STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

POSITIVE BEHAVIOR SUPPORT,

Petitioner,

vs. Case No. 21-1789RU

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

FINAL ORDER OF DISMISSAL

This case is before the undersigned on the Agency's Motion to Dismiss Amended Petition, filed by Respondent on June 29, 2021, and Petitioner's Response, filed July 2, 2021. Upon consideration of the motion and response, as well as the arguments made in Respondent's prior motion to dismiss, Petitioner's response, and during the telephonic motion hearing held on June 15, 2021, the undersigned is persuaded that the Amended Petition must be dismissed with prejudice. Accordingly, this is a Final Order of Dismissal.

APPEARANCES

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STATEMENT OF THE ISSUE

At issue is whether Petitioner has met the pleading requirements in section 120.56(4), Florida Statutes (2020),[1] to allege "agency statements" that meet the definition of a "rule."

PRELIMINARY STATEMENT

Positive Behavior Support (PBS or Petitioner) filed a Petition Challenging Agency Statements as Unpromulgated Rules, with four exhibits incorporated by reference (Original Petition), on June 4, 2021. The case was assigned to the undersigned on June 7, 2021, and a telephonic scheduling conference was set for June 8, 2021. On June 8, 2021, shortly before the scheduling conference, the Agency for Health Care Administration (AHCA or Respondent) filed the Agency's Motion to Dismiss.

During the scheduling conference, counsel for PBS stated that he intended to initiate substantial discovery, necessitating a waiver of the time limits for commencing the hearing. Alternatively, he suggested that the just-filed Agency's Motion to Dismiss should be addressed and resolved first. Counsel for AHCA was not in a position to agree to waive time limits, but ultimately it was agreed that the Agency's Motion to Dismiss would be taken up and resolved first, before proceeding to discovery and scheduling a final hearing. Petitioner agreed to file its response to the motion by June 14, 2021, and a telephonic motion hearing was scheduled for June 15, 2021.

Petitioner filed its response on June 11, 2021, arguing that the Original Petition was sufficient, but that if it were found to be deficient, Petitioner should be given leave to amend. The telephonic motion hearing went forward as scheduled.

[1] References to Florida Statutes are to the 2020 codification, unless otherwise provided.

During the telephonic motion hearing, the undersigned ruled that the Original Petition would be dismissed without prejudice, and detailed deficiencies in the Original Petition and how those deficiencies should be addressed in an amended petition. An abbreviated summary of the detailed discussion and ruling made during the hearing was set forth in an Order of Dismissal Without Prejudice, issued June 16, 2021.

Petitioner timely filed its Amended Petition Challenging Agency Statements as Unpromulgated Rules (Amended Petition) on June 25, 2021. The same four exhibits from the Original Petition were adopted by reference in the Amended Petition and are considered a part thereof. No additional exhibits were attached.

On June 29, 2021, AHCA filed the Agency's Motion to Dismiss Amended Petition. Petitioner filed its response on July 2, 2021, asserting that the "Amended Petition has cured what the ALJ [Administrative Law Judge] determined to be the infirmities in" the Original Petition. Unlike its response to the Agency's Motion to Dismiss the Original Petition, Petitioner did not request leave to further amend the petition if the undersigned disagrees with Petitioner's claim of cured infirmities. Neither party requested oral argument on the Agency's Motion to Dismiss Amended Petition, and the undersigned finds that this matter may be disposed of based on the written submissions and the arguments presented during the June 15, 2021, motion hearing.

FINDINGS OF FACT

Accepting the well-pled allegations of fact in the Amended Petition (including its exhibits) as true for purposes of this Order, the following findings of fact are made:

1. PBS is the largest provider of Applied Behavioral Analysis services in Florida. Its principal place of business is 7108 South Kanner Highway, Stuart, Florida 34997.

2. AHCA is an executive agency of the State of Florida, headquartered at the Fort Knox Executive Center, 2727 Mahan Drive, Building 3, Tallahassee, Florida 32308.

3. AHCA has promulgated the Florida Medicaid Provider Reimbursement Handbook, CMS-1500 (Handbook), which is adopted by reference in Florida Administrative Code Rule 59G-4.001. *See* Original Pet., Ex. A, adopted by reference in Amended Pet., Ex. A. The Handbook, some two inches thick when printed out on paper, contains requirements and instructions for many different types of Medicaid providers regarding completing, submitting, and processing claims for reimbursement for services provided to Medicaid recipients.

4. AHCA has also promulgated the Florida Medicaid Behavior Analysis Services Coverage Policy (BA Coverage Policy). *See* Original Pet., Ex. B, adopted by reference in Amended Pet., Ex. B.[2] The BA Coverage Policy contains eight pages of detailed criteria, addressing eligibility for recipients and for providers, coverage, exclusions, documentation requirements, authorization requirements, reimbursement criteria, and review criteria for BA services.

5. As set forth in the BA Coverage Policy, "[b]ehavior analysis (BA) services are highly structured interventions, strategies, and approaches provided to decrease maladaptive behaviors and increase or reinforce appropriate behaviors." BA Coverage Policy at 1. BA services "are considered as either the treatment of choice or as an adjunct treatment modality for a

[2] The BA Coverage Policy attached as Exhibit B is undated; it is identified as a "Draft Rule." It appears that the Draft Rule is substantively the same as the current promulgated BA Coverage Policy (October 2017), incorporated by reference in rule 59G-4.125. *See* link available at: https://www.flrules.org/Gateway/reference.asp?No=Ref-08679 (last visited July 10, 2021). Out of caution, citations herein to specific pages in the BA Coverage Policy are to the October 2017 version, which is the official promulgated version.

variety of conditions and disorders where maladaptive behaviors are part of the recipient's clinical presentation, including behavioral manifestations of diagnoses such as Autism Spectrum Disorder and other behavioral health conditions." BA Coverage Policy at 6.

6. Electronic Visit Verification (EVV) is a system which serves to capture relevant information regarding the provision of services. The information captured by the EVV system includes: (a) that an approved provider provided the agreed-upon point-of-care service; (b) the time that a visit began and ended; (c) the individual who received the service; and (d) the date and location of the provided service.

