STATE OF FL0RIDA

AGENCY FOR PERSONS WITH DISABILITIES

[redacted] DOAH Case No.: 10-4345CPR

Petitioner, Rendition No.: APD-10-6736-FO

vs.

AGENCY FOR PERSONS WITH DISABILITIES,

Respondent.
_____/

## FINAL ORDER

This cause is before the Agency for Persons with Disabilities (the Agency) for entry of a Final Order pursuant to Chapter 120, F.S., following the issuance of an order entitled FINAL ORDER OF DISMISSAL rendered by Administrative Law Judge John G. Van Laningham, serving as a Department of Children and Family Services (DCF) Hearing Officer (the Hearing Officer) concluding that he had final order authority and that matter before him was moot. A copy of the Hearing Officer's Order is attached to this Final Order.

## PROCEDURAL HISTORY

In November 2009, the Agency sent Petitioner a "Notice of Cost Plan Rebasing," advising Petitioner that it intended to adjust [redacted] current cost plan in accordance with the directives of s. 393.0661(6), Florida Statutes (2009).[1] Included with the Notice was an Explanation of Hearing Rights. Petitioner

[1] That section directs the Agency to adjust Petitioner's existing cost plan to reflect the amount of her actual expenditures during the previous state fiscal year plus 5 percent if that amount would be less than her existing cost plan.

disagreed with the Agency's intended action and submitted a "Request for Reconsideration and Petition for Formal Hearing" on December 10, 2009. The Agency forwarded her Petition to the Division of Administrative Hearings (DOAH) on June 25, 2010, and requested the assignment of an administrative law judge to conduct the hearing.

On July 1, 2010, amended section 393.125(a), Florida Statutes (2010), became effective. The amended law provides that administrative hearings requested by any developmental services applicant or client are to be provided by DCF pursuant to s. 409.285. See s. 393.125(1)(a), Florida Statutes (2010). On July 12, 2010, relying on his authority under s. 409.285, Florida Statutes, the Secretary of DCF issued an "Order of Appointment" in which he appointed DOAH's administrative law judges to serve as DCF hearing officers for all APD Cost Plan Rebasing litigation pending before DOAH as of July 1, 2010.

On July 16, 2010, Judge Van Laningham, who was now serving as a DCF Hearing Officer under the Order of Appointment, issued an Order to Show Cause indicating that he intended to enter a final administrative decision dismissing the case as moot unless a party could show why such an order should not be entered. Respondent Agency filed a Response to the Order to Show Cause, and Petitioner submitted a memorandum of law in response to the Agency's Response. On August 12, 2010, the Hearing Officer heard oral argument on his motion to Show Cause and on September 1, 2010, issued his order entitled "Final Order of Dismissal."

In his purported "Final Order," the Hearing Officer concluded that the Agency's notice had advised Petitioner that it intended to rebase only her 2009-2010 cost plan and that, since the 2009-2010 cost plan year had expired and it was no longer possible to reduce [redacted] 2009-2010 funds, the case must be dismissed as moot. The Final Order rejected the Agency's contention that the case was not moot because the Agency's action would also rebase Petitioner's subsequent cost plans. First, the Hearing Officer found that the Agency's notice to Petitioner was insufficient to clearly show that it intended to rebase subsequent cost plans or that [redacted] had a right to contest that intended action by requesting a hearing. Therefore, according to the Hearing Officer,, that issue was not before him. Second, the DCF Hearing Officer opined that s. 393.0661(6) does not even authorize the Agency to rebase cost plans subsequent to the 2009-2010 cost plan year.

On September 17, 2010, DCF issued a Notice advising the parties of their right to submit written exceptions to the DCF Hearing Officer's Order.[2] As DCF's Notice stated, "(b)y law, the Agency for Persons with Disabilities is required to issue the Final Order in this case." On September 15, 2010, counsel for the Respondent Agency submitted its first Exceptions to "Final Order of Dismissal"/Recommended Order, and on October 4, 2010, submitted Amended Exceptions to "Final Order of Dismissal"/Recommended Order. The Agency's

[2] The Final Order of Dismissal, unlike Recommended Orders issued by DOAH administrative law judges under s. 120.57(1)(k), did not contain a notice to the parties of their right to submit exceptions; rather, it contained a "Notice of Right to Judicial Review" and advised the parties that, if they were adversely affected by the Final Order, they were entitled to judicial review pursuant to s. 120.68, Florida Statutes. It was Hearing Officer Van Laningham's opinion that, as a DCF hearing officer, he had the power to take final agency action in the form of a final order.

