STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

INTUITION COLLEGE SAVINGS SOLUTIONS, LLC,

Petitioner,

Case No. 20-2933RX

vs.

FLORIDA PREPAID COLLEGE BOARD,

Respondent.
_____/

FINAL ORDER

Pursuant to notice, the final hearing in this case was held on July 30, 2020, before Lynne A. Quimby-Pennock, Administrative Law Judge, Division of Administrative Hearings (DOAH or Division), in Tallahassee, Florida.

APPEARANCES

For Petitioner: J. Stephen Menton, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Florida Administrative Code Rules 19B-14.001, 19B-14.002, and 19B-14.003 (collectively the "Rules"), are each an invalid exercise of delegated legislative authority for the reasons alleged by Petitioner.

PRELIMINARY STATEMENT

On June 25, 2020, Petitioner, Intuition College Savings Solutions, LLC (Intuition or Petitioner), initiated this proceeding by filing a "PETITION TO DETERMINE THE INVALIDITY OF EXISTING RULES 19B-14.001, 19B-14.002, AND 19B-14.003, FLORIDA ADMINISTRATIVE CODE" (Petition). The Petition alleges:

> As set forth below, Rules 19B-14.001, 19B-14.002 and 19B-14.003 are an invalid exercise of delegated legislative authority under Section 120.52(8), Florida Statutes, because: (1) the Rules enlarge, modify and/or contravene the statute purportedly implemented and exceed the Board's rulemaking authority; (2) the Rules are arbitrary and capricious; (3) the Rules are vague, vesting unbridled discretion with the Board and attempt to create unauthorized jurisdiction at DOAH. The Rules also contravene the mandate set forth in Section 120.54(5), that state agencies must follow the Uniform Rules of Procedure unless a special exception is granted.

On June 30, 2020, Acting Chief Judge Robert S. Cohen issued an Order of Assignment, assigning the matter to the undersigned. A telephonic pre-hearing conference call was held on July 2, 2020. A Notice of Hearing and Order of Pre-hearing Instructions were issued on July 2, 2020, setting the final hearing for July 30, 2020, in Tallahassee, Florida. The case proceeded to hearing as scheduled.

On July 20, 2020, Florida Prepaid College Board (Board or Respondent), filed "RESPONDENT'S MOTION TO DISMISS PETITION TO DETERMINE THE INVALIDITY OF EXISTING RULES 19B-14.001, 19B-14.002 AND 19B-14.003, FLORIDA ADMINISTRATIVE CODE" (Motion). On July 27, 2020, Petitioner filed its response in opposition to the Motion. On July 28, 2020, an Order Denying the Dismissal of the Petition was issued.

On July 27, 2020, "RESPONDENT'S MOTION TO STRIKE PETITIONER'S EXPERT WITNESS" (Strike Motion) was filed. The Strike Motion failed to include whether Petitioner would file a written response (as required in the Order of Pre-hearing Instructions) and the certification required by Florida Administrative Code Rule 28-106.204(3). An Order Denying the Strike Motion was issued on July 28, 2020.

On July 29, 2020, the parties filed a Joint Prehearing Stipulation in which they identified their proposed witnesses and exhibits, set forth their objections to the other party's proposed exhibits, and agreed to several statements of fact and law. The stipulated facts are incorporated below to the extent relevant.

The parties offered Joint Exhibits 1 through 6,[1] which were admitted in evidence. Petitioner's Exhibit 1, the deposition of Walter Hamilton Traylor, was proffered over Respondent's relevancy objection. The undersigned reserved ruling on the admission of Petitioner's Exhibit 1 in evidence pending review of the deposition transcript. Having now reviewed Petitioner's Exhibit 1, it is not admitted in evidence. Petitioner's Exhibit 2 was admitted

[1] In the Pre-hearing Stipulation, there were five enumerated exhibits. At hearing, a numbering error was identified and the parties agreed there were, in fact, six Joint Exhibits. After a review of Joint Exhibits 3, through 5, the undersigned finds these exhibits are not related or relevant to the specific issue at hand.

in evidence over Respondent's objections. Respondent's Exhibit 1 was admitted without objection. Respondent's Exhibits 2 through 32 were admitted in evidence over Petitioner's objections.[2]

Petitioner presented the live testimony of two witnesses, David Maloney, Esquire, via Zoom Conference; and Claude Collier, Petitioner's Chief Executive Officer and its corporate representative. During Mr. Maloney's testimony, Respondent provided the undersigned and opposing counsel two other documents: a copy of chapter 5 of the 2019 edition of the Florida Administrative Practice book; and a copy of *State of Florida, Department of Health and Rehabilitative Services v. E.D.S. Federal Corp.*, 631 So. 2d 353 (Fla. 1st DCA 1994). These two documents were not offered or received in evidence.

