to the pool of clients who would be affected by the new iBudget system. The client pool contained a large number of different situations and scenarios, as each client and client family is unique despite some similar developmental issues. As a result of these differences, there were cases in which a particular client -- because of his or her needs, or those of his or her family -- did not fit the model. These cases were called "outliers" and had to be treated differently by the Agency. Of the total group of some 26,000 clients, 9.37 percent, or about 2,400 clients, were deemed outliers. Dr. McClave criticized this

percentage of outliers, but Dr. Niu's substantiation of the percentage is credible.

17. Dr. Niu utilized actual expenditures by APD for DD Waiver Program clients during the 2007-2008 fiscal year as an indicator of what APD had faced in the past. Those data were recent enough in time to be linked to current assessment data for the clients and to be assigned scores from the QSI. APD also found that the 2007-2008 data more accurately reflected service needs compared to other recent years because the data pre-dated the implementation of the more restrictive Tier system. Dr. Niu did not use clients with less than one year of claims because they may not project the client's actual annual expenditures. Dental services, environmental services, and durable medical equipment purchases were excluded because they are generally a once-a-year purchase. Four of Florida's 67 counties were excluded from the calculations because they had a much higher cost of living than the rest of the state. Mismatches and clerical errors in clients' records were also taken into consideration. Age was used as a predictor, but after trial and error Dr. Niu decided upon a single division, i.e., persons under 21 years of age versus persons 21 or older. The rationale was that people under 21 receive services from other sources, like the public school system, for example. Persons over 21 begin to require more services as they age. Dr. Niu considered more

factors than just the mathematical statistical accuracy. His extensive work resulted in the best model out of many possibilities.

18. Transportation needs and costs were considered during the stakeholder meetings as a factor to be considered when discussing possible variables. Dr. Niu attempted to use a transportation index in his models, but that resulted in a negative coefficient which is less valid statistically. Applying the current year's transportation costs did not work. It was also impossible to apply a portion of a year's transportation costs as an indicator of the entire year's transportation costs. And, because transportation costs constitute only about 1.5 percent of overall expenses, it was reasonably determined that such costs could be handled by way of an extra needs review.

19. Upon completion of the iBudget system, it was implemented and introduced to all eligible DD Waiver clients. The program was introduced in "waves," i.e., not all DD waiver clients being served by APD received their iBudgets at one time. Rather, the new system was phased in over time.

How the iBudget System Is Employed

20. APD sends an information packet to each client, i.e., each person seeking services to be paid for under the DD Waiver Program. This information packet, called a Welcome Guide, is meant to help the client understand the new system. The Welcome

Guide provides a large amount of information, plus education and training possibilities as well. It is understandably difficult to absorb all of the information contained in the packet, but APD opted for completeness rather than over-simplifying the information. Z.L.'s father, who is a licensed attorney and CEO of a bank, expressed difficulty understanding the information contained in the Welcome Guide. However, he testified that he has "some kind of memory block" about DD Waiver services. It is understandable that this would be a difficult thing for a parent to review.

21. The first step of the process for requesting funds for services under the iBudget system is to have the client complete a QSI form.

22. After the QSI assessment is done, the second step of the process is for the Agency to run its algorithm using the previously discussed variables such as age, living arrangement, behavioral status, functional status, and the responses to various personal questions concerning the client. Running the algorithm then creates a dollar value for the services deemed appropriate for the client. The cost of the services is then related back to the appropriation of funds received by APD from the Legislature for providing all needed services. Each client's sum for needed services is then given a pro rata reduction (or,

theoretically, an increase) based on the total funds available to APD.

23. There are then adjustments which can be made to the algorithm amount. For example, if the algorithm amount for a client was greater than the amount set forth in the client's existing care plan, that client's "algorithm amount" was reduced to the existing care plan amount, at least temporarily pending further possible actions under the iBudget process.

24. There are specific services identified in the Proposed Rule (at 65G-4.0212(b)(2)), which are indicative of certain health and safety needs. If a client needs any of those services and the cost of those services is greater than the algorithm amount, the greater sum will be substituted.

