STATE OF FLORIDA
DEPARTMENT OF CHILDREN AND FAMILY SERVICES

[redacted]

Petitioner,

vs.

AGENCY FOR PERSONS WITH DISABILITIES,

Respondent.

Case No. 10-4345CPR

FINAL ORDER OF DISMISSAL

In an Order to Show Cause issued on July 16, 2010, the undersigned directed that, "no later than July 30, 2010, each party who believes that this case presents a live controversy shall show cause in writing why a final administrative decision dismissing this case as moot should not be entered." Respondent Agency for Persons with Disabilities ("APD") timely filed a Response to Order to Show Cause ("Response"), in which it argued that this case is not moot. On August 2, 2010, Petitioner [redacted] filed a memorandum of law responding to APD's Response. Petitioner takes the position that this case is moot and should be dismissed on that basis. On August 12, 2010, the undersigned heard oral argument on the question of whether this case is moot. Both parties' attorneys appeared in person at the Division of Administrative Hearings ("DOAH") to present argument

on the issue. The undersigned, having considered the parties' respective written and oral arguments, has determined that this case is moot and therefore must be dismissed with prejudice.

DECISION SUMMARY

This case is moot for two reasons, each of which is sufficient, without the other, to reach the decision.

The first and primary ground follows a straightforward administrative-law analysis. In November 2009, APD notified Petitioner that it intended to take a specific proposed agency action, namely to reduce [redacted] Medicaid benefits (by refusing to pay for all [redacted] previously approved developmental services) for the period from February 1, 2010, through June 30, 2010. In December 2009, Petitioner timely requested a hearing; consequently, APD could not take its proposed action except pursuant to a final order entered at the conclusion of a proceeding conducted under Sections 120.569 and 120.57, Florida Statutes. In the meantime, Petitioner would receive [redacted] benefits, without reduction—as, in fact, [redacted] did.

APD referred the matter to DOAH on June 25, 2010. A few days later, on June 30, 2010, the period lapsed in which APD's proposed action would have operated, had it been finalized in time to be effectual. At present, it is no longer necessary or possible to reduce Petitioner's benefits as APD intended because

[redacted] has already received them for the relevant period. This makes the case moot.

The final agency action that APD now seeks, in an effort to breathe life into this dead case, is a reduction in Petitioner's present benefits, to be effective for an indefinite period going forward. This proposed action does not conform to the intended action of which APD notified Petitioner in November 2009, and about which, in December 2009, [redacted] requested a hearing. Rather, APD's desire to cut payments for Petitioner's current approved services reflects a proposed decision about which Petitioner, having never been given a clear point of entry, has never requested a hearing. Without a written petition requesting a hearing on a proposed agency action, there is no jurisdictional basis for a formal hearing respecting such action.

The second and alternative ground looks at the statute under which APD traveled when it proposed, in November 2009, to reduce Petitioner's benefits for a limited time ending on June 30, 2010, and pursuant to which APD now would like to cut payments, for the indefinite future, for Petitioner's current services. The proposed agency action of which APD notified Petitioner in November 2009 was allowed by the plain language of the statute, assuming APD's factual allegations were true. The final agency action that APD now wants taken, however, is not allowed by the plain language of the statute, as a matter of

law. This is because the statute only authorized APD to cut payments for some clients' benefits for a period which expired on June 30, 2010. The statute plainly does not authorize a reduction in Petitioner's, or any other client's, benefits for any period of time after June 30, 2010. Consequently, the relief that APD seeks, which it claims gives this case continued vitality, is not available. For this additional and alternative reason, this case is moot.

BACKGROUND

Introduction

In a Notice of Cost Plan Rebasing (the "Decision Notice"), which is undated but was, it is reasonably inferred, sent in November 2009, APD informed Petitioner that APD intended to "rebase" her "current cost plan" pursuant to Section 393.0661(6), Florida Statutes (2009)(the "Rebase Statute"). According to the Decision Notice, if APD's proposed "0910 rebasing decision" were finalized, then, for the final five months of fiscal year ("FY") 2009-2010[1], the state Medicaid program would pay only $23,887.05 (the "Rebased Cost Plan Amount") for the medically necessary developmental services which APD had approved and agreed to provide Petitioner, at public expense, pursuant to her FY 2009-2010 cost plan. Because the Rebased Cost Plan Amount was insufficient to cover all of Petitioner's approved services, the proposed agency action (if

implemented) would have cut Petitioner's Medicaid benefits for the period beginning on February 1, 2010, and ending on June 30, 2010.

Petitioner objected to APD's proposed agency action (the "2009-2010 Rebasing Decision") and submitted a "Request for Reconsideration and Petition for Formal Hearing—Re-Basing" ("Petition"), which APD received on December 10, 2009. In [redacted] Petition, Petitioner alleged that cutting the payments previously authorized under the "cost plan approved by APD with begin date 07/01/09 and ending date 6/30/10" would "require Petitioner to reduce or terminate services petitioner is currently receiving at the expense of petitioner's health and safety." Petition at 3-4.

APD referred the matter to DOAH a half-year later, on Friday, June 25, 2010, by which time there were only three business days left in FY 2009-2010.[2] In so doing, APD treated the Petition as a request for formal administrative hearing pursuant to Sections 120.569 and 120.57, Florida Statutes.