Respondent presented the live testimony of its corporate representative William Thompson, Esquire.

The two-volume Transcript of the hearing was filed on August 21, 2020.[3] Both parties timely filed Proposed Final Orders (PFOs) on August 31, 2020.

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[2] In the Prehearing Stipulation:
a. Petitioner's objections to Respondent's Exhibits 6 through 8, and 27 through 32 were not noted. However, as the exhibits were being offered, Petitioner voiced relevancy objections to each;
b. Respondent listed its Exhibit 8 as "ITN 16-01." However, in Respondent's Exhibit Book Index, Exhibit 8 is listed as "Blank," which it is;
c. Respondent's Exhibit 12 contains a completed questionnaire for a gubernatorial appointment with the individual's Social Security number, which the undersigned has redacted; and
d. Respondent listed its Exhibit 26 as "Adoption documents and correspondence with the Department of State and the Joint Administrative Procedures Committee regarding the adoption of the Rules." However, in the Exhibit Book Index, Exhibit 26 is listed as "Blank," which it is.

[3] An electronic version of the Transcript was filed with DOAH on August 21, 2020, and the two-volume hard copy of the Transcript with CDs was filed on August 25, 2020.

The PFOs have been given due consideration in the preparation of this Final Order.

Unless otherwise indicated, all rule and statutory references are to the current versions.

FINDINGS OF FACT

1. The Board is the State Agency which administers the Stanley G. Tate Florida Prepaid College Program (Florida Prepaid College Plan) set forth in section 1009.98, Florida Statutes, and the Florida College Savings Program (Florida 529 Plan) set forth in section 1009.981, collectively known as the Plans.

2. Intuition is a Florida corporation authorized to do business in Florida. Intuition provides services to customers nationwide, including college savings and prepaid record keeping administration services. It is the largest third-party contractor in the country providing prepaid record keeping administrative services.

3. The Board and Intuition have entered into a series of contracts over the past 25 years. The parties entered their last contract on July 1, 2019, which called for Intuition to provide customer services and records administration services to the Board. Witnesses for both parties testified about the possibility of an upcoming contract dispute involving $700,000.00. This issue prompted the rule challenge.

4. The dispute resolution paragraph in the July 1, 2019, contract provides the following in pertinent part:

> 33. INTERPRETATION, VENUE AND DISPUTE RESOLUTION
>
> * * *
>
> B. The sole and exclusive manner of resolution of all claims, disputes or controversies related to or arising under or from this Contract shall be

> pursuant to Rules 19B-14.001, 19B-14.002, and 19B-14.003, Florida Administrative Code, as amended from time to time.

5. Rules 19B-14.001, 19B-14.002, and 19B-14.003, were effective as "New" on June 20, 1996.

6. Rule 19B-14.001, the only rule that has been amended since 1996,[4] currently provides:

> 19B-14.001 Scope
>
> These rules shall apply to the resolution of all claims, disputes or controversies related to or arising from contracts, including any extensions of contracts, entered by the Florida Prepaid College Board on or after the effective date of these rules. These rules shall constitute the sole procedure for the resolution of all claims under all such contracts. These rules do not apply to advance payment contracts for the prepayment of Registration Fees, Local Fees, the Tuition Differential Fee and dormitory fees.
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> *Rulemaking Authority 1009.971(1), (4), (6) FS.*
> *Law Implemented 1009.971*[5] *FS.*
> *History–New 6-20-96, Amended 10-18-10.*[6]

7. Rule 19B-14.001 identifies the "Rulemaking Authority" as section 1009.971(1), (4), and (6), and the "Law Implemented" as section 1009.971.

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[4] The rule was amended in the following ways: the name was changed from Florida Prepaid Postsecondary Education Expenses Board to Florida Prepaid College Board; the word "postsecondary" was deleted before "Registration Fees"; the word "registration" was deleted after the word "dormitory"; "Registration Fees" was capitalized; and the phrase "Local Fees, the Tuition Differential Fee" was added.

[5] Although section 1009.971 is cited as the "Law Implemented," these three statutory subsections: (2) Florida Prepaid College Board; Membership; (3) Florida Prepaid College Board; Elections; Meetings; and (5) Florida Prepaid College Board; Contractual Services, are not applicable to the challenged rules.

[6] These history notes are not completely accurate. This rule was amended in 2010 and the citations are accurate for 2010. Florida Administrative Code Rule 1-1.012, Legal Citations and History Notes, provides the specific method to record legal citations and history notes.