7. An EVV system has been in place and is required to be used by Medicaid providers of home health services. *See* § 409.9132, Fla. Stat., and Fla. Admin. Code R. 59G-4.132. The EVV system for home health services began as a pilot project in one county (Miami-Dade), and then was expanded to statewide use. The EVV system for home health services was developed, and is operated, by a procured vendor with which AHCA has contracted. § 409.9132, Fla. Stat. Rule 59G-4.132 requires that Medicaid providers of home health services use the EVV system and submit claims to be reimbursed for services rendered through the EVV system.

8. AHCA has taken steps to extend the usage of the same kind of EVV system for BA services. AHCA procured the services of a vendor, identified by Petitioner as "Tellus," to create and operate an EVV system for BA services.[3]

9. The EVV system for BA services is currently operative in a "Pilot Region" only. BA service providers within the Pilot Region are currently

[3] That AHCA operates an EVV system for BA services through its procured vendor, Tellus, is set forth in Exhibit C, attached to the Original Petition and adopted by reference in the Amended Petition. Exhibit C is Petitioner's notice letter to AHCA of its claims of unadopted rules that it seeks to challenge in this proceeding, as a precursor to seeking attorney's fees pursuant to section 120.595(4). *See* Amended Pet. at 7, ¶ 20, and at 11 (Relief requested). Exhibit C notifies AHCA that the alleged unadopted rules "relate to AHCA's Electronic Visit Verification ("EVV") system and the actions of AHCA's EVV vendor/agent, Tellus" and are based on "AHCA's implementation of the EVV system (through its procured vendor, Tellus)[.]" Ex. C at 1, 3.

required to use the EVV system. It was not disclosed how long the EVV system has been in use in the Pilot Region, or if its use by BA providers has been required since inception (versus being phased in). The Pilot Region covers Medicaid regions 9, 10, and 11, which include the following counties: Indian River, Martin, Okeechobee, Palm Beach, St. Lucie, Broward, Miami-Dade, and Monroe. PBS provides BA services in the Pilot Region. A fair inference from Petitioner's allegations of having called problems to AHCA's attention for "the past several months" is that the transition to use of the EVV system for BA services in the Pilot Region is relatively recent. *See* Amended Pet. at 5, ¶ 15.

10. AHCA has announced a plan to expand this EVV system to cover all BA services provided statewide, "by potentially as early as sometime this summer." Amended Pet. at 3, ¶ 10.

11. Recently, AHCA published Notice of Rule Development to amend rule 59G-4.132, which is now called "Home Health Electronic Visit Verification Program." Amended Pet., Ex. D. According to the Notice, the rule amendments will include changing the name of the rule to "Electronic Visit Verification Program," and expanding the scope of the rule to add that providers of BA services (in addition to home health service providers) must render services to recipients and submit claims in accordance with rule 59G-4.132. After publication of the Notice, a rule development workshop was held on May 28, 2021.

12. PBS has made clear, in two different parts of the Amended Petition, that it is *not* challenging as an unadopted rule the requirement that BA service providers use the EVV system. "PBS does not allege that the use of EVV, in and of itself, to verify data relating to ABA[4] services constitutes an unpromulgated rule. In fact, PBS is a strong proponent of a functional EVV

[4] PBS describes its services as "applied behavioral analysis," for which it uses the acronym "ABA." However, AHCA's rules, such as the BA Coverage Policy, use the term "behavior analysis" to describe these services, for which AHCA uses the acronym "BA."

system." Amended Pet. at 4, ¶ 11. "[A]s stated herein, PBS does not contest that EVV use is required." Amended Pet. at 9, n. 5.

13. Instead, PBS seeks to challenge certain aspects of AHCA's implementation (through its procured vendor, Tellus) of the EVV system in the Pilot Region. In particular, PBS articulates the objects of its unadopted rule challenge as follows:

> The Agency is operating pursuant to two generally applicable policies which fit the legal definition of unpromulgated rules. First, it is denying reimbursement for clean claims for ABA services, contrary to the Handbook's promulgated assurance that such clean claims will be paid. Second, the Agency is denying ABA providers the ability to resubmit these claims for service reimbursement, despite the Handbook's promulgated allowance for such resubmission.

Amended Pet. at 9, ¶ 26. The allegations and exhibit provisions related to Petitioner's claim of two unadopted "policies" are examined in turn.

Denying reimbursement for clean claims

14. The Handbook requires that providers submit a "clean claim" in order to be reimbursed for services (including BA services) to Medicaid recipients. *See* Original Pet., Ex. A, adopted by reference in Amended Pet., Ex. A at 1-4. Clean claims are those that:

- have been completed properly according to Medicaid billing guidelines;
- are accompanied by all necessary documentation required by federal law, state law, or state administrative rule for payment; and
- can be processed and adjudicated without obtaining additional information from the provider or from a third party.

15. According to the Handbook, "[a] clean claim includes a claim with errors originating in the claim system." *Id.* By this provision, the Handbook codifies a recognition that errors will sometimes occur because of an issue originating within the claim system itself.

16. According to PBS, despite the Handbook's assurance that clean claims will be paid, the AHCA/Tellus EVV system is rejecting clean claims that meet the Handbook's requirements. PBS did not quantify or otherwise characterize the frequency of rejected clean claims; it is unknown whether this happens occasionally, frequently, or all the time. Likewise, since PBS does not describe the claims that are rejected, it cannot be determined whether there is any common denominator characterizing the claims that it alleges are clean claims suffering rejection. However, for purposes of this Order, PBS's allegations are accepted as true: that some indeterminate number of clean claims are being rejected by the EVV system.

17. According to PBS, "[t]he only even potential errors in these claims as submitted stem from issues with the EVV system itself." Amended Pet. at 4, ¶ 14. This scenario falls squarely within the Handbook provision recognizing that system-caused errors can occur.

18. Not only does the Handbook codify the recognition that system errors can occur, but the Handbook also codifies a process, with an extended timeframe, for providers to fix claims denied due to system errors. Petitioner does not mention the following provision in its Handbook exhibit: "**System Error**[:] If a clean claim is denied due to a system error, a fiscal agent processing error, or any error that is the fault of Medicaid or the fiscal agent, an exception may be granted [to the time limit for filing claims] *if the provider submits another clean claim along with documentation of the denial* to the area Medicaid office *no later than 12 months from the date of the original denial*." Ex. A at 1-7 (emphasis added).

19. These Handbook provisions should mean that, on a claim-by-claim basis, within 12 months of an improper denial of a clean claim, PBS's (or any other provider's) proof that it timely submitted a clean claim, but that an EVV system error caused the claim to be denied, would result in a determination that a "clean claim" was timely filed and it would be paid.