25. If the algorithm amount was less than the client's care plan amount but within $1,000 of the existing care plan amount, then the care plan amount was used as the "algorithm amount." This $1,000 buffer will necessarily mean that a client whose care plan amount is $999 more than the algorithm amount may be treated differently from a person whose care plan amount is $1,001 more than the algorithm amount. Still, the decision to employ a $1,000 threshold is generally reasonable as APD attempts to maintain a sufficient care plan allocation despite the change in systems. APD reasonably believes it would be more time-consuming and costly to deal with changes of $1,000 or less than to simply

accept the prior care plan amount (which was based upon the client's needs).

26. If the algorithm amount is less than the amount in the client's existing care plan, then APD determines whether the reduction is greater than 50 percent of the existing care plan amount. If so, the algorithm amount is raised to an amount equal to at least 50 percent of the existing care plan amount.

27. After application of the above-reference factors and -- if warranted -- adjustments are made, the client is provided an amount which is referred to as the "Target Allocation."

28. The fourth step in the process is for APD to provide the Target Allocation amount to the client and WSC.

29. Step five of the process is a review to determine whether, notwithstanding the algorithm amount, a client has extra needs that warrant an increase in their ultimate allocation of funds for services. This is called the Extraordinary Needs Review. The first phase of this step is an allocation implementation meeting (AIM), wherein the client is advised about the changes --if any -- to his/her care plan. The client and his or her waiver support coordinator (WSC) are given information about how the reductions may be handled, e.g., that under the iBudget it might be possible to utilize funds to pay for one service even if they are allocated for another service. Or, there may be ways under the iBudget system to merge two or more

services into one. One example of that is that in-home personal service caregivers may be allowed to perform other tasks, e.g., they may be able to provide services outside the home setting. After almost a full year of implementing the iBudget system, this portability of funds from one service to another has proven to be one of the most appreciated functions of the new process by waiver support coordinators.

30. If the client and WSC agree that the service needs can be met by the Target Allocation, that amount becomes the client's iBudget Allocation amount.

31. If the client and WSC do not think the Target Allocation amount is sufficient to meet the service needs, the AIM form is completed and sent to APD for further review. If the health and safety of the client, client's caregiver, or the public is placed in immediate jeopardy without an increase in the allocation, then an increase will be approved.

32. APD then gives the client notice as to its decision and the final iBudget Allocation is provided. This constitutes step six of the process.

33. Subsequent to setting and providing notice of the final iBudget Allocation, a client may seek supplemental funding for significant one-time or temporary needs. If a significant increase in need for services arises after the beginning of a

plan year, a process exists for further consideration of the client's needs.

34. For new clients, i.e., those who do not have an existing care plan when the iBudget is applied to them, the process is slightly different. First there is an eligibility determination (which has already occurred for existing clients). The client then responds to the QSI. The algorithm is calculated to form the target allocation for the new client. An extra needs review is then performed to make sure that all health and safety needs are being met.

35. It is possible that a new client with exactly the same condition, circumstances, and needs as an existing client (albeit an extremely unlikely occurrence), could receive a larger amount under the iBudget than the existing client. If both clients were assigned exactly the same score under the algorithm, but the existing client's allocation amount were larger than the care plan amount under the Tier system, then the existing client's allocation would be reduced. There would not be a concomitant reduction of the new client's allocation. Although Petitioners pointed out this alleged flaw, no remedy was suggested that would make it possible for APD to make the treatment of two similarly situated clients more equal. The iBudget system is not flawless, but it is an admirable effort toward equality of application to all "clients."

36. The Agency did not set aside or reserve any portion of their allocation from the Legislature as a Reserve Fund, per se. Rather, APD uses the reserve fund concept as a management tool to be used when making adjustments to an individual client's final allocation of funds. Thus, during the AIM process or the Supplemental Cost Funding phase, APD might raise a client's allocation based on funds it has "reserved" under the algorithm calculation.

Statement of Estimated Regulatory Costs

37. APD published the initial proposed rule on August 3, 2012. The publication included a statement that the Agency had determined there would not be an adverse impact on small business nor would it increase regulatory costs in excess of $200,000 within one year. Petitioners' contention that clients may have difficulty understanding the welcome packet information and may challenge iBudget Allocations by way of fair hearings does not establish the necessity for SERC.