Section 1009.971(1), (4), and (6) state in pertinent part:

> (1) FLORIDA PREPAID COLLEGE BOARD; CREATION.—The Florida Prepaid College Board is hereby created as a body corporate with all the powers of a body corporate for the purposes delineated in this section. The board shall administer the prepaid program and the savings program, and shall perform essential governmental functions as provided in ss. 1009.97-1009.988.[7] For the purposes of s. 6, Art. IV of the State Constitution, the board shall be assigned to and administratively housed within the State Board of Administration, but it shall independently exercise the powers and duties specified in ss. 1009.97-1009.988.
>
> * * *
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> (4) FLORIDA PREPAID COLLEGE BOARD; POWERS AND DUTIES.—The board shall have the powers and duties necessary or proper to carry out the provisions of ss. 1009.97-1009.988, including, but not limited to, the power and duty to:
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> (a) Appoint an executive director to serve as the chief administrative and operational officer of the board and to perform other duties assigned to him or her by the board.
>
> (b) Adopt an official seal and rules.
>
> (c) Sue and be sued.
> (d) Make and execute contracts and other necessary instruments.
>
> (e) Establish agreements or other transactions with federal, state, and local agencies, including state universities and Florida College System institutions.

[7] In 1996, the statutes addressing the Plans ended at section 1009.984. Sections 1009.985 through 1009.988 were added in 2015; but those additions do not affect the issue herein. Further reference to these additional sections 1009.985 through 1009.988 will not be noted.

(f) Administer the trust fund in a manner that is sufficiently actuarially sound to defray the obligations of the prepaid program and the savings program, considering the separate purposes and objectives of each program. The board shall annually evaluate or cause to be evaluated the actuarial soundness of the prepaid fund. If the board perceives a need for additional assets in order to preserve actuarial soundness of the prepaid program, the board may adjust the terms of subsequent advance payment contracts to ensure such soundness.

(g) Invest funds not required for immediate disbursement.

(h) Appear in its own behalf before boards, commissions, or other governmental agencies.

(i) Hold, buy, and sell any instruments, obligations, securities, and property determined appropriate by the board.

(j) Require a reasonable length of state residence for qualified beneficiaries.

(k) Segregate contributions and payments to the trust fund into the appropriate fund.

(l) Procure and contract for goods and services, employ personnel, and engage the services of private consultants, actuaries, managers, legal counsel, and auditors in a manner determined to be necessary and appropriate by the board.

(m) Solicit and accept gifts, grants, loans, and other aids from any source or participate in any other way in any government program to carry out the purposes of ss. 1009.97-1009.988.

(n) Require and collect administrative fees and charges in connection with any transaction and impose reasonable penalties, including default, for delinquent payments or for entering into an

advance payment contract or a participation agreement on a fraudulent basis.

(o) Procure insurance against any loss in connection with the property, assets, and activities of the trust fund or the board.

(p) Impose reasonable time limits on use of the benefits provided by the prepaid program or savings program. However, any such limitations shall be specified within the advance payment contract or the participation agreement, respectively.

(q) Delineate the terms and conditions under which payments may be withdrawn from the trust fund and impose reasonable fees and charges for such withdrawal. Such terms and conditions shall be specified within the advance payment contract or the participation agreement.

(r) Provide for the receipt of contributions in lump sums or installment payments.

(s) Require that purchasers of advance payment contracts or benefactors of participation agreements verify, under oath, any requests for contract conversions, substitutions, transfers, cancellations, refund requests, or contract changes of any nature. Verification shall be accomplished as authorized and provided for in s. 92.525(1)(a).

(t) Delegate responsibility for administration of one or both of the comprehensive investment plans required in s. 1009.973 to persons the board determines to be qualified. Such persons shall be compensated by the board.

(u) Endorse insurance coverage written exclusively for the purpose of protecting advance payment contracts, and participation agreements, and the purchasers, benefactors, and beneficiaries thereof, including group life policies and group disability

policies, which are exempt from the provisions of part V of chapter 627.

(v) Form strategic alliances with public and private entities to provide benefits to the prepaid program, savings program, and participants of either or both programs.

(w) Solicit proposals and contract, pursuant to s. 287.057, for the marketing of the prepaid program or the savings program, or both together. Any materials produced for the purpose of marketing the prepaid program or the savings program shall be submitted to the board for review. No such materials shall be made available to the public before the materials are approved by the board. Any educational institution may distribute marketing materials produced for the prepaid program or the savings program; however, all such materials shall be approved by the board prior to distribution. Neither the state nor the board shall be liable for misrepresentation of the prepaid program or the savings program by a marketing agent.