During the 2010 legislative session, the Florida Legislature amended Section 393.125, Florida Statutes, so as to invest the Department of Children and Family Services ("DCF"), exclusively, with the statutory duty of providing hearings for persons whose substantial interests in receiving developmental services under Medicaid programs administered by APD are being

determined. See § 393.125(1)(a), Fla. Stat. (2010). This law took effect on July 1, 2010. See Ch. 2010-157, § 5, Laws of Fla. By a letter entitled "Order Appointing Hearing Officers" dated July 12, 2010 (the "Order of Appointment"), the Secretary of DCF stated to the Chief Judge of DOAH, in relevant part, as follows:

> As you know, the Agency for Persons with Disabilities (APD) has recently referred a large number of cases to [DOAH] for administrative adjudication. Those cases generally involve adjustments to cost plans for the developmentally disabled pursuant to §393.0661(6), Florida Statutes (Cost Plan Rebasing Litigation) . . . . While DOAH has had jurisdiction over such litigation, the Florida Legislature recently amended Chapter 393, Florida Statutes[,] . . . so that APD hearings will now be provided by the Department of Children & Family Services (DCF) pursuant to §409.285, Florida Statutes.
>
> * * *
>
> Section 409.285, Florida Statutes, provides "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." Pursuant to this statute, I, as Secretary of DCF, now appoint DOAH's administrative law judges as hearing officers for all APD Cost Plan Rebasing Litigation . . . pending before DOAH as of July 1, 2010.

DOAH accepted the Order of Appointment.

As a DOAH administrative law judge, therefore, the undersigned will exercise all of the powers that 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.[3] See § 409.285(2), Fla. Stat. (2010)("The hearing authority is responsible for a final administrative decision in the name of [DCF] on all issues that have been the subject of a hearing."); Fla. Admin. Code R. 65-2.042(3)("Hearings officer shall mean the individual presiding over the hearings. The hearings will be conducted by a hearings officer from the Office of Appeal Hearings, which is within the Office of Inspector General."); Fla. Admin. Code R. 65-2.066(1)("Orders issued by the hearings officers of the Office of Appeal Hearings of the Department of Children and Family Services are final orders and shall be implemented immediately.").

Cost Plans and the State Fiscal Year

"Under the Home and Community Based Waiver Program, a part of Medicaid, individuals who would otherwise be cared for in nursing homes or other institutions can receive services in their own home or home-like settings." Courts v. Agency for Health Care Administration, 965 So. 2d 154, 156 (Fla. 1st DCA 2007). In Florida, individuals with developmental disabilities may be eligible for services under the Florida Medicaid Developmental Disabilities Waiver Program (the "Waiver"). Petitioner is enrolled in, and receives services under, the

Waiver. [redacted] is, therefore, a "client" of APD's. See § 393.063(5), Fla. Stat. ("'Client'" means any person determined eligible by the agency for services under this chapter.").

As APD's client, Petitioner is supposed to have, at all times, a "support plan," which must be reviewed, and revised if necessary, on an annual basis. See § 393.0651, Fla. Stat. (2010). The support plan and another instrument known as a "cost plan" together form a "plan of care." See FLORIDA MEDICAID DEVELOPMENTAL DISABILITIES WAIVER SERVICES COVERAGE AND LIMITATIONS HANDBOOK, May 2010 ("Waiver Handbook")[4] at 2-6 ("The plan of care includes the support plan and approved cost plan."); id. at 2-5 ("[The] recipient's support plan and cost plan [are] also known as the plan of care.").

The cost plan is a document which lists "all of the services requested by the recipient on the support plan, regardless of funding source, and the anticipated cost of each waiver service and approval. The APD Area Office must approve the cost plan prior to service provision." Id. at Appendix A, A-2 (emphasis added). This latter point is repeated in the Waiver Handbook for emphasis. See id. at 2-9 ("APD must approve the cost plan prior to service provision."). Medicaid will not pay for Waiver services unless such services are identified in the client's APD-approved plan of care, by service type, frequency, and duration. Id. at 2-7. To be approved for

payment, developmental services must be medically necessary, based on the client's current needs and circumstances, and fall within the coverage and limitations of the Waiver. Id. at 2-6, 2-9. Providers of approved services are reimbursed at the Medicaid reimbursement rates as published in the Developmental Disabilities Home and Community-Based Services Waiver Provider Rate Table. Id. at 2-6.

In a final order entered in a case involving a request for funding with respect to developmental services, DCF described as follows the process by which such requests are handled:

> The process of support planning and requesting services through the Developmental Disabilities Program is an annual process. Section 393.0651(7), F.S. (2002). Each year a separate support plan and request for funding is made, and each year action is taken on that separate request. The action taken on the request for funding is effective for the one year period of the support plan. All services purchased or funded by [DCF, which was APD's predecessor-in-interest with regard to administering the Waiver,] must be approved by the Department prior to actual provision of services. Section 393.0662(2), F.S. (2002). Thus, under no circumstances can the Department pay for services which were provided before the date of approval.