20. As one example of an EVV system-created error, PBS alleges:

> In some instances, the EVV system (or some party who the Agency has granted access to it) [sic] is modifying claims post-submission, therefore rendering otherwise clean claims to be invalid.[5] The only opportunity that providers such as PBS have to correct such an improper modification prior to the reimbursement filing deadline is to personally monitor these submissions and attempt to manually restore them within the EVV system to their original status.

Amended Pet. at 4-5, ¶ 14.

21. In the same paragraph, Petitioner added the following: "This goes far beyond the process and puts providers such as PBS in jeopardy of having claims improperly denied if they do not have the time or resources to monitor and manually edit the system in this way. Remedying errors that the system itself has caused falls outside of the Agency's promulgated requirements for providers, and results in improper delay in reimbursement for their services." This allegation is not accepted as true; it is contradicted by the "System Error" Handbook provision quoted above in paragraph 18.[6] While system errors are not ideal, and putting providers in the position of having to remedy

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[5] In Exhibit C, attached to the Original Petition and adopted by reference in the Amended Petition, Petitioner was more direct, asserting that "*either Tellus or the EVV system itself* are [sic] modifying claims post-submission, therefore rendering otherwise clean claims invalid." Ex. C at 4 (emphasis added). Thus, Petitioner's reference in the Amended Petition to "some party" is to Tellus, the vendor that developed and operates the EVV system.

[6] Petitioner's allegations are properly considered together with the exhibits adopted by reference in the Amended Petition. Where, as here, the exhibit contradicts the allegation, the exhibit controls. *See, e.g.*, *Ginsberg v. Lennar Fla. Holdings, Inc.*, 645 So. 2d 490, 494 (Fla. 3d DCA 1994) ("When a party attaches exhibits to the complaint those exhibits become part of the pleading and the court will review those exhibits accordingly [in ruling on whether there are pleading deficiencies]. … The conclusions of the pleader, as to the meaning of the exhibits attached to the complaint, are not binding on the court. Exhibits attached to the complaint are controlling, where the allegations of the complaint are contradicted by the exhibits, the plain meaning of the exhibits will control.") (internal citations omitted); followed in *Viverette v. State, Dep't of Transp.*, 227 So. 3d 1274, 1277 (Fla. 1st DCA 2017). The same principles apply in administrative proceedings. *See Altee v. Duval Cty. Sch. Bd.*, 990 So. 2d 1124, 1129 (Fla. 1st DCA 2008) (in ruling on a motion to dismiss, the administrative law judge considers facts drawn from the petition, any amendments, and any incorporated attachments).

system-caused errors is also not ideal, they are codified as part of the claims process in the promulgated Handbook.

22. PBS alleges that it repeatedly made AHCA aware of the problem it is experiencing with having clean claims denied "throughout the past several months," but that up to this point, AHCA has not remedied this improper rejection of clean claims. PBS further alleges: "This is a generally occurring issue" for BA service providers in the Pilot Region, and "there is nothing specific to PBS that is causing its clean claims to be improperly denied." Amended Pet. at 5, ¶ 15.

23. In new paragraph 16 in the Amended Petition, PBS added this allegation:

> Further, despite being made repeatedly aware of this problem, the Agency contends that the EVV system is functioning as intended. *Although the Agency concedes that some technical issues with the system may have occurred previously, it incorrectly believes that all such issues have been resolved. The Agency has also taken the incorrect position that any provider having problems with the EVV system simply needs more training on how to use it.* However, the industry-wide problems described herein stem from the system itself, not from a lack of training. Further, the Agency is so confident in the EVV system, as it currently exists, that the Agency has announced its intention to roll that system out statewide at some point this summer. Accordingly, the only even possible inference that can be drawn from the Agency's defense of the system and plan to expand it is that the EVV system as it is currently operating implements, interprets, or prescribes the Agency's policies, procedures, and/or practice requirements for EVV and claim reimbursement. (emphasis added).

Denying ability to resubmit claims

24. The Handbook provides a 12-month filing limit: "A clean claim for services rendered must be received by Medicaid or its fiscal agent no later

than 12 months from the date of service." Accordingly, the Handbook encourages providers to submit claims immediately: "Medicaid providers should[7] submit claims immediately after providing services so that any problems with the claim can be corrected and the claim resubmitted before the [12-month] filing deadline." *See* Ex. A at 1-4.

25. PBS characterized this Handbook provision as follows: "To the extent that providers may make inadvertent errors in submitting otherwise clean claims [i.e., claims that are not clean because of a provider-made error], the Handbook creates a process to remedy that. … [I]f a provider such as PBS promptly submits an ABA service reimbursement claim in the EVV system, then the Handbook grants it the legal right to resubmit that claim within a specified time period to fix any errors that might prevent payment." Amended Pet. at 6, ¶ 17. (As set forth in the Handbook at 1-4, the "specified time period" for correcting claims with provider-made errors is within 12 months from the date of service.)

26. PBS described the claim resubmittal problem as follows:

> However, the Agency's EVV system is not allowing PBS and other providers [in the Pilot Region] to resubmit claims as permitted in the Handbook. Instead, it is deeming any such resubmitted claims to be duplicates of the originals, and then denying payment for that reason. Further, the EVV system has repeatedly gone down, been updated without notice, and otherwise failed to process resubmitted claims. Although technical glitches are generally understandable, the Agency has been repeatedly made aware of these problems, they have been ongoing, and the resulting delays have caused claims to be rejected without the opportunity to amend. The Agency has failed to or refused to

[7] PBS inaccurately characterized this Handbook suggestion as a requirement, alleging that the Handbook *requires* that claims be submitted immediately so that problems can be corrected and claims resubmitted before the filing deadline.

> address this issue and that failure or refusal has served to negate providers' resubmission rights as promulgated in the Handbook.

Amended Pet. at 6-7, ¶ 18.

27. As with the first alleged policy, the following allegation was added regarding the second alleged policy, in paragraph 19 of the Amended Petition:

> Much like with the processing of claims, *the Agency incorrectly contends that the EVV system is not preventing the resubmission and/or correction of claims and that any even potential issues result from a lack of training*. Further, as stated, the Agency is preparing to drastically expand the scope of its EVV system despite being made repeatedly aware of these problems. Therefore, the only reasonable inference is that the EVV system in its present state implements, interprets, or prescribes the Agency's policies, procedures, and/or practice requirements for EVV and claim reimbursement. (emphasis added).