(x) Establish other policies, procedures, and criteria to implement and administer the provisions of ss. 1009.97-1009.988.

(y) Adopt procedures to govern contract dispute proceedings between the board and its vendors.

(z) Amend board contracts to provide Florida ABLE, Inc., or the Florida ABLE program with contractual services.

(aa) Adopt rules relating to the purchase and use of a prepaid college plan authorized under s. 1009.98 or a college savings plan authorized under s. 1009.981 for the Gardiner Scholarship Program pursuant to s. 1002.385, which may include, but need not be limited to:

* * *

> (6) QUALIFIED TUITION PROGRAM STATUS.—Notwithstanding any other provision of ss. 1009.97-1009.984, the board may adopt rules necessary for the prepaid program and the savings program each to retain its status as a "qualified tuition program" in order to maintain its tax-exempt status or other similar status of the program, purchasers, and qualified beneficiaries under the Internal Revenue Code. The board shall inform participants in the prepaid program and the savings program of changes to the tax or securities status of advance purchase contracts and participation agreements.

8. Rule 19B-14.001 provides, in plain language, "[t]hese rules shall apply to the resolution of all claims, disputes or controversies related to or arising from contracts" and "shall constitute the sole procedure for the resolution of all claims under all such contracts." The term "shall" is defined as "directives to express what is mandatory." *See Merriam-Webster On-line Dictionary (*https://www.merriam-webster.com/dictionary/shall*).*

9. Rule 19B-14.002 provides the following:

> 19B-14.002 Initiating Proceedings Related to Contracts with the Board.
>
> (1) Any person or firm that has entered into a contract with the Board and has been adversely affected by a decision of the Board or its employees concerning such contract shall file a written petition to contest the decision with the Board within 21 days of the date of the receipt by such person or firm of the decision. The notice of the decision shall be provided in writing to the person or firm by the Executive Director. The date of receipt of the notice shall be either the date on which the notice is received by the person or firm if the notice is sent by registered mail or by other means of delivery which results in a receipt for delivery or the date of the decision plus five days if the notice is sent by regular mail. Any person or firm who receives such written notice of the decision and who fails to request a hearing within

twenty-one days, shall have waived his right subsequently to request a hearing on such matters.

(2) The petition shall include the following:

(a)The name and business address of the person or firm which claims to be adversely affected by a decision of the Board or its employees;

(b) A concise statement of the ultimate facts upon which the claim arose;

(c) The date and subject of the contract under which the claim arose;

(d) A statement of all disputed issues of material fact upon which the claim is based or, if there are none, the petition shall so indicate;

(e) A concise statement which explains how the substantial interests of the person or firm are affected by the decision of the Board or the Board's employees;

(f) A concise statement of the provisions of the contract together with any fed., state and local laws, ordinances or code requirements or customary practices and usages in the industry asserted to be applicable to the questions presented by the claim;

(g) The demand for relief sought by the claimant;
(h) The date of the occurrence of the event or events which gave rise to the claim and the date and manner of the Contractor's compliance with the contract; and

(i) Any other material information the person or firm contends is material to its claim.

(3) The written petition shall be printed, typewritten or otherwise duplicated in legible form. The petition shall include copies of all documents which support the claim.

Rulemaking Authority 1009.971(1), (4), (6) FS. Law Implemented 1009.971 FS. History–New 6-20-96.[8]

10. Rule 19B-14.002(1) clearly states that any person or firm (vendor) "shall file a written petition to contest the decision with the Board within 21 days of the date of the receipt by such person or firm of the decision." The next sentence provides the method by which the specific date of receipt of the notice is determined, and when the clock starts ticking for the affected vendor to file a written petition. However, the rule fails to establish a time frame in which Respondent must issue the notice once the adverse decision is made. Further, there are no specific requirements for the content of the written notice, such as explaining the basis for the adverse decision. Although Mr. Thompson asserted that any affected vendor could file a written petition to contest any adverse decision by the Board or a Board employee, there is no such language in the rule, the "sole procedure" for a vendor to do so.

11. Rule 19B-14.002(2) provides specific requirements for the written petition. Although a vendor may be able to include some of the required information for the written petition, the requirement that the vendor "shall" provide a "concise statement of the ultimate facts upon which the claim arose"; a "statement of all disputed issues of material fact upon which the claim is based ..."; and a "concise statement which explains how the substantial interest of the person or firm are affected by the decision of the Board or the Board's employees" is impossible without specific information from Respondent as to the circumstances giving rise to the adverse decision. Mr. Thompson testified there was nothing to preclude an affected vendor from filing a public records request seeking the information desired.