McDuffy v. Department of Children and Families, 25 F.A.L.R. 4023, 4030 (Fla. Dep't of Children & Fam. 2003). As DCF explained further, "[n]o money may be drawn from the state treasury except pursuant to an appropriation made by

law. . . . Unless specifically authorized by law, [DCF] is prohibited from entering into any agreement to spend money in excess of the amount appropriated." Id. Because "the Florida Constitution and other provisions of state law" require that "the budgeting and appropriations process [be] an annual process," id., "appropriations for community-based developmental services" are "available to [DCF] for expenditure" only during the state fiscal years for which such funds are appropriated. Id. at 4031.

In a letter to Petitioner dated January 27, 2010, which APD forwarded to DOAH with the Petition as one of the "pleadings" in this case, APD stated as follows: "Your annual cost plan budget covers a fiscal year." This statement is confirmed in APD's COST PLAN AND SERVICE PLAN DEVELOPMENT GUIDE (Revised Sept. 15, 2009)[5], at page 9, which provides in relevant part as follows:

> **Cost Plan Dates—**
>
> - Cost plan dates cannot overlap an existing cost plan.
> - There can only be one cost plan per consumer, per date period.
> - Cost plan dates must span no more than ONE FISCAL YEAR.

APD confirmed at oral argument, as well, that a cost plan is effective for one state fiscal year, and thus "expires" on June 30; and that each successive cost plan constitutes a separate and distinct legal instrument. See, e.g., Transcript of Proceedings (08/12/10) ("T.") at 10 ("The fiscal year '09-'10

cost plan is no longer in effect. It expired, I guess you could say, on June 30, 2010 . . . ."); id. at 20 ("The [Petitioner's FY 2009-2010] cost plan did expire on the end of the fiscal year like every cost plan does."); id. at 10 (each cost plan is "a separate instrument"); id. at 12 ("The cost plan is tied to a fiscal year . . . ."); id. at 21 ("[C]ost plans are defined to meet the fiscal year . . . .").

It is clear from the plain language of the Waiver Handbook, the discussion in McDuffy regarding requests for funding, and APD's many statements on the subject, that a cost plan is approved for a term of up to one state fiscal year. All cost plans, therefore, expire on the thirtieth of June each year, regardless of when they began, because June 30 marks the end of the state fiscal year. This compels the conclusion that APD's proposed decision to "rebase" Petitioner's FY 2009-2010 cost plan—that is, to reduce the payment amount originally approved, to the lower amount stated in the Decision Notice—could not have reached beyond June 30, 2010, just as APD stated in the Decision Notice. See McDuffy, 25 F.A.L.R. at 4030 (The relief available in a proceeding to determine petitioner's substantial interests in funding for developmental disabilities services is "limited to the cost plan year, as any approval or denial is effective for that period only[.]"). That date has passed. Consequently, this case is moot.

GROUNDS

I.

The Decision Notice described APD's proposed 2009-2010 Rebasing Decision as follows:

> The 2008 Legislature passed legislation that requires adjustment of your current cost plan effective January 1, 2010. This law, Section 393.0661(6), F.S. (2009), requires [APD] to rebase cost plans for individuals receiving Medicaid waiver services to the amount of an individual's service expenditures for the period July 1, 2008 through June 30, 2009, plus 5%. To "rebase" means adjusting your current cost plan to the total amount that you spent for services last fiscal year, plus 5% additional funding. The Legislature has allowed certain adjustments for changes in services during the year. The entire content of the new law is included on page two of this Notice.
>
> All cost plans must be reviewed and adjusted for cost plan rebasing. Your monthly expenditures for the period July 1, 2008 through August 31, 2009, are shown on page two of the Notice. In addition, an average monthly expenditure amount, adjusted according to the requirements of the law, is shown. Next to this expenditure amount, your annual adjusted cost plan amount plus 5% is shown.
>
> You must contact your Waiver Support Coordinator immediately to discuss information about the amount of your cost plan change and the development of your revised cost plan. Your Waiver Support Coordinator can assist you in choosing or changing services to meet your needs. Cost plans must be adjusted even if you have a pending fair hearing on a different issue such as your tier assignment. If you requested a hearing challenging last year's

rebasing notice, that does not apply to this notice. You must file a challenge to this notice if you disagree with the 0910 rebasing decision.

You have 30 days from the day you receive this notice to file a request for hearing. **You have only 10 days from the day you receive this notice to file a request for hearing if you wish to continue your current cost plan at the current, approved amounts.** Please refer to the attached Notice of Hearing Rights for instructions on how to file a hearing request. Also please refer to the attached Hearing Request Form *if you decide to file for a hearing on your rebased cost plan.*

* * *

Your expenditure information for last year and your rebased cost plan amount are shown on the back of this page.

[First Table on Page Two:]

FY 0809	FY 0809	FY 0809	FY 0910
Annualized Paid Claims Plus 5%	Monthly Expend	Adjusted 12 Month Cost Plan Plus 5%	Feb. 1, 2010 Rebased Cost Plan Amount
$57,328.93	$4,549.92	$57,328.93	$23,887.05

* * *

The language of Section 393.0661, F.S. (2009), requiring APD to rebase your cost plan is shown below.

Section 393.0661(6), Florida Statutes (2009)

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 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.