What Petitioner does not allege

28. Petitioner does not allege that AHCA has stated or adopted, *as its position*, that clean claims for BA services submitted through the EVV system shall be denied. Petitioner does not allege that AHCA has stated or adopted, *as its position*, that resubmittals of BA service provider claims to correct provider errors shall be rejected by the EVV system.

29. Rather than alleging that these two problems are occurring because AHCA intends for them to be occurring—because AHCA's *position* is that clean claims must be denied and resubmittals must be rejected—Petitioner's new allegations in the Amended Petition admit that the opposite is true. Petitioner admits by its own allegations that AHCA believes that the EVV system had technical issues in the past, but that AHCA "incorrectly believes that all such issues have been resolved." Petitioner, itself, has alleged that AHCA "incorrectly believes," "incorrectly contends," and "has taken the incorrect position" that the EVV system is not improperly denying clean

claims or preventing resubmission of corrected claims, and that any problems still being experienced are the result of user error, not caused by the EVV system. Petitioner alleges the opposite of AHCA policy statements.[8]

30. Petitioner plainly disagrees with AHCA's "incorrect" beliefs that EVV technical issues have been corrected, bristling at the suggestion that the problems are, in effect, user error that would be resolved by more training. But accepting Petitioner's allegations as true that AHCA is mistaken in its beliefs does not transform those mistaken beliefs into statements of policy that are the opposite of what AHCA mistakenly believes.

31. By failing to allege that AHCA has asserted the positions that clean claims are to be denied and that attempts to resubmit claims are to be rejected, Petitioner has failed to allege agency statements. As admitted at the motion hearing and in its written response to the pending motion to dismiss, and as acknowledged in the new paragraphs added to the Amended Petition, Petitioner cannot allege that AHCA intends for these problems with the EVV system to occur. In fact, as Petitioner acknowledges, AHCA believes that the problems are a thing of the past and have been fixed.

CONCLUSIONS OF LAW

32. The Division of Administrative Hearings has jurisdiction over the subject matter and parties, pursuant to sections 120.56, 120.569, and 120.57, Florida Statutes.

33. Petitioner seeks to challenge alleged "agency statements" that it contends are unadopted rules. The pleading requirements for petitions

[8] At the June 15, 2021, motion hearing, the undersigned addressed deficiencies in the Original Petition to allege that the described EVV system problems were based on AHCA statements of policy—that AHCA's position was that the EVV system must operate so that clean claims are denied and resubmitted claims are rejected. In response, counsel for Petitioner stated he could not in good faith allege that AHCA was intentionally denying payment of claims. But he added that he did not think allegations of intent were necessary, and that it was enough to allege that this was the effect of the EVV system. At page 10 of its response to the motion to dismiss the Amended Petition, Petitioner reiterated: "PBS does not believe that the Agency is some sort of bad actor or is operating with nefarious intent."

initiating such challenges are set forth in section 120.56(4)(a), providing as follows:

> Any person substantially affected by an agency statement that is an unadopted rule may seek an administrative determination that the statement violates s. 120.54(1)(a). The petition shall include the text of the statement or a description of the statement and shall state facts sufficient to show that the statement constitutes an unadopted rule.

34. Section 120.54(1)(a) declares that "[r]ulemaking is not a matter of agency discretion" and directs that "[e]ach agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable."

35. "Unadopted rule," as used in section 120.56(4)(a), is defined in section 120.52(20) as "an agency statement that meets the definition of the term 'rule,' but that has not been adopted pursuant to the requirements of s. 120.54."

36. Section 120.52(16) defines "rule" to mean "each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule." The statutory definition provides several exceptions, but none that is applicable here.

37. Therefore, petitions invoking section 120.56(4) must allege facts that are sufficient to demonstrate, first, that the object of the challenge is "an agency statement" and, second, that the agency statement meets the definition of a "rule" that has not been adopted pursuant to section 120.54.

38. This case presents a threshold issue that has not often been in question in unadopted rule challenges: whether the objects of the challenge here are "agency statements."

39. An agency statement can be in the form of a declaration, expression, or communication. It does not need to be in writing. *See Dep't of High. Saf. & Motor Veh. v. Schluter*, 705 So. 2d 81, 84 (Fla. 1st DCA 1997). To be a rule, however, the statement or expression must be an "agency" statement, that is, a statement that reflects the agency's position with regard to law or policy. Therefore, the offhand comment of an agency employee, without more, is not an "agency statement"; rather, the statement must be "attributable to [the agency head] or some duly authorized delegate."[9] *Id.* at 87 (Benton, J., concurring and dissenting).

40. Agency statements subject to challenge as unadopted rules are those that reflect the agency's policy statements, in that they were "issued by the agency head for implementation by subordinates with little or no room for discretionary modification" and "were applied and *were intended to be applied*

[9] Even more attenuated than offhand statements of an agency employee are statements or actions of a vendor or contractor. DOAH ALJs have consistently ruled that statements by an entity contracting with an agency are not attributable to the agency so as to support an unadopted rule challenge to those statements, because of the lack of allegations or proof that the agency adopted those statements or at least affirmatively reviewed and approved them. *See, e.g., Brooks v. Dep't of Health,* Case No. 18-705RU (Final Order of Dismissal, Fla. DOAH May 31, 2018) (unadopted rule challenge directed to various aspects of the impaired practitioner program, including drug screening requirements, failed to allege agency statements where the program was operated by Professionals Resource Network, Inc., pursuant to contract with the Department of Health, and Petitioner could not allege that the Department adopted or specifically approved the challenged program requirements); *Carswell v. Fla. State Univ. Schools, Inc., et al.*, Case No. 13-3388RU (Final Order of Dismissal, Fla. DOAH Nov. 26, 2013) (charter school's Student Code of Conduct could not be challenged as an unadopted rule by attribution to Florida State University (FSU) through the contract between the charter school and FSU as its sponsor; even though the charter contract required that student dismissals occur in accordance with the policies and procedures in the charter school's Student Code of Conduct, FSU could not be said to have adopted the Code as its own); *Fla. Ass'n for Child Care Mgmt., Inc. v. Early Learning Coalition of Duval, et al.*, Case No. 08-1717RU (Fla. DOAH Aug. 26, 2008) (rejecting attempted unadopted rule challenge to a quality rating improvement system developed by an Early Learning Coalition (ELC), a non-profit corporation providing school readiness services pursuant to a grant agreement with the Agency for Workforce Innovation (AWI); even though the challenged system was part of the ELC's school readiness program which was approved by AWI, the system itself was not reviewed and approved by AWI, and even if it had been, review and approval of an ELC's school readiness program does not transform that program into an agency statement subject to challenge as an unadopted rule); *cf. Vey v. Bradford Union Guidance Clinic, Inc.*, 399 So. 2d 1137, 1139 (Fla 1st DCA 1981) (holding that a private entity that contracts to provide services for a state agency, for which the entity receives public funds, does not thereby become a state agency itself).

with the force of a rule of law." *Dep't of Admin. v. Stevens,* 344 So. 2d 290, 296 (Fla. 1st DCA 1977) (emphasis added).