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[8] These citations are not accurate. In 1996, Respondent listed sections 120.53(1) and 240.551(5), Florida. Statutes (1995), as the "Specific Authority" and section 240.551 as the "Law Implemented." Rule 1-1.012, Legal Citations and History Notes, provides the specific method to record legal citations and history notes.

However, this is contrary to the specific language of the rule, which neither requires the Board to explain the basis for their adverse decision nor provides any procedure for an adversely affected vendor to obtain the information necessary to file a written petition. There is no such language in the rule, the "sole procedure" for a vendor to do so.

12. Rule 19B-14.003 provides the following:

> 19B-14.003 Resolution of Claims.
>
> (1) Upon receipt of a formal written petition, the Executive Director shall attempt to resolve the matters that are the subject of the petition by mutual agreement within fifteen (15) days, excluding Saturdays, Sundays, and legal holidays.
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> (2) If the petition is not resolved by mutual agreement within fifteen (15) days, excluding Saturdays, Sundays and legal holidays, the Executive Director shall deliver, within forty-five (45) days from the date such petition was filed, to the person or firm that filed the petition a determination that indicates the Board's written response to the claims or such person or firm.
>
> (3) Unless the person or firm who filed the petition agrees to the determination of the Board and a consent order adopting the determination is entered within thirty (30) days from the receipt by the person or firm of the Board's determination, the Executive Director, if no disputed issues of material fact are involved, shall designate a hearing officer who shall conduct an informal proceeding pursuant to Section 120.57(2), F.S., and applicable Board rules. The hearing officer designated by the Executive Director shall be either a person who is a member in good standing of the Florida Bar or a person knowledgeable by virtue of education or practical experience with the subject matter of similar contracts involving state agencies.
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> (4) If there is a disputed issue of material fact, the Executive Director shall refer the petition to the

Division of Administrative Hearings of the Department of Management Services for proceedings under Section 120.57(1), F.S.

(5) Once the Executive Director has referred the dispute to a hearing officer pursuant to subsection (3) or (4), no further information or amendment of the claims shall be permitted.

(6) The statements, facts, documents and materials contained in the petition filed pursuant to Rule 19B-14.002, F.A.C., or which are submitted to and received by the Executive Director prior to the determination made pursuant to subsection 19B-14.003(2), F.A.C., shall constitute the entire factual record submitted by a person or firm on which a claim against the Board may be sustained in any hearing under this rule. A person or firm making a claim against the Board shall not be allowed to submit to a hearing officer any statements, facts, documents or materials to support any claim against the Board which were not submitted to the Executive Director by the person or firm making the claim prior to the Executive Director's determination pursuant to subsection 19B-14.003(2), F.A.C. The Board may submit statements, facts, documents or materials in response to the factual record submitted by a person or firm making a claim against the Board or to sustain the decision of the Executive Director which was made pursuant to subsection 19B-14.003(2), F.A.C.

(7) The filing of a petition by a person or firm pursuant to the provisions of this rule shall not affect the duty or obligation of the person or firm pursuant to the contract under which the claim or dispute arose. Any person or firm which files a petition pursuant to the provisions of this rule expressly agrees that it shall continue to proceed with all scheduled work as determined under any prior existing schedule pursuant to such contract unless otherwise agreed in writing between the person or firm and the Board.

Rulemaking Authority 1009.971(1), (4), (6) FS. Law Implemented 1009.971 FS. History–New 6-20-96.[9]

13. Rule 19B-14.003(1) adds the word "formal" before "written petition" in the first sentence. The addition of this one word, without any definition and without any previous mention in rule 19B-14.001 (the "sole procedure"), imposes another requirement on vendors. Yet, there is no direction provided as to what that "formal written petition" includes. Respondent aptly states in its PFO: "A rule may be vague if it does not define important terms or standards." Such is the case when a word is inserted and not defined. The remainder of rule 19B-14.003(1) places a duty on the Board's Executive Director to attempt a resolution of the "formal written petition" within 15 business days of its receipt.

14. Rule 19B-14.003(3) establishes that if no resolution is reached, the matter is referred to a hearing officer designated by the Board's Executive Director for a hearing not involving disputed issues of fact (formerly and commonly referred to as an "informal hearing"). This informal hearing is to be conducted pursuant to section 120.57(2), Florida Statutes.