(Emphasis in original.)

As described in the Decision Notice, the 2009-2010 Rebasing Decision was to allocate $23,887.05 to cover the last five

months (February 1, 2010 through June 30, 2010) of Petitioner's FY 2009-2010 cost plan. It is clear that the 2009-2010 Rebasing Decision operated only on Petitioner's "current cost plan," which could only have been [redacted] cost plan covering FY 2009-2010, because (a) that was, without question, [redacted] "current cost plan" in November 2009, a date which fell within FY 2009-2010; and (b) the Decision Notice unambiguously correlated Petitioner's "current cost plan" with the state FY 2009-2010, not only by calling APD's proposed action the "0910 rebasing decision," but also by tying the Rebased Cost Plan Amount to "FY 0910."[6]

It is beyond dispute that the Decision Notice said nothing about rebasing a cost plan other than Petitioner's "current cost plan" covering FY 2009-2010. The Decision Notice, moreover, said nothing about the allocation of funds to Petitioner's future cost plans for periods of time after June 30, 2010. To the contrary, the proposed agency action had clear limits: the 2009-2010 Rebasing Decision was to allocate a specific sum to a specific cost plan for a specific period of time. In informing Petitioner of [redacted] hearing rights, moreover, APD made clear that, if Petitioner were to request a hearing, [redacted] would be "fil[ing] for a hearing on [redacted] rebased cost plan," which was a "different issue" from, e.g., "last year's rebasing notice" or "[her] tier assignment." The "rebased cost plan" to which the Decision Notice referred was obviously the cost plan which APD

intended to rebase, namely Petitioner's then-current cost plan covering FY 2009-2010.

Therefore, as the Decision Notice itself plainly stated, if Petitioner were to request a hearing regarding APD's 2009-2010 Rebasing Decision, which [redacted] did by filing [redacted] Petition on December 10, 2009, then the only "issue" would be Petitioner's "rebased cost plan" (= her FY 2009-2010 cost plan). The 2009-2010 Rebasing Decision, according to which APD intended to adjust Petitioner's FY 2009-2010 cost plan, was the only proposed agency action that Petitioner could *possibly* have requested a hearing about following the issuance of the Decision Notice. No other preliminary decision, or any other cost plan, was mentioned in the Decision Notice.

Under Florida law, once Petitioner timely requested a hearing, APD's 2009-2010 Rebasing Decision became a procedural event. The Decision Notice, which was the vehicle for entry into a formal administrative proceeding, now serves as the equivalent of a pleading, as APD recognizes. APD cannot take final agency action in the matter until a de novo proceeding under Sections 120.569 and 120.57, Florida Statutes, is completed. APD agrees that because Petitioner requested a hearing, [redacted] FY 2009-2010 cost plan was not rebased, and that, consequently, the 2009-2010 Rebasing Decision had no effect on the services that Petitioner received during the period from

February 1, 2010, through June 30, 2010. See Response at 3-4.[7] In other words, whichever services Petitioner received during FY 2009-2010, [redacted] received them as if the 2009-2010 Rebasing Decision had never been proposed.

Petitioner's FY 2009-2010 cost plan expired on June 30, 2010, before final agency action rebasing it had been taken. (APD conceded at oral argument that Petitioner's FY 2009-2010 cost plan had "expired." T. 10, 20.) Because the relevant cost plan is no longer in effect, it is impossible for APD to finalize the 2009-2010 Rebasing Decision announced in November 2009, which proposed agency action gave rise to the only "matter" at issue in this case. Petitioner's FY 2009-2010 cost plan cannot be effectually rebased for the obvious reason that *that* particular cost plan no longer exists. Looked at another way, Petitioner's substantial interests in receiving all of [redacted] approved services between February 1, 2010, and June 30, 2010, without suffering the reductions in services that the rebasing of [redacted] FY 2009-2010 cost plan would have caused, are no longer at stake: Petitioner has already received the services. This case, therefore, is moot. See Montgomery v. Dep't of Health and Rehabilitative Servs., 468 So. 2d 1014, 1016-17 (Fla. 1st DCA 1985).

APD contends that the "matter" presently at issue includes an intended decision to put a cap on the amount the state will

spend during FY 2010-2011 for Petitioner's approved services, and even for periods beyond FY 2010-2011. APD argues that, because it quoted the Rebase Statute in full in the Decision Notice, the Decision Notice informed Petitioner that [redacted] FY 2010-2011 cost plan would be rebased, and therefore was sufficient to put Petitioner on notice, in November 2009, that APD intended to determine [redacted] substantial interests in having [redacted] benefits continue at approved levels during the period from July 1, 2010, through June 30, 2011, and beyond. T. 45, 47. This argument is rejected.