41. A statement made in error does not, without more, constitute an agency statement subject to challenge as an unadopted rule. If, however, the agency takes ownership of the statement, by knowingly allowing the erroneous statement to operate as a rule, then the statement may become the agency's position, despite its origin. *See Filippi v. Dep't of Educ.*, Case No. 07-4783RU (Fla. DOAH June 20, 2008).

42. In this case, Petitioner has alleged, in its Amended Petition and exhibits adopted by reference, that the EVV system, as it is being operated by AHCA's procured vendor Tellus, is improperly denying clean claims and improperly rejecting resubmission of corrected claims. Petitioner has failed, in two attempts, to allege that AHCA's position is that the EVV system must be operated so as to deny clean claims and reject resubmitted claims. To the contrary, Petitioner concedes that there have been technical problems with the EVV system (such as the system going down and updating without notice), which may be to blame for the results of which it complains. And in the Amended Petition, the new allegations undermine, rather than support, Petitioner's attempt to plead the existence and application of agency statements, by admitting that AHCA believes the past technical problems have all been fixed.

43. Petitioner's Amended Petition attempts to parlay its allegations of technical problems into a predicate of AHCA policy, by alleging that it has repeatedly informed AHCA of the EVV system problems "throughout the past several months," but that AHCA has "failed to *or* refused to address [these issues]." Amended Pet. at 5, ¶ 15, and 7, ¶ 18 (emphasis added). Petitioner's argument is, in effect, that technical problems with electronic systems developed and operated by contracted vendors become agency statements of policy with the passage of time. Petitioner adds the point that AHCA has stated it plans to expand required use of the EVV system to all BA service

providers statewide. From these facts, Petitioner offers the conclusion that the only reasonable inference is that the EVV system, in its current form, complete with problems, is the equivalent of an agency statement.

44. There are several problems with Petitioner's attempted leaps in logic. The biggest problem stems from Petitioner's own allegations that while AHCA has acknowledged there were technical problems previously, AHCA "incorrectly" believes that the past technical problems have been fixed. Petitioner's own allegations refute any suggestion that AHCA has knowingly allowed technical problems to continue unabated, or endorsed a flawed system.[10] Having admitted that AHCA believes the past technical problems have been fixed, Petitioner saps any logic from its self-proclaimed "reasonable inference" of nefarious intent by reason of AHCA's plan to expand the required use of the EVV system to BA providers statewide. In fact, Petitioner admits the opposite is true: "PBS does not believe that the Agency is some sort of bad actor or is operating with nefarious intent." Petitioner's Response to Respondent's Motion to Dismiss Amended Petition at 10.

45. The Amended Petition also suffers from another key inconsistency. Petitioner repeatedly claims in the Amended Petition that it is not

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[10] Petitioner's allegations vacillate between conclusory (e.g., parroting the definition of a "rule"), and contradictory. For example, in paragraph 18, Petitioner tempers its allegations to only state that AHCA has "failed to or refused to" address the problems that Petitioner has called to AHCA's attention, but by paragraph 24, the allegation became: "Further the Agency has endorsed this flawed system by refusing to fix it and planning to expand it, despite having knowledge of the problems described herein." As the more tempered allegation in paragraph 18 implicitly concedes, to say that AHCA has "refused" to fix problems is flatly inconsistent with the new allegations in paragraphs 16 and 19 that AHCA incorrectly believes the problems have all been fixed. Thus, the most that Petitioner can fairly allege (without contradicting itself) is that AHCA has failed to fix problems because AHCA mistakenly believes they are already fixed. AHCA cannot be said to refuse to fix problems that AHCA believes do not exist. So too, Petitioner cannot fairly allege that AHCA has endorsed a flawed system by planning to expand it, when Petitioner admits that AHCA believes the past system flaws have been eliminated. In the ultimate example combining both contradictory and conclusory, Petitioner ends with this allegation: "Finally, the Agency has manifestly adopted and endorsed the EVV system, as it is currently operating despite the problems raised, showing that this system implements, interprets, and prescribes the Agency's current policy, procedures, and practice requirements in this area." Amended Pet. at 9, ¶ 26. Petitioner's inability to meet the pleading requirements is clear from the strained effort, so riddled with contradictions.

challenging as an unadopted rule the requirement that BA providers use the EVV system. Yet many of the allegations are directed to the EVV system, itself. Indeed, all of the alleged Disputed Issues of Material Fact are stated in terms of whether the EVV system is doing or not doing certain things. Amended Pet. at 10. Perhaps Petitioner intended to say that it does not challenge a requirement to use a theoretical, utopian EVV system, but does challenge the actual EVV system developed and operated by Tellus, because it has allegedly been problem-ridden for the past several months. But Petitioner's attempt to use section 120.56(4) as a vehicle to push AHCA to fix technical problems that AHCA believes are already fixed is also problem-ridden.

46. To illustrate the fallacy in Petitioner's claim that the problematic results of the EVV system constitute agency statements that must be adopted as rules, consider what Petitioner's claim means: Petitioner is actually suggesting that AHCA engage in rule promulgation to adopt in rule form its alleged policies that clean claims submitted by BA providers shall be denied and that resubmitted claims shall be rejected. Yet Petitioner admits that AHCA is not taking that position. Instead, the most Petitioner has alleged and can allege is that AHCA is mistaken in its belief that the problems with the EVV system have all been corrected. AHCA is not relying on the alleged statements (deny clean claims; reject resubmitted claims) now, by Petitioner's own allegations. Perhaps AHCA is misinformed about whether its vendor's operation of the EVV system continues to result in the specific problems alleged by Petitioner. These issues may be redressable in other ways, in other forums[11]; but Petitioner's own allegations establish that the objects of Petitioner's challenge are not "agency statements."