exceptions challenge two of the conclusions in the Final Order: 1) that the DCF Hearing Officer has the authority to issue a final order as opposed to a recommended order; and 2) that s. 393.0661(6), Florida Statutes, does not grant the Agency authority to rebase cost plans that commence (or provide any other basis for relief) after June 30, 2010. Respondent/Agency does not challenge the Hearing Officer's conclusion that the case should be dismissed as moot based on the finding that the Agency's Decision Notice only applied to the 2009-2010 Cost Plan and that the case should therefore be dismissed as moot. On October 11, 2010, Petitioner filed a Motion to Strike Respondent's Exceptions and Amended Exceptions, arguing that the order issued by the Hearing Officer was a Final Order and that there is no provision for the filing of exceptions to Final Orders. Because we conclude that the Hearing Officer's order was not a Final Order, we deny Petitioner's Motion to Strike.

**FINAL ORDER AUTHORITY**

Until July 1, 2010, administrative hearings involving developmental disability applicants or clients who disagreed with a decision related to Medicaid programs administered by the Agency were conducted by DOAH. See s. 393.125(1), Florida Statutes (2009). Those proceedings were conducted in accordance with the provisions of ss. 120.569 and 120.57(1), Florida Statutes. At the conclusion of the hearing, the ALJ submitted a recommended order to the Agency and all parties, which included findings of fact, conclusions of law and, where applicable, a recommended penalty. Section 120.57(1)(k), Florida

Statutes. The Agency, after granting the parties 15 days in which to file exceptions, issued the final order which had the effect of final agency action. The Agency was constrained by law from rejecting or modifying the findings of fact unless a review of the entire record showed that they were not based upon competent substantial evidence. Regarding the recommended conclusions of law, the Agency could reject or modify those that interpreted specific laws or rules over which the Agency had substantive jurisdiction so long as it stated with particularity its reasons and made a finding that its interpretation was at least as reasonable as that of the ALJ. Section 120.57(1)(l), Florida Statutes. The Agency could accept the ALJ's recommended penalty but not increase or decrease it without justification. The Petitioner could appeal an adverse Agency final order by filing a notice of appeal in either the appellate district where he or she resides or in the First District Court of Appeal. Section 120.68, Florida Statutes.

Chapter 2010-157, Laws of Florida, effective July 1, 2010, transferred jurisdiction for administrative hearings relating to Medicaid programs administered by the Agency from DOAH to DCF. Section 393.125(1)(a), Florida Statutes (2010), now provides:

> For Medicaid programs administered by the agency, any developmental services applicant or client, or his or her parent, guardian advocate, or authorized representative, may request a hearing in accordance with federal law and rules applicable to Medicaid cases and has the right to request an administrative hearing pursuant to ss. 120.569 and 120.57. These hearings shall be provided by the Department of Children and Family Services pursuant to s. 409.285 and shall follow procedures consistent with federal law and rules applicable to Medicaid cases.

At issue is whether this legislative change intended to abrogate the Agency's final order authority following administrative hearings provided by DCF. The amended statute does not specifically state a legislative intent to transfer the Agency's final order authority to DCF. The amended statute merely provides that the "***hearings*** shall be provided by" DCF [emphasis added].

The DCF Hearing Officer, however, does not rely on the language in Section 393.125, F.S., for his authority to issue a final order. Rather, he asserts that, once appointed by the Secretary of DCF, the hearing officer may "exercise all of the powers that the DCF hearing officers within that agency's Office of Appeal hearings have, including the authority to take final agency action in the form of a final order." (R.O. paragraph 11) To support this claim, he cites both s. 409.285 (2), Florida Statutes, and Fla. Admin. Code R. 65-2.066(1)[3], both of which predate the 2010 amendments to s. 393.125, F.S..

The DCF Hearing Officer's reasoning is invalid. Chapter 120 governs the conduct of proceedings in which a party's substantial interests are determined. Chapter 120 establishes that the agency determining a party's substantial interests has the authority to issue the final order. See ss. 120.52(15), 120.57(k) and (l). Section 409.285(2) creates an exception to these general procedures for DCF. It provides that

> "The hearing authority may be the Secretary of Children and Family Services, a panel of department officials, or a hearing officer appointed for that purpose. The hearing authority is responsible for a final administrative decision in the name of the department on all

[3] 65-2.066(1): Orders issued by the hearing officers of the Office of Appeal Hearings of the Department of Children and Family Services are final orders and shall be implemented immediately.

> issues that have been the subject of a hearing. With regard to the department, the decision of the hearing authority is final and binding. The department is responsible for seeing that the decision is carried out promptly."