15. Rule 19B-14.003(4) establishes that if no resolution is reached, the matter is referred to DOAH for a hearing involving disputed issues of fact (formerly and commonly referred to as a "formal hearing"), "for proceedings under section 120.57(1),F.S."

16. However, rule 19B-14.003(5) provides that regardless of which referral is made (either rule 19B-14.003(3) or (4)), "no further information or amendment of the claims shall be permitted." This, in effect, precludes the discovery process at DOAH, and purports to cut off the authority of the presiding administrative law judge to grant leave to amend the petition.

[9] See Footnote 8 above.

17. Rule 19B-14.003(6) then proceeds to place further restrictions on how either hearing (informal or formal) must proceed. Subsection (6) restricts what "shall constitute the entire factual record" to the "statements, facts, documents and materials contained in the petition," and that which is "submitted to and received by the Executive Director prior to the determination made pursuant to subsection Rule 19B-14.003(2), F.A.C." This phrase is emphasized again with the following statement: "[A] person or firm making a claim against the Board shall *not* be allowed to submit to a hearing officer any statements, facts, documents or materials to support any claim against the Board which were not submitted ... prior to the Executive Director's determination." (Emphasis added). However, the Board, itself, "may submit statements, facts, documents or materials in response to the factual record submitted by person or firm making a claim against the Board, or to sustain the decision of the Executive Director which was made pursuant to subsection 19B-14.003(2), F.A.C."

18. Overall, these three rules set forth the procedures, in either informal or formal proceedings, to adjudicate contractual disputes. To prohibit the adversely affected party from fully prosecuting their claim, while allowing the Board to submit additional material to the trier of fact is not fair, and is contrary to the procedures in place at DOAH, contrary to several statutory provisions found in sections 120.569 and 120.57(1), and the discovery permitted at DOAH under the Florida Rules. of Civil. Procedures. The phrase "judge, jury, and executioner" may not be an incorrect analogy.

19. Each rule cites as its "Rulemaking Authority" section 1009.97(1), (4), and (6). The Board is a creature of the Florida Statutes, created by section 1009.971(1), "with all the powers of a body corporate," yet subsection (1) does not provide any rulemaking authority. Further, nowhere does this section grant the Board the ability to adopt rules to bind another state agency, that is governed by different statutes and rules.

20. Section 1009.971(6) allows the Board to "adopt rules necessary for the prepaid program and the savings program... to maintain its tax-exempt status or other similar status of the program," but does not specifically provide that the Board may impose its rules on another state agency.

21. Section 1009.971(4)(b) grants the Board the "power and duty to… (a)dopt an official seal and rules." This subsection does not expound on what the rules may impart, and thus does not grant the specific authority to do more.

22. Section 1009.971(4)(y) grants the Board the "power and duty to… "(a)dopt procedures to govern contract dispute proceedings between the board and its vendors." Although the Board has the ability to adopt rules, that authority does not grant the Board the ability to impose its "procedures" on another state agency that is governed by different statutes and rules.

23. The term "procedures" is not defined in the statute. The common definition of procedures is "a particular way of accomplishing something." *See Merriam-Webster On-line Dictionary* (https://www.merriam-webster.com/dictionary/procedure). In the legal arena, the term "procedure" is defined as "[T]hat which regulates the formal steps in an action or other judicial proceeding; a form, manner, and order of conducting suits or prosecutions." *Black's Law Dictionary* 1368 (4th ed. 1968). Another characterization of the term "procedure" is the structure for carrying on a lawsuit, including the pleadings, discovery process, evidence, and practice.

24. The Division[10] provides independent administrative law judges to conduct hearings pursuant to sections 120.569 and 120.57(1), and other laws.

25. Section 120.569 sets forth the type of proceedings to be conducted: "Decisions which affect substantial interests." The petition for a hearing is

[10] The Division operates two distinct programs: the adjudication of administrative cases by administrative law judges (ALJs); and the adjudication of workers' compensation claims by the judges of compensation claims. In this instance, the Division employs ALJs to conduct hearings in which the substantial interests of a person or entity are determined by an agency and involve a disputed issue of material fact.

filed with the affected agency, which in turn has 15 days to notify DOAH, although the parties may attempt to resolve the dispute and a delay in sending the case to DOAH occurs. Once the case is at DOAH, an ALJ is assigned and the affected agency is mandated to "take no further action with respect to the proceeding ... except as a party litigant, as long as the division has jurisdiction over the proceeding under s. 120.57(1)." The "presiding officer has the power to swear witnesses and take their testimony under oath, to issue subpoenas, and to effect discovery on the written request of any party by any means available to the courts ... ." *See* § 120.569(2)(f), Fla. Stat. Further, the presiding officer shall exclude irrelevant, immaterial, or unduly repetitious evidence, while allowing "all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs ... ." *See* § 120.569(2)(g), Fla. Stat.