[11] In Petitioner's notice to AHCA of its unadopted rule claims asserted in this proceeding, Petitioner added the following: "Further, PBS wishes to provide AHCA notice that it is likely to, at or around the same time as any unadopted rule challenge, seek other legal redress relating to the AHCA/Tellus EVV system in other legally appropriate forums. Specifically, PBS believes it is entitled to monetary damages relating to all clean claims it has submitted which have been improperly denied." Ex. C at 5.

47. In arguing that its Amended Petition should be accepted as sufficiently pled, Petitioner contended that it has effectively distinguished a case heavily relied on by AHCA, *Aloha Utilities, Inc. v. Public Service Commission*, 723 So. 2d 919 (Fla. 1st DCA 1999). Petitioner is wrong.

48. In *Aloha*, an amended petition challenged the Public Service Commission's (PSC) reliance on "Commission audit procedures," without describing or reciting the text of any of the individual statements challenged. Indeed, the challenger admitted to not having seen or read the Commission audit procedures. The administrative law judge (ALJ) denied a motion challenging the sufficiency of the amended petition. The parties proceeded with "extensive" discovery and an evidentiary hearing. In the final order, the ALJ determined that two specific Commission audit procedures proven at hearing were unadopted rules, but that dozens of other Commission audit procedures did not meet the definition of a "rule."

49. On appeal, the court concluded that the "amended petition did not meet threshold pleading requirements laid down by section 120.56(4)(a)" and reversed the final order's invalidation of two audit procedures. *Id.* at 920. As the court put it, the two invalidated procedures "were but two among dozens of possible 'Commission audit procedures' nebulously referenced in the amended petition." *Id.* at 921. The court went even further, by vacating the ALJ's denial of the PSC's request for attorney's fees and costs. The court held that "the amended petition wholly lacked legal merit," and remanded for reconsideration of an award of attorney's fees under section 120.569(2)(c), Florida Statutes (1997), now in section 120.569(2)(e). *Id.* at 920. (The *Aloha* decision was before the adoption of section 120.595(4)(d), Florida Statutes, specifically applicable to unadopted rule challenges.)

50. Petitioner argues that *Aloha* does not dictate dismissal of its Amended Petition, because the allegations describing the challenged agency statements there were much less detailed than those in the Amended Petition. Petitioner is partially correct, in that unlike in *Aloha*, the Amended Petition described

what Petitioner is challenging as unadopted rules: the denial of clean claims and the rejection of resubmitted claims. But the Amended Petition suffers from a different deficiency not present in *Aloha*. Here, Petitioner failed to allege "agency" statements, whereas in *Aloha*, the petition alleged that the PSC relied on "Commission audit procedures," albeit that the specific procedures challenged were not described. Moreover, unlike in *Aloha*, the Amended Petition here contains allegations directly at odds with the pleading requirement that the challenged statements are *AHCA's* statements—that they represent AHCA's policies and positions and are intended by AHCA to have the force and effect of law.

51. The court in *Aloha* made clear that the "threshold pleading requirements" unique to unadopted rule challenges should be met before the challenger is permitted to engage in substantial discovery and be afforded an evidentiary hearing, reversing the result that followed discovery and an evidentiary hearing because the challenger failed to meet the threshold pleading requirements. *Aloha*, 723 So. 2d at 920. *Aloha* plainly supports a threshold determination of the sufficiency of pleading all elements of an unadopted rule challenge before the parties engage in extensive discovery.

52. More recently, in *P.F.-G. v. Department of Education, Division of Vocational Rehabilitation*, 252 So. 3d 304 (Fla. 5th DCA 2018), cited by AHCA but not mentioned by Petitioner, the court affirmed an ALJ's dismissal of an initial petition challenging an alleged unadopted rule, with leave to amend, followed by a final order of dismissal when an amended petition was filed one day late. The court held that the ALJ properly dismissed the initial petition because it failed to allege facts sufficient to establish the challenged statements constitute unadopted rules: "Despite Appellant's assertion that she alleged sufficient facts to challenge the unadopted rule, the original petition was riddled with conclusory statements, without any factual basis to support her claims." *Id.* at 306. The court also held that the ALJ did not err in dismissing the amended petition as untimely, and was free to dismiss it

with prejudice, having afforded petitioner one opportunity to amend as required by section 120.569(2)(c). *P.F.-G.* supports the threshold determinations and action taken here.

53. Petitioner's strained effort to fit its complaints within the framework of an unadopted rule challenge is perhaps most apparent in its attempt to analogize its challenge to one recently decided and affirmed on appeal, *Florida Quarter Horse Racing Association, Inc. v. Department of Business and Professional Regulation*, *Division of Pari-Mutuel Wagering*, Case No. 11-5796RU (Fla. DOAH May 6, 2013), *affirmed*, 133 So. 3d 1118 (Fla. 1st DCA 2014). There, Administrative Law Judge John Van Laningham determined that the Division's decision to issue an annual operating license to Gretna Racing, authorizing pari-mutuel wagering on "Gretna-style barrel match racing," was an agency statement of policy that was an unadopted rule.

54. Judge Van Laningham's order set forth the requirements for an unadopted rule challenge, similar to those stated here. As for the "agency statement" requirement, he repeated that "to be a rule, … the statement or expression must be an 'agency statement,' that is, a statement which reflects the agency's position with regard to law or policy." *Florida Quarter Horse Racing*, Case No. 11-5796RU at 32-33, ¶ 57. As applied to those facts, there was no question that the Division intended to approve barrel match racing by its decision to issue the license. The Division did not argue otherwise. Instead, the Division argued that its decision to approve barrel match racing was a direct application of the statute to the facts. Alternatively, it argued that its licensing decision approving barrel match racing for Gretna Racing was a matter between the agency and licensee. Judge Van Laningham rejected both arguments. He determined that the Division had, by its decision, adopted a new interpretation of the law to extend allowable pari-mutuel wagering on quarter horse racing to include barrel match racing. Further, he determined that the decision to issue the license approving barrel match racing was a statement of general

applicability because the Division's new interpretation of allowable pari-mutuel wagering on horseracing would have to be applied to all other applicants seeking the same extended authority.