The 2009-2010 Rebasing Decision set forth in the Decision Notice proposed to allocate a specific sum ($23,887.05) to a specific cost plan (Petitioner's FY 2009-2010 cost plan) to cover a specific period of time (February 1, 2010, through June 30, 2010); that is the substance of the proposed agency action at issue in this case, nothing more. The very first sentence of the Decision Notice, in fact, states: "The 2008 Legislature passed legislation that requires adjustment of your current cost plan effective January 1, 2010." Nothing was said, anywhere in the Decision Notice, about future cost plans. If the quoted text of Section 393.0661(6), Florida Statutes, provided any additional insight into APD's intentions, it merely confirmed that the only cost plan at issue in the 2009-2010 Rebasing Decision was Petitioner's current, FY 2009-2010 cost plan,

because the statute (like the Decision Notice), speaks only of adjusting a client's "existing cost plan"—and there is only one of those at a given time.[8] At any rate, the statute did not communicate an intended agency decision to rebase a future cost plan in addition to Petitioner's FY 2009-2010 cost plan because the statute's text does not convey that meaning.

APD also argues, in the alternative, that a letter dated January 27, 2010 (the "January Letter"), "informed Petitioner that the rebasing would take effect when this proceeding was completed and apply to the remainder of the then current year and thereafter into subsequent periods." Response at 16. Thus, according to APD, Petitioner was adequately notified "that the rebasing would apply to a time period beyond the twelve (12) months ending June 30, 2010." Response at 5. APD claims that the January Letter "relate[s] back" to the Decision Notice, Response at 4, by which it apparently intends to imply that the January Letter amended or supplemented the Decision Notice and hence the 2009-2010 Rebasing Decision.

The January Letter did not, however, purport to determine, *unconditionally*, Petitioner's substantial interests. The January Letter provides, in pertinent part, as follows:

> [1] Your annual cost plan budget covers a fiscal year. The current fiscal year runs from July 1, 2009 through June 30, 2010 (FY 0910).

* * *

[3] You have recently been notified that the Agency determined that your cost plan is subject to rebasing. If this rebasing occurs, your cost plan would be rebased for the remainder of the current fiscal year (through June 30, 2010) and for the next fiscal year (July 1, 2010 through June 20, 2011, FY1011).

[4] The Agency has determined that $427.96 in additional funds are available for the remaining four months of the current 2009/2010 fiscal year (ending on June 30, 2010).

[5] Also, the Agency has determined that your total cost plan budget, which originally was projected to be $57,328.93 will be increased to $58,612.81 (beginning on July 1, 2010).

[6] **Because you have requested a hearing regarding the rebasing of your cost plan, your cost plan has not been rebased.** If you wish to continue to challenge the decision to rebase your cost plan you do not need to take any further action. Your hearing request, and request for reconsideration (if you requested it), will continue to be processed.

[7] Your waiver support coordinator will be in touch with you to determine if this increase in funding is satisfactory and if you wish to withdraw your request for a hearing on reconsideration regarding this matter. If so, your WSC can assist you in submitting a written request for withdrawal and in completing an amended cost plan for the balance of this year and for next year.

(Paragraph numbering added)(emphasis in original).

APD draws particular attention to paragraph 3 of the January Letter, arguing that this language "clearly indicated that rebasing would apply to the Petitioner's [2010-]2011 cost plan lasting through June 30, 2011." Response at 4. Actually, the language APD used does not clearly say that. Rather, APD stated in paragraph 3 only that, *if* Petitioner's FY 2009-2010 cost plan were rebased before June 30, 2010 (which in fact did not occur), then APD would "rebase" Petitioner's FY 2010-2011 cost plan. APD did not announce in paragraph 3 of the January Letter a substantial-interests determination, because a statement regarding possible future action, which is contingent on something else happing first, does not have the attributes of an "order" that can be immediately implemented. See, e.g., Hobe Associates, Ltd. v. State, Dep't of Business Regulation, 504 So. 2d 1301 (Fla. 1st DCA 1987); Henry v. State, Dep't of Admin, Div. of Ret., 431 So. 2d 677 (Fla. 1st DCA 1983).

Nothing in the remainder of the January Letter constitutes intended agency action, either. In paragraph 5, APD informed Petitioner that her FY 2010-2011 cost plan budget, which was "projected to be" a dollar amount equal to the number represented in the Decision Notice as being Petitioner's "FY 0809" expenditures plus five percent, "will be increased to [a higher amount] (beginning on July 1, 2010)." Again, this statement refers to an action that would take place only if

Petitioner's FY 2009-2010 cost plan were rebased, which did not occur. Further, the statement does not take into account the possibility that Petitioner might request and be approved for additional services for FY 2010-2011, or have a service reduced or terminated by APD for the cost plan to be in effect in FY 2010-2011. The assumption that Petitioner's approved cost plan for FY 2010-2011 would include the same services at the same frequency and duration as those in [redacted] FY 2009-2010 cost plan was plainly speculative, because APD could not have known in January 2010 what Petitioner's "current" needs and circumstances were going to be five months down the road. The conditional and speculative statement in paragraph 5 did not constitute an immediate substantial-interests determination.

Rather than being a substantial-interests determination, it is reasonably clear from paragraph 7 that paragraph 5 was a settlement offer contingent on Petitioner's withdrawing [redacted] request for hearing on APD's proposed rebasing of [redacted] FY 2009-2010 cost plan. In effect, APD informed Petitioner that it would agree to improve her situation, relative to the one APD asserted [redacted] would occupy if APD were successful in rebasing her FY 2009-2010 cost plan, provided Petitioner withdrew [redacted] request for hearing and agreed to complete an amended cost plan for the balance of FY 2009-2010 and for the entirety of FY 2010-2011.