26. The Florida Administration Commission, composed of the Governor and Cabinet, adopted the hearing procedures that DOAH utilizes, commonly referred to as the Uniform Rules. *See* §§ 14.202 and 120.54(5), Fla. Stat. Chapter 28-106, Part I, sets forth the general provisions that apply to "all proceedings in which the substantial interest of a party are determined by the agency and shall be construed to secure the just, speedy, and inexpensive determination of every proceeding." Part II sets forth those processes for hearings involving disputed issues of material fact, which are at specific odds with rule 19B-14.003.[11] Section 120.54(5)(a)2. provides that an "agency may seek exceptions to the uniform rules of procedure by filing a petition with the Administration Commission." The Board provided no evidence that it has sought and received an exception that would authorize the challenged rules.

[11] Chapter 28-106, Part III, provides the uniform procedures for proceedings and hearings not involving disputed issues of material fact; Part IV provides the uniform procedures for mediations; Part V provides the process for emergency actions; and Part VI provides conflict direction.

27. It is true that the Board can adopt procedures to govern contract dispute proceedings. However, the challenged rules, read separately and as a whole, are an invalid exercise of delegated legislative authority.

CONCLUSIONS OF LAW

28. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to section 120.56.

29. Rulemaking is a legislative function within the exclusive authority of the Legislature. *See* Art. II, § 3 Fla. Const. An administrative rule is valid only if adopted under a proper delegation of legislative authority. *See Askew v. Cross Key Waterways*, 372 So. 2d 913 (Fla.1978); *Chiles v. Children A, B, C, D, E, and F*, 589 So. 2d 260 (Fla. 1991).

30. The purpose of a rule challenge proceeding is "to determine the facial validity of [the challenged rules], not to determine their validity as applied to specific facts, or whether the agency has placed an erroneous construction on them." *Fairfield Communities v. Fla. Land & Water Adj. Comm'n*, 522 So. 2d 1012, 1014 (Fla. 1st DCA 1988).

31. Section 120.56(1)(a) provides that "[a]ny person substantially affected by a 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."

32. To establish standing under the "substantially affected" test, a party must demonstrate that: 1) the rule will result in a real and immediate injury in fact, and 2) the alleged interest is within the zone of interest to be protected or regulated. *Jacoby v. Fla. Bd. of Med.*, 917 So. 2d 358 (Fla. 1st DCA 2005); *see also Fla. Bd. of Med. v. Fla. Acad. of Cosmetic Surgery*, 808 So. 2d 243, 250 (Fla. 1st DCA 2002), superseded on other grounds, *Dep't of Health v. Merritt*, 919 So. 2d 561 (Fla. 1st DCA 2006). As a vendor of the Board, Petitioner is directly regulated by the challenged rules. The parties acknowledged the possibility of an upcoming contract dispute which

prompted this rule challenge. Intuition has standing to challenge the rules in this proceeding.

33. In accordance with section 120.56, Petitioner is challenging existing, as opposed to proposed, rules. Section 120.56 sets forth the specific method by which a rule challenge petition is filed, and how it will be adjudicated. Section 120.56(1)(e) provides that a hearing held under this statute is "de novo in nature" and requires Petitioner to prove by a preponderance of the evidence that the existing rules are an invalid exercise of delegated legislative authority as to the objections raised.

34. A preponderance of the evidence has been defined as "the greater weight of the evidence," or evidence that "more likely than not" tends to prove a certain proposition. *Gross v. Lyons*, 763 So. 2d 276, 280 n.1 (Fla. 2000).

35. Section 120.52(8) defines the term "invalid exercise of delegated legislative authority" as follows:

> (8) "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.

See also § 120.536(1), Fla. Stat. (repeating the "flush-left" paragraph found at the end of section 120.52(8)).

36. In its Petition, Petitioner identified three bases in section 120.52(8) for invalidating the rules: 1) the rules enlarge, modify, and/or contravene the law purportedly implemented and exceeds the Board's rulemaking authority in violation of section 120.52(8)(c); 2) the rules are vague, fail to establish adequate standards for agency decisions, or vest unbridled discretion in the agency in violation of section 120.52(8)(d); and 3) the rules are arbitrary and capricious in violation of section 120.52(8)(e).