55. In its response to the motion to dismiss the Amended Petition, Petitioner offered a false analogy in an attempt to suggest that the *Florida Quarter Horse* decision supports its unadopted rule challenge here. Petitioner suggested the decision would apply equally if the Division had mistakenly issued a license approving barrel racing, but then failed to act to revoke the license upon realizing its mistake; Petitioner then suggested this was similar to what it has alleged. Petitioner conceded that the comparison was not "apples to apples." In fact, a more apt description would be apples to dentures made for someone else's mouth: the scenario suggested by Petitioner neither fits the *Florida Quarter Horse* decision nor provides fitting support for Petitioner's allegations. Prominent in the *Florida Quarter Horse* decision was the fact that the Division intended to approve barrel match racing by its decision to issue the license: "[T]he Division's decision to permit gambling on [barrel match racing] was not a mistake … . Rather, this was an intentional, knowing, and informed decision … ." *Florida Quarter Horse*, Case No. 11-5796RU at 72, ¶ 134. Here, Petitioner has not alleged that AHCA intends for the EVV system to deny clean claims or reject resubmitted claims; Petitioner has alleged the opposite: AHCA believes these problems occurred in the past due to technical problems and have been fixed. The *Florida Quarter Horse* decision supports the analysis here.

56. Moving beyond decisions addressing unadopted rule challenges, Petitioner misplaces reliance on caselaw providing that in ruling on a motion to dismiss, all well-pled allegations of fact and reasonable inferences *therefrom* must be accepted as true. The reasonable inferences to be accepted as true are those arising from well-pled allegations of fact, not Petitioner's own suggestion of a "reasonable inference." The self-styled "reasonable inference" offered up by Petitioner in its Amended Petition does not flow from

the well-pled allegations of fact. Instead, it is an unreasonable inference, inconsistent with Petitioner's allegations of fact, and rejected for that reason.

57. Petitioner also argues for application of a principle borrowed from in inapposite contexts that "intent" is a matter of ultimate fact to be resolved by the factfinder only after an evidentiary hearing. That principle was stated in *S.T.N. v. State*, 474 So. 2d 884, 885-886 (Fla. 4th DCA 1985), in which a convicted defendant claimed on appeal that his motion to dismiss before trial should have been granted, where the motion had argued there would be no *evidence* to prove felonious intent, an element of the crime *charged*. *See also State v. Garantiva*, 603 So. 2d 135 (Fla. 3d DCA 1992), *following S.T.N.* (issue of knowledge and intent, as part of the crime charged in the information, is an ultimate question of fact). Other equally inapposite cases address the propriety of granting summary judgment on discrimination complaints in which discriminatory intent is alleged, but may or may not be proven by circumstantial evidence. *See, e.g., Zahn v. City of San Diego*, 2007 WL 9734495 (S.D. Cal. 2007). The issue here is whether the Amended Petition alleges "agency" statements, to meet the threshold pleading requirement for an unadopted rule challenge. No case offered by Petitioner addresses the sufficiency of pleading intent as a threshold pleading requirement.[12]

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[12] At the June 15, 2021, motion hearing, Petitioner asked to brief the issue of whether it had to allege AHCA intended for the EVV system to deny clean claims and reject resubmittals. Petitioner argued that cases like *State Department of Administration, Division of Personnel v. Harvey*, 356 So. 2d 323 (Fla. 1st DCA 1977), stood for the proposition that it was enough to allege that the effect of the EVV system was to deny clean claims and reject resubmittals. As the undersigned noted then, in *Harvey*, as is true in many unadopted rule challenges, there was no question that the agency adopted the statements at issue. The court in *Harvey* addressed whether an admitted agency statement met the definition of a rule, holding: "Whether an agency statement is a rule turns on the effect of the statement, no on the agency's characterization of the statement by some appellation other than 'rule.'" *Id.* at 325. In other words, an agency cannot avoid promulgating its policy statements that are intended to have the effect of rules by calling them something other than rules. Petitioner had the chance to brief this issue in responding to the motion to dismiss its Amended Petition, but offered no authority for its original view that it need not allege AHCA intends for the claimed policies to be applied as law. Instead, Petitioner shifted to argue, unpersuasively, that consideration of intent should be deferred until after it engages in substantial discovery and after an evidentiary final hearing. To get there, Petitioner must first meet the "threshold pleading requirements" in section 120.56(4). *See Aloha*, 723 So. 2d at 920.

58. There are additional pleading problems with the Amended Petition, but they are subsidiary to the primary pleading failure: that the well-pled allegations of fact themselves establish that the objects of Petitioner's challenge are not "agency" statements. The additional pleading problems are noted below for completeness, having been raised in the Agency's Motion to Dismiss Amended Petition.

59. The Amended Petition contains only conclusory allegations as to the "general applicability" element. AHCA noted as much, arguing that Petitioner only asserts the conclusion that the same problems it has experienced with attempted claims submittal and resubmittal have also been experienced by similarly-situated BA providers in the Pilot Region. No facts are set forth to support these conclusory allegations. AHCA pointed out that there are no co-petitioners, which is obviously true. While the undersigned agrees with Petitioner's response that there is no such requirement in order to assert "general applicability," the absence of other similarly-situated BA providers or provider-representing organizations is a point of emphasis that underscores the lack of factual detail in the conclusory allegations.

60. "Sufficient facts," not just conclusory allegations, are required to show that the challenged statements are statements of general applicability.[13]

[13] Petitioner made a sweeping and incorrect statement in its response, claiming the undersigned rejected AHCA's argument that the Original Petition "should be dismissed for lack of detail," and characterizing AHCA's argument directed to the "general applicability" allegations as an "already-rejected request for additional specificity." *See* July 2, 2021, Response at 3, 11. To the contrary, the undersigned only disagreed with AHCA's argument that the Original Petition did not adequately describe the challenged statements because it failed to identify the specific clean claims and attempted resubmittals that were rejected by the EVV system. The undersigned summarized this ruling in the Order of Dismissal Without Prejudice, ruling that the failure to allege "agency statements" was a pleading deficiency that "would not be cured by detailing specific claims," and referring generally to the discussion during the motion hearing describing how the pleading deficiencies could be addressed, i.e., by alleging that AHCA has asserted as its position that clean claims are to be denied and resubmitted claims rejected. Notably, AHCA did not raise in its motion to dismiss the Original Petition, and the undersigned did not address, the issue of whether the allegations regarding "general applicability" were sufficient or conclusory. But AHCA raised this point in its motion to dismiss the Amended Petition; Petitioner responded and did not request leave to further amend to provide facts underlying its conclusory allegations.