Needless to say, this was not intended agency action of the sort that would support a substantial-interests proceeding.

Finally, APD's argument that the January Letter notified Petitioner that [redacted] FY 2010-2011 cost plan would be rebased fails because APD did not inform Petitioner of [redacted] right to a request a hearing relating to any post-FY 2009-2010 cost plan; nor did APD advise Petitioner of the procedure for requesting such a hearing if [redacted] wanted one. The January Letter, in short, did not give Petitioner a clear point of entry to contest any proposed action, conditional or otherwise, concerning [redacted] FY 2010-2011 cost plan, or any future cost plans beyond that one.[9] See § 393.125(1)(b), Fla. Stat. (2009). To the contrary, in paragraph 6, APD told Petitioner that [redacted] did not need to do anything in response to the January Letter, stating: "If you wish to continue to challenge the decision to rebase your [FY 2009-2010] cost plan you do not need to take any further action." January Letter at 1 (emphasis added). The only challenge that existed on (and hence could continue beyond) January 27, 2010, was initiated by Petitioner's December 10, 2009, request for hearing to contest the 2009-2010 Rebasing Decision; such challenge is the only matter presently before the undersigned.

APD argues that the failure to advise Petitioner of [redacted] right to request a hearing is not a problem because APD assumed

Petitioner would have wanted to challenge any proposed agency action set forth in the January Letter which would have the effect of "rebasing" [redacted] then-nonexistent FY 2010-2011 cost plan. T. 49, 58. APD therefore included the January 27, 2010, letter with the June 25, 2010, referral of Petitioner's December 10, 2009, request for a hearing, and now claims that this was sufficient to initiate a proceeding to determine Petitioner's substantial interests in [redacted] FY 2010-2011 cost plan, which is [redacted] current cost plan as of July 1, 2010. See id. This argument is rejected because the requirement of filing a petition with the agency to initiate an administrative proceeding is jurisdictional. See McDuffy v. Department of Children and Families, 25 F.A.L.R. 4023, 4030 (Fla. Dep't of Children & Fam. 2003).[10]

The issue in McDuffy was whether the petitioner's request for developmental disabilities services, which DCF had proposed to deny in a letter dated December 17, 2001, should be granted or not. During the proceeding at DOAH, the administrative law judge granted the petitioner leave to amend [redacted] petition to include a challenge to an earlier decision of DCF's, which had been made in December 2000, to drop the petitioner from the Waiver program—a decision for which DCF had not given the petitioner a clear point of entry.

In its final order, DCF ruled, on jurisdictional grounds, that the administrative law judge had erred in allowing the amendment. As one of those jurisdictional grounds, DCF held that the filing of a petition with the agency in the first instance is a jurisdictional requisite for a formal hearing. Id. at 4027-28. As DCF explained, the agency must review the petition, determine whether there are material facts in dispute, and either grant or deny the request for hearing. Id. at 4028. Because the petitioner had never filed a petition with DCF contesting the December 2000 decision, there was no jurisdictional foundation for a formal hearing regarding that particular matter. Id.

The jurisdictional defect identified in McDuffy was a function of the Administrative Procedure Act, which requires that a petition be filed with the agency to initiate a substantial-interests proceeding with regard to a proposed agency action. DOAH does not have the authority to initiate what would be a new substantial-interests proceeding via the mechanism of allowing an amendment to a petition because such a proceeding may only be initiated by the filing of a petition with the agency. Id.; see also, Fla. Admin. Code R. 28-106.201(1)(initiation of proceeding is accomplished only by written petition to agency).

By the same token, an agency does not have the authority to initiate what would be a new substantial-interests proceeding by the expedient of (a) unilaterally amending its original notice of proposed agency action *after the affected party has requested a hearing on the original proposed agency action* and then (b) sua sponte deeming the petitioner's prior hearing request to be a petition challenging the subsequently announced substantial-interests determination. Put simply, neither the agency nor the administrative law judge can circumvent the jurisdictional requirement that, to initiate a substantial-interests proceeding under Sections 120.569 and 120.57, Florida Statutes, a non-agency party must request a hearing by filing a petition with the agency.

In this case, Petitioner never filed a petition with APD to request a hearing with respect to any matter set forth in the January Letter. This fact cannot be disputed because the January Letter was issued after Petitioner had filed [redacted] one-and-only Petition in this case. Obviously, Petitioner's December 10, 2010, Petition could not have disputed anything first announced in the January 27, 2010, letter. Therefore, as a jurisdictional matter, the only proposed agency action at issue in this case is the 2009-2010 Rebasing Decision.

It is undisputed that the 2009-2010 Rebasing Decision was not finalized in FY 2009-2010, and that, consequently,

Petitioner received all of the services she would have received between February 1, 2010, and June 30, 2010, as if the 2009-2010 Rebasing Decision had never been proposed. As a result, there is no longer a need to take final agency action on the 2009-2010 Rebasing Decision. Indeed, it would be impossible to do so, for the period in which the 2009-2010 Rebasing Decision would have operated, if finalized, has passed and will never return. This case is moot.[11]

II.