37. The rules exceed the grant of rulemaking authority by establishing a "sole procedure" for vendors to resolve all claims while imposing the Board's jurisdictional procedures on another state agency. The rules specifically preclude additional facts or evidence from consideration in an informal or formal hearing. Section 1009.971 does not authorize the imposition of the Board's rules over the adjudicatory process. The Legislature has dictated that disputed–fact hearings at DOAH "shall be de novo." §120.57(1)(k), Fla. Stat.

38. Section 120.52(8)(e) declares that a rule is an invalid exercise of delegated legislative authority when it is arbitrary and capricious. The statute incorporates a longstanding definition of the term, stating that 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." *See Dravo Basic Materials Co. v. Dep't of Transp.*, 602 So. 2d 632, 634 (Fla. 1st DCA 1992).

39. The rules state a written petition is to be filed when an adverse action has occurred and notice given, but fails to include when the notice is to be provided to the affected vendor, or what details are required to be in the notice. Yet the vendor must somehow specify all disputes in its written petition with no procedure to obtain the information, and no right to seek amendment. Taken together, these provisions are irrational, creating an impossible one-sided stacked deck against the vendor seeking to challenge an adverse decision or action. Add to that the lack of details as to what the notice is to provide to the affected vendor is most troublesome.

40. As used in section 120.52(17), the term "rulemaking authority" is defined to mean "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'".

41. The term "law implemented" is defined to mean "the language of the enabling statute being carried out or interpreted by an agency through rulemaking." § 120.52(9), Fla. Stat.

42. Generally, under the Administrative Procedure Act, each agency rule must be accompanied by a reference to specific rulemaking authority and a reference to the section of the Florida Statutes or Laws of Florida being implemented or interpreted. § 120.54(3)(a)1., Fla. Stat.

43. In *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1st DCA 2000), the First District Court of Appeal considered a challenge to rule provisions which granted exemptions to certain permitting requirements based upon prior governmental approval in relation to the flush-left paragraph. The agency had been delegated the power to establish exemptions, but the power was qualified: only exemptions that did not "allow significant adverse [environmental] impacts to occur" could be granted. *Id.* at 600.

44. The court found that the language prohibiting agencies from adopting any rules except those "that implement or interpret the specific powers and duties granted by the enabling statute" is clear and unambiguous. The court also observed that "[i]n the context of the entire sentence, it is clear that the authority to adopt an administrative rule must be based on an explicit power or duty identified in the enabling statute. Otherwise, the rule is not a valid exercise of delegated legislative authority." *Id.* 599.

45. In interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute or rule and, instead, must interpret such statute or rule de novo. Art V, § 21, Fla. Const. (Amendment No. 6 in the 2018 election cycle.). The late Justice Anton Scalia foreshadowed the policy adopted by this recent constitutional amendment when he wrote: "It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well." *See Talk Am., Inc., v Mich. Bell Tel. Co.*, 564 US 50, 68 (2011).

46. Petitioner has met its burden as to each rule based on section 120.52(8)(b),(c), (d), and/or (e). These rules enlarge, modify, and/or contravene

the statute they purportedly implemented, and exceed the Board's rulemaking authority. These rules are contrary to the governing statutes and rules for adjudication at DOAH.

47. Section 120.595(3), provides:

> If the appellate court or administrative law judge declares a rule or portion of a rule invalid pursuant to s. 120.56(3) or (5), a judgment or order shall be rendered against the agency for reasonable costs and reasonable attorney's fees, unless the agency demonstrates that its actions were substantially justified or special circumstances exist which would make the award unjust. An agency's actions are "substantially justified" if there was a reasonable basis in law and fact at the time the actions were taken by the agency. If the agency prevails in the proceedings, the appellate court or administrative law judge shall award reasonable costs and reasonable attorney's fees against a party if the appellate court or administrative law judge determines that a party participated in the proceedings for an improper purpose as defined by paragraph (1)(e). No award of attorney's fees as provided by this subsection shall exceed $50,000.

48. Inasmuch as this Final Order determines that the challenged rules are each an invalid exercise of delegated legislative authority as defined in section 120.52(8)(b),(c),(d), and/or (e), Petitioner is entitled to a hearing as to entitlement and, if entitled, the amount of any reasonable fees and costs.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Rules 19B-14.001, 19B-14.002, and 19B-14.003 are each individually an invalid exercise of delegated legislative authority. Jurisdiction is retained for the purpose of determining whether attorney's fees and costs are warranted and, if so, the amount. Any motion to determine fees and costs shall be filed within 60 days of the issuance of this Final Order.

DONE AND ORDERED this 25th day of September, 2020, in Tallahassee, Leon County, Florida.

LYNNE A. QUIMBY-PENNOCK
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Filed with the Clerk of the
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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.