Any exception must be narrowly construed and limited to those circumstances plainly within its scope. Cf. ss. 120.80 and 120.81, F.S. And see s. 120.569(1): "The provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency unless . . ."; and s. 120.57(1)(a): "Except as provided in ss. 120.80 and 120.81, an Administrative Law Judge . . . shall conduct all hearings . . ."

In that regard, the process established by s. 409.285 circumscribes only the DCF Hearing Officer's authority to take final agency action for the "department," DCF. Specifically, it states that "(t)he hearing authority is responsible for a final administrative decision in the name of the department . . ." s. 409.285, F.S. It also specifically provides that the decision of the hearing authority is final and binding with regard to the department. See s. 409.16(1) that defines "department" as the Department of Children and Family Services; and see s. 20.197 creating the Agency for Persons with Disabilities, "a separate budget entity not subject to control, supervision, or direction by the Department of Children and Family Services in any manner . . ."; and s. 20.197(4) that provides that "(t)he Agency shall engage in such other administrative activities as are deemed necessary to effectively and efficiently address the needs of the agency's clients." To cite section 409.285, applicable only to DCF, as the basis for abrogating the Agency's authority to issue a final order, fails to give deference

to the established rule of law that exceptions to the Florida Administrative Procedure Act (Chapter 120, Florida Statutes) should be narrowly construed.

While the DCF Hearing Officer cites DCF's rules for the proposition that orders of DCF hearing officers are final orders, it requires no citation to support the proposition that an agency's rules cannot expand upon the substantive law which they implement. Rule 65-2.066(1) expressly states that it implements s. 409.285 and, as indicated above, that statutory provision only grants DCF hearing officers final order authority with regard to the department, DCF, and thus this rule, as applied in the purported "Final Order," is in conflict with and in derogation of section 120.57, Florida Statutes. Thus, Rule 65-2.066 cannot be interpreted to independently confer final order authority on DCF hearing officers; it merely restates s. 409.285: "with regard to the department" the decision of the hearing authority is final and binding.

For the above reasons, the Agency rejects the DCF Hearing Officer's conclusion that he has the legal authority to (1) take final agency action on behalf of the Agency in the form of a Final Order and (2) deny the Agency it's authority under Chapter 120 to issue its Final Order. Paragraph number 11 of the "Final Order of Dismissal" is struck.

**MOOTNESS**

The Respondent Agency does not take exception with the DCF Hearing Officer's finding that, since the Agency's notice only applied to cost plan year

2009-2010, that noticed action became moot when the 2009-2010 cost plan year expired on June 30th, 2010.

The Agency did file exceptions which challenge the DCF Hearing Officer's conclusion that s. 393.0661(6), only authorizes the Agency to rebase cost plans effective during fiscal year 2009-2010, and that it provides no authority for the Agency to rebase cost plans in subsequent years.

The Agency does have substantive jurisdiction over this conclusion of law and it substitutes its conclusions of law as more reasonable than the Hearing Officer's. Therefore, the exceptions are granted and paragraphs 39 – 43 are struck and in their place are substituted the following:

"By its express terms, Section 393.0661(6) is '[e]ffective January 1, 2010'and may be implemented beginning on that date. Though the statute contains a beginning date, it does not set forth an expiration date. The statute does not contain any sort of sunset provision.[4]

Section 393.0661(6), Florida Statutes provides:

> Effective January 1, 2010, and except as otherwise provided in this section, a client served by the home and community-based services waiver or the family and supported living waiver funded

[4] Notably, a prior version of Section 393.0661(6) did contain a sunset provision. See § 393.0661(6), Fla. Stat. (2008); Compare Ch. 2009-56, s. 2, Laws of Florida, which amended Section 393.0661 by striking through the sunset provision and replacing that sentence with a prohibition against rebasing the cost plan of any client who experiences a significant change in recipient condition or circumstance which results in a change of more than 5 percent to his or her cost plan between July 1, 2009 and the date upon which the cost plan would take effect. Thus, the legislature knowingly removed the law's former sunset provision but simultaneously protected clients by prohibiting the late rebasing of a client's cost plan if his or her cost plan changed significantly since the rebasing exercise began.

> through the agency shall have his or her cost plan adjusted to reflect the amount of expenditures for the previous state fiscal year plus 5 percent if such amount is less than the client's existing cost plan. The agency shall use actual paid claims for services provided during the previous fiscal year that are submitted by October 31 to calculate the revised cost plan amount. If the client was not served for the entire previous state fiscal year or there was any single change in the cost plan amount of more than 5 percent during the previous state fiscal year, the agency shall set the cost plan amount at an estimated annualized expenditure amount plus 5 percent. The agency shall estimate the annualized expenditure amount by calculating the average of monthly expenditures, beginning in the fourth month after the client enrolled, interrupted services are resumed, or the cost plan was changed by more than 5 percent and ending on August 31, 2009, and multiplying the average by 12. In order to determine whether a client was not served for the entire year, the agency shall include any interruption of a waiver-funded service or services lasting at least 18 days. If at least 3 months of actual expenditure data are not available to estimate annualized expenditures, the agency may not rebase a cost plan pursuant to this subsection. The agency may not rebase the cost plan of any client who experiences a significant change in recipient condition or circumstance which results in a change of more than 5 percent to his or her cost plan between July 1 and the date that a rebased cost plan would take effect pursuant to this subsection.