APD contends that the fact that Petitioner's FY 2009-2010 cost plan has expired is irrelevant because the Rebase Statute did not require APD to rebase Petitioner's FY 2009-2010 cost plan in particular, or any other specific cost plan for that matter, but instead authorizes APD to rebase Petitioner's "'existing cost plan'—whenever the rebasing exercise is accomplished, and regardless of delays caused by administrative litigation or other reasons." Response at 13. This contention contravenes the statute's plain language. The Rebase Statute (reformatted, with sentence numbering added) provides as follows:

> [1] 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 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.

[2] 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.

[3] 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.

[4] 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.

[5] 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.

[6] 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.

[7] 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.

The first sentence of the Rebase Statute provides unambiguously that a client's "existing cost plan" "shall" be "adjusted" based on a sum equal to 105 percent of the expenditures that the state made for services rendered to that client during "the previous state fiscal year," provided this sum is "less than the client's existing cost plan." The clause "[e]ffective January 1, 2010," modifies the verb "adjust," which plainly means that an adjusted, or "rebased", cost plan was to have taken effect on January 1, 2010. It follows that the only "existing cost plan" that could have been rebased was the client's cost plan in effect on January 1, 2010; a cost plan coming into existence after January 1, 2010, is beyond the Rebase Statute's limited reach. As discussed above in Part I, the only cost plans in existence and effective on January 1, 2010, were cost plans covering FY 2009-2010. All of those cost plans expired on June 30, 2010, and can no longer be rebased.

There is another reason why the Rebase Statute does not, contrary to APD's contention, authorize the adjustment of whichever cost plan of a client's happens to be in place "whenever the rebasing exercise is accomplished." To begin, the plain language of the statute's first sentence provides that

rebasing was to occur if "expenditures for the previous state fiscal year plus 5 percent" were less than "the client's existing cost plan" amount. Next, sentences two through six of the Rebase Statute—with number four being the key—"clearly define[] the expenditures to be examined for the rebasing process as the expenditures from the 2008/2009 Fiscal Year," as APD states in its Response at page 13.[12] Logic dictates, therefore, that "the 2008/2009 Fiscal Year" is "the previous state fiscal year" referred to in the Rebase Statute.

Because FY 2008-2009 is "the previous state fiscal year" referred to in the statute, it follows that the only "existing cost plan" in line for adjustment pursuant to the Rebase Statute was the client's cost plan for FY 2009-2010. Cost plans commencing on July 1, 2010 (covering FY 2010-2011), and on any July first thereafter, cannot be rebased, because "the previous state fiscal year" in relation to such cost plans would not be FY 2008-2009 but some subsequent fiscal year.

For these reasons, the Rebase Statute authorized APD to rebase only cost plans covering FY 2009-2010. All of those cost plans, including Petitioner's, expired on June 30, 2010. The relief that APD now requests, namely a final order rebasing Petitioner's FY 2010-2011 cost plan, and/or some subsequent cost plan(s), is not relief that can lawfully be granted pursuant to the Rebase Statute. This conclusion provides a sufficient legal

basis, independent of the rationale expressed in Part I above, to hold that this case is moot.

Upon consideration, it is

ORDERED that this case is dismissed with prejudice.

DONE AND ORDERED this 1st day of September, 2010, in Tallahassee, Leon County, Florida.

JOHN G. VAN LANINGHAM
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Hearing Officer for the Department of Children and Family Services

Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of September, 2010.

ENDNOTES

[1]/ The state fiscal year runs from July 1 of one calendar year to June 30 of the next calendar year. Thus, FY 2009-2010 began on July 1, 2009, and ended on June 30, 2010.

[2]/ No explanation for this six-month delay appears in the record. Clearly, however, APD failed to comply with § 120.569(2)(a), Fla. Stat., which requires that "[a]request for a hearing shall be granted or denied within 15 days after

receipt," and that "[i]f the agency requests an administrative law judge from [DOAH], it shall so notify [DOAH] within 15 days after receipt of the petition or request." The substantial delay, for which APD alone is responsible, made timely action on the 2009-2010 Rebasing Decision impossible.

[3]/ The term "final order" is defined in § 120.57(7), Fla. Stat., to mean

> a written final decision which results from a proceeding under s. 120.56, s. 120.565, s. 120.569, s. 120.57, s. 120.573, or s. 120.574 which is not a rule, and which is not excepted from the definition of a rule, and which has been filed with the agency clerk, and includes final agency actions which are affirmative, negative, injunctive, or declaratory in form. A final order includes all materials explicitly adopted in it. The clerk shall indicate the date of filing on the order.

(Emphasis added.)

[4]/ Many of the rules governing the Waiver are set forth in the Waiver Handbook, which amplifies § 393.0651, Fla. Stat., and which is incorporated by reference in, and thus a part of, Florida Administrative Code Rule 59G-13.083.

[5]/ This document is available from APD's Web Portal at http://www.apd.myflorida.com. Click on Waivers, and then, under Support Coordination, select the topic "ABC Cost Plan and Service Development Guide."

[6]/ The Rebased Plan Amount of $23,887.05 is precisely equal to *five*-twelfths (5/12) of the "Annualized Paid Claims Plus 5%" for "FY 0809," which confirms that the Rebased Plan Amount for FY 2009-2010 was intended to cover the final *five* months of FY 2009-2010, i.e. February 1, 2010, through June 30, 2010.