CONCLUSIONS OF LAW

38. The Division of Administrative Hearings jurisdiction over the parties and the subject matter of this proceeding pursuant to section 120.56, Florida Statutes.

39. Section 120.56(1)(a), Florida Statutes, provides that, "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." Section 120.56(2)(a), Florida Statutes, provides that in challenges to proposed rules, "[P]etitioner has the burden of going forward. The agency then has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised." See SW Fla. Water Mgmt. Dist. v. Charlotte Co., 774 So. 2d 903, 908 (Fla. 2d DCA 2001) (quoting St. John's River Water Mgmt. Dist. v. Consolidated-Tomoka Land Co., 717 So. 2d 72, 77 (Fla. 1st DCA 1998)).

40. In order to prove they are "person[s] substantially affected" in this case, G.B., Z.L., J.H., and M.R. must show that they will suffer injury in fact of sufficient immediacy to entitle them to a hearing, and that their substantial injury is of a type or nature which the requested hearing is designed to protect. Agrico Chem. Co. v. Dep't of Envtl. Reg., 406 So. 2d 478, 482 (Fla. 2d DCA 1981). The Agrico court set out a test for determining whether a petitioner had standing to challenge a governmental action. Each of the Petitioners satisfies the test requirements. The "injury in fact" aspect of the test deals with the degree of the injury, and the "zone of interest" aspect deals with the nature of the injury. Id. See also Lanoue v. Fla. Dep't of Law Enf., 751 So. 2d 94, 96-97 (Fla. 1st DCA 1999).

41. Petitioners are current recipients of Medicaid services under the DD Waiver. Each Petitioner has received notice that their allocation of funds for services under their prior care plan is being reduced under the new iBudget system. The Petitioners are affected by the Proposed Rules and have standing to initiate and pursue the challenge to those rules.

42. Section 120.56(1)(e), Florida Statutes, provides that a rule challenge proceeding is de novo in nature and the standard of proof is a preponderance of the evidence. The Administrative Law Judge should consider and base the decision upon all the available evidence, regardless of whether the evidence was placed before the agency during its rulemaking proceedings. Dep't of Health v. Merritt, 919 So. 2d 561, 564 (Fla. 1st DCA 2006) (concluding that the Legislature has overruled the court's holding in Board of Medicine v. Florida Academy of Cosmetic Surgery, 808 So. 2d 943 (Fla. 1st DCA 2002), that an Administrative Law Judge's role in a proposed rule challenge is limited to a review of the record and a determination as to whether the agency action was supported by legally sufficient evidence).

43. Section 120.52(8), Florida Statutes, states 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:

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

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

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

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

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

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

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.

44. In this case, Petitioners challenge the proposed rule as being an invalid exercise of delegated legislative authority in that it violates subsections (a), (b), (c), (d), and (e) of section 120.52(8). Each of these potential reasons for invalidating the rule will be discussed below.

Section 120.52(8)(a)

45. As stated previously, APD did not need to include a SERC because it had determined that there was no economic impact created by the Proposed Rules. The Agency did not fail to follow the applicable rulemaking procedures or requirements.

Section 120.52(8)(b)

46. Section 393.0662(9), Florida Statutes, authorizes APD to adopt rules which specify: (1) the allocation algorithm and methodology described in the statute; (2) the criteria and processes for clients to access reserved funds for extraordinary needs, temporarily or permanently changed needs, and one-time needs; (3) and the processes and requirements for selection and review of services, development of support and cost plans, and management of the iBudget system.

47. The Proposed Rules establish an allocation algorithm and methodology. There are criteria established in the Proposed Rules whereby clients can access additional funds for extraordinary needs, e.g., one-time or temporary expenses.

Section 120.52(8)(c)

48. Petitioners argue that the system created by the Proposed Rules enlarges, modifies, or contravenes the iBudget statute because the algorithm allocation is not the final iBudget amount for each client. The post-algorithm steps of the process are, according to Petitioners, in violation of the statute because those steps are outside the algorithm. However, APD's credible explanation of its process refutes Petitioners' argument. The step-by-step process created by APD ultimately results in an iBudget for each client which "ensures the equitable allocation of available funds to each client based on the client's level of need, as determined by the variables in the allocation algorithm." It is splitting hairs to say that APD cannot adjust the initial algorithm amount using pertinent information concerning each client's unique situation and circumstances. The statute specifically allows for adjustments to the algorithm amount; the Proposed Rules reasonably attempt to effectuate that end.