§ 393.0661(6), Fla. Stat. (2009)(underline added).

When given its plain and ordinary meaning, the statute clearly directs the Agency to calculate Petitioner's expenses for a defined period of time and then to increase those expenses by 5%. If the result of that calculation is less than a client's cost plan, then the cost plan will be rebased to that amount.

The statute creates no deadline for the implementation of the rebasing exercise, indicating merely that any adjustment may be made effective on January 1, 2010. The statute does not refer to the rebasing of any particular cost plan for any particular fiscal year. The statute directs and defines a one-time rebasing exercise, and clearly defines how the calculation for rebasing should

occur. The statute in no way suggests that any sort of delay in implementation -- including delays caused by requests for hearing -- should render the statute moot, void, repealed or otherwise rendered ineffective. Any such reading of the statute frustrates the very purpose and intent of the statute -- to rebase cost plans.

Thus, according to the Agency's rules[5] and as verified by its personnel, cost plans may be referred to by a fiscal year, but they consist of a 365 day period that begins at the anniversary of each individual recipient's annual support plan review. Cost plans only change when the support plan is amended.

The Agency has consistently interpreted its rules and the effect of a change in the State's fiscal year on cost plans. That consistently applied interpretation of Agency rules is entitled to great deference. See Dep't of Revenue v. First Union Nat'l Bank of Fla., 513 So. 2d 114, 119 (Fla. 1987). An agency's interpretation of its statutes must receive deference so long as that interpretation is consistent with legislative intent and is supported by competent evidence. See Pub. Employees Relations Comm'n v. Dade County Police Benevolent Ass'n, 467 So. 2d 987, 989 (Fla 1985). The Agency's interpretation is consistent with legislative intent and makes the law effective."

[5] Hearing Offcier Van Laningham's Order makes reference to the Handbook, and even partially quotes from the Handbook's definition of "cost plans." However, to reach his conclusion that "cost plans" begin and end with the State's fiscal year, the Order cites a different source, The Agency's Cost Plan and Service Development Guide (revised Sept. 15, 2009). While the Guide is available on the Agency's web site, it is not adopted by rule. The Agency respectfully suggests that the Guide's reference to cost plan dates spanning no more than one fiscal year should be interpreted as instructing that cost plans span no more than 365 days. In any event, the Handbook's definition of "cost plans", which is adopted by Rule, controls.

Because of the accepted conclusion that the action was moot owing to the fact that agency action was noticed for cost plan year 2009-2010, this action should be dismissed on those grounds. It should be noted that the disposition of the action premised upon a show cause order did not provide for full evidentiary proceedings and the findings of fact are limited to the particular circumstances of this action.

Accordingly, upon review of the complete record in this case, including the Recommended Order, the submissions and arguments of the parties, and being otherwise fully advised in the premises, the DCF Hearing Officer's Order of Dismissal issued on September 1, 2010, as amended above, is hereby ADOPTED and this case is hereby DISMISSED.

DONE AND ORDERED, this __ day of _____, 2010, in Tallahassee, Leon County, Florida.

_____
Jim DeBeaugrine, Director
Agency for Persons with Disabilities

## RIGHT TO APPEAL

A party who is adversely affected by this final order is entitled to judicial review. To initiate judicial review, the party seeking it must file one copy of a "Notice of Appeal" with the Agency Clerk. The party seeking judicial review must also file another copy of the "Notice of Appeal," accompanied by the filing fee required by law, with the First District Court of Appeal in Tallahassee, Florida, or with the District Court of Appeal in the district where the party resides. Review proceedings shall be conducted in accordance with Florida Rules of Appellate Procedure. The Notices must be filed within thirty (30) days of the rendition of this final order.[6]

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Final Order was provided to the above-named individuals at the listed addresses, by U.S. Mail or electronic mail, this ____ day of _____, 2010.

_____

Percy W. Mallison, Jr., Agency Clerk
Agency for Persons with Disabilities
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[6] The date of the "rendition" of this Final Order is the date that is stamped on its first page. The Notices of Appeal must be received on or before the thirtieth day after that date.