See P.F.-G, 252 So. 3d at 306 (unadopted rule challenge petition was properly dismissed where the petition "was riddled with conclusory statements, without any factual basis … Appellant failed to allege facts to establish that the challenged statements constitute unadopted rules."). Not only are Petitioner's allegations of general applicability conclusory, the context in which they are made raises concerns about whether such facts are or could be known to Petitioner. Petitioner's complaints are with the actions taken by the EVV system in response to individual claims submitted by Petitioner, or individual claims that Petitioner attempted to resubmit to correct errors. As to the first alleged problem (denial of clean claims), Petitioner has alleged that the claims it submitted are "clean claims." To make this allegation, Petitioner necessarily assessed its claims pursuant to various criteria, including eligibility of the recipient, services authorized, and services provided, among other things. These are case-specific, claim-specific, Medicaid recipient-specific criteria. As such, Petitioner's failure to articulate facts underlying its conclusory allegations that other providers are similarly situated and are experiencing the same issues is more than just oversight. Petitioner cannot make these judgments as to other providers without being able to assess whether the claims submitted by other providers are "clean claims." So too, for attempted resubmittals to correct provider errors, Petitioner cannot make the judgment that the attempted resubmittals by other providers correct errors to turn the claims into clean claims that should not be rejected. But it would be a violation of patient privacy laws for Petitioner to assess other providers' claims to know they are "clean claims." As AHCA argues, the lack of factual allegations underlying these conclusory claims is more than just a cosmetic lack of detail; it is a real problem. The Amended Petition's allegations of "general applicability" are inadequate.

61. AHCA has also argued in its motions to dismiss that Petitioner's claim is actually a contractual matter,[14] i.e., seeking relief for the improper denial of individual claims for reimbursement for BA services provided to Medicaid recipients. Petitioner's notice letter to AHCA (Exhibit C) lends credence to this view. In addition, a phrase added by Petitioner in the Amended Petition's request for relief adds further credence to AHCA's view.

62. The only remedy available in an unadopted rule challenge is a declaration that the challenged statement is an unadopted rule that violates section 120.54(1)(a). From that point forward, the agency must discontinue reliance on the unadopted rule as a basis for agency action. § 120.56(4)(d), Fla. Stat. In the Original Petition, the request for relief was for entry of a final order "determining that the agency statements described herein are invalid, unpromulgated rules and directing the Agency to immediately cease reliance on them." In addition, Petitioner asked that jurisdiction be reserved to address its entitlement to attorney's fees and costs pursuant to section 120.595(4) and the notice letter attached as Exhibit C.

63. In its Amended Petition, Petitioner requested expanded relief, as follows:

> Accordingly, the Agency must "immediately discontinue all reliance upon" these unadopted rules *and take all necessary steps to ensure that PBS' promulgated rights discussed herein are given full effect*. *See* § 120.56(4)(e), Fla. Stat.

Amended Pet. at 10, ¶ 27 (emphasis added). Although Petitioner cites section 120.56(4)(e) to support this requested relief, only the language that Petitioner put in quotation marks appears in section 120.56(4)(e). The italicized

[14] Petitioner rather coyly argues in its response that it can avoid addressing this argument because it did not allege in the Amended Petition that it has a Medicaid provider contract with AHCA. But AHCA cited the statute providing, as a matter of law, that the relationship between AHCA and Medicaid providers is a voluntary contractual relationship. *See* § 409.907, Fla. Stat. Petitioner does not refute AHCA's argument that DOAH would not have jurisdiction to adjudicate contract claims, if this case had been presented as such.

language in the above quote from paragraph 27 of the Amended Petition exceeds the scope of relief available in an unadopted rule challenge.[15]

64. In short, whether considered a contractual claim to be asserted in a different forum or an action to adjudicate entitlement to payment on a claim-by-claim basis, the gravamen of Petitioner's complaints is that, as a Medicaid provider of BA services, it has individual claims that it believes should be reimbursed, but they have been denied, claim by claim, by the EVV system. An unadopted rule challenge is plainly not an action to adjudicate individual claims.

65. Viewed as an inartful attempt to present individual claims for adjudication, the Amended Petition can be disposed of on the basis of the following sentiment expressed in *Environmental Trust v. State, Department of Environmental Protection*, 714 So. 2d 493, 498 (Fla. 1st DCA 1998):

> An agency statement explaining how an existing rule of general applicability will be applied in a particular set of facts is not itself a rule. If that were true, the agency would be forced to adopt a rule for every possible variation on a theme, and private entities could continuously attack the government for its failure to have a rule that precisely addresses the facts at issue. Instead, these matters are left for the adjudication process under section 120.57, Florida Statutes.

66. Equally untenable would be to allow private entities to utilize the unadopted rule challenge process, with its attendant provision for attorney's fees, to attack government for technical errors arising during a transition to a

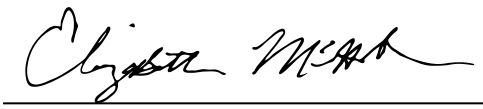
[15] In Petitioner's response to the motion to dismiss the Amended Petition, it disclaimed any intent to expand its request for relief and inaccurately claimed that all it asked for in paragraph 27 was that AHCA discontinue reliance upon the alleged unadopted rules. Without actually addressing, much less explaining, why it added the italicized phrase, Petitioner argued that it is entitled to enforce compliance with AHCA's promulgated rules. "Specifically, as promised in the Handbook, the Agency must ensure that the EVV system pays clean claims and allows, when necessary and applicable, for resubmission." Pet. Resp. at 11. Although Petitioner might be entitled to enforce compliance with AHCA's promulgated rules in a different kind of proceeding, but requiring an agency to take action in compliance with its adopted rules is not an available remedy in a section 120.56(4) proceeding.

new electronic system developed and operated by a vendor. No doubt such errors are frustrating to Petitioner and interfere with the smooth operations of its business. But system errors are part of the promulgated claim process, subject to a promulgated resolution process, and should be dealt with accordingly, by seeking the allowable relief as to the improperly denied claims.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Amended Petition Challenging Statements as Unpromulgated Rules is DISMISSED, with prejudice.

DONE AND ORDERED this 23rd day of July, 2021, in Tallahassee, Leon County, Florida.



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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.