49. The "methodology" mandated by the statute includes "the algorithm that determines the amount of funds allocated to a

client's iBudget." § 393.0662(1)(b), Fla. Stat. That the client's iBudget allocation is further adjusted based upon additional factors in order to make all allocations as equitable as possible does not invalidate the algorithm; that element of the methodology remains appropriate.

50. The Proposed Rules, in whole, assure that "the total of all clients' projected annual iBudget expenditures [do not] exceed the Agency's appropriation for waiver services." § 393.0661(1)(c), Fla. Stat.

Section 120.52(8)(d)

51. Petitioners argue that the Proposed Rules contain vague and inadequate standards that vest unbridled discretion in the Department.

52. Though not easy rules to read, there is no ambiguity or vagueness in the Proposed Rules. The consideration of additional information for each client is clearly enunciated in the Proposed Rule. Its purpose is clearly defined. APD could not set forth in the rules every single potential scenario that a client might be faced with as they ask for services. Rather, the Agency created a function within the rules to help it deal with all possible situations.

53. The test for vagueness of a rule or statute is "whether men of common understanding and intelligence must guess at [the provision's] meaning" and differ as to its application." Dep't

of Health & Rehab. Servs. v. Health Care and Ret. Corp. of Amer., 593 So. 2d 539, 541 (Fla. 1st DCA 1992) quoting State v. Cumming, 365 So. 2d 153, 156 (Fla. 1978)). See also Witmer v. Dep't of Bus. & Prof'l. Reg., 662 So. 2d 1299, 1302 (Fla. 4th DCA 1995).

54. In this case, people of common understanding should be able to see that the Agency may increase the algorithm amount if a client has additional needs.

Section 120.52(8)(e)

55. Petitioners say that the Proposed Rules are arbitrary and capricious because they are not supported by logic or the necessary facts, were adopted without adequate thought or reason, and are irrational.

56. Case law provides that an "arbitrary" decision is one not supported by facts or logic, or despotic, and a "capricious" decision is one taken irrationally, or without thought or reason. Bd. of Clinical Lab. Pers. v. Fla. Ass'n of Blood Banks, 721 So. 2d 317, 318 (Fla. 1st DCA 1998); Bd. of Trs. of the Int. Imp. Trust Fund v. Levy, 656 So. 2d 1359, 1362 (Fla. 1st DCA 1995).

57. It is clear Petitioners disagree with how the algorithm was created and believe that other statistical analytical tools could have been used to change the algorithm. Nonetheless, APD's method of dealing with this complex issue is reasonable. The Proposed Rules are neither arbitrary nor capricious as promulgated.

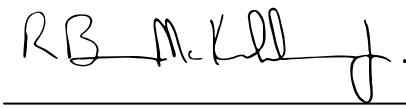
ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED:

Proposed Rules 65G-4.0210 through 65G-4.027 are not invalid exercises of delegated legislative authority.

DONE AND ORDERED this 9th day of September, 2013, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of September, 2013.

ENDNOTES

[1/] K.L. says that he cannot afford to provide necessary care for his son or to pay for services which will be lost due to the iBudget reduction to Z.L.'s care plan. That testimony is difficult to reconcile with K.L.'s description of his business interests. This is not to say K.L.'s son is not entitled to government-funded assistance for his needs, but begs the question of whether these were the funds of last resort.

[2/] The tier system has expired and is no longer available as a means of allocating funds under the DD Waiver Program. If the

Proposed Rules are invalidated, the Agency will not be able to automatically return to the tier system.

[3/] Dr. McClave stated during his testimony that he wanted to "run models" in order to test or replicate Dr. Niu's technical findings, but was unable to do so because he did not receive sufficient data from APD. Thus, Dr. McClave's understanding of the algorithm is somewhat limited.

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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.