[7]/ APD clarified at oral argument that its use of the term "stay" in the Response was not meant to suggest that the 2009-2010 Rebasing Decision had attributes of finality, as the term "stay" might imply. T. 25.

[8]/ It is indisputable that the statute authorizes APD to rebase "the client's existing cost plan"—nothing more. § 393.0661(6), Fla. Stat. Not to put too fine a point on it, but the word used in the statute is "plan" (singular), not "plans" (plural).

[9]/ It is a fundamental tenet of administrative law that when an agency determines a party's substantial interests, the agency must grant the affected party a clear point of entry into formal or informal proceedings under Chapter 120, which point of entry cannot be "so remote from the agency action as to be ineffectual as a vehicle for affording [the affected party] a prompt opportunity to challenge" the decision. See, e.g., General Development Utilities, Inc. v. Florida Dep't of Environmental Regulation, 417 So. 2d 1068, 1070 (Fla. 1st DCA 1982). Moreover, unless and until a clear point of entry is offered, "there can be no agency action affecting the substantial interests of a person." Florida League of Cities, Inc. v. State of Florida, Administration Com., 586 So. 2d 397, 413 (Fla. 1st DCA 1991). Indeed, absent a clear point of entry, "the agency is without power to act." Id. at 415; see also, e.g., Capeletti Brothers, Inc. v. State Dep't of Transp., 362 So. 2d 346, 348-49 (Fla. 1st DCA 1978)("Absent [an express] waiver [of the right to an administrative hearing], we must regard an agency's free-form action as only preliminary irrespective of its tenor. . . . Until proceedings are had satisfying Section 120.57, or an opportunity for them is clearly offered and waived, [an agency] is powerless to" determine a party's substantial interests.)

[10]/ Under the "principle of administrative stare decisis in Florida," an agency must adhere to its prior decisions or explain its deviation therefrom. Gessler v. Dep't of Bus. and Prof. Regulation, 627 So. 2d 501, 503-04 (Fla. 4th DCA 1993). As a deputized DCF hearing officer charged with taking final agency action in DCF's name, therefore, the undersigned considers himself as bound to follow McDuffy as DCF itself would be, were DCF, through one of its own employees, exercising its final-order authority in this case.

[11]/ APD alleges that the effective dates of a client's support plan are not synchronous with the state fiscal year (unlike his or [redacted] cost plan, which ends when the fiscal year ends), and that, therefore, cost plans are issued "automatically" at the beginning of each state fiscal year—without an agency "decision" being made, or a clear point of entry being given—because, as the underlying support plan subsists without change

at the beginning of the new fiscal year, the new cost plan should conform in all respects to the one it is replacing. These alleged facts are immaterial, as is APD's assertion that, had Petitioner not requested a hearing, [redacted] cost plan would have been rebased effective February 1, 2010, and she would have been issued a rebased cost plan automatically, effective July 1, 2010.

To explain, the Rebase Statute is concerned only with adjusting the client's cost plan, which, it is undisputed, always expires on June 30 at the end of the state fiscal year; the statute says nothing about support plans. Likewise, neither the Decision Notice, nor the January Letter, referred to Petitioner's support plan. Thus, regardless of whether Petitioner's support plan was synchronous with the state fiscal year, Petitioner's support plan was not relevant to the 2009-2010 Rebasing Decision, and its effective dates are immaterial to this case. The instrument that *is* relevant and material to this case is Petitioner's FY 2009-2010 cost plan, which expired, as a matter of undisputed fact, on June 30, 2010. The support plan is a distraction, a red herring.

Next, the issuance of a rebased cost plan, whenever that might occur in relation to the period covered by the client's support plan, necessarily would determine the client's substantial interests. This is because, first, "APD must approve the cost plan prior to service provision." Waiver Handbook at 2-9; see also id. at Appendix A, A-2. Therefore, APD must make a decision every time it issues a new cost plan, i.e. to approve the instrument or not, and this is true regardless of whether the new cost plan is identical to the one it will replace. Second, a rebased cost plan puts a cap on the amount of money the state will spend on the client's behalf for developmental services and thus cuts the client's benefits. Thus, a rebased cost plan not only determines the client's substantial interests, but also it reflects an *adverse* determination thereof. A rebased cost plan, accordingly, could not *lawfully* be issued, "automatically" or otherwise, without giving the affected client notice and a clear point of entry.

APD's assertion about what would have happened if Petitioner had not requested a hearing is pointless, because Petitioner obviously did request a hearing, and [redacted] FY 2009-2010 cost plan, as a result, was not rebased. (It is also irrelevant that APD might have, in fact, automatically issued rebased FY 2010-2011 cost plans to clients whose FY 2009-2010 cost plans

were rebased. Such clients are not similarly situated to Petitioner, and in any event are not before the undersigned.)

[12]/ The statute's third, fourth, and fifth sentences prescribe the mechanism for adjustment if the client either were not served during the "entire previous state fiscal year," or had a single change of more than five percent in his cost plan amount during the "previous state fiscal year." The cost plan of such a client was to be adjusted so as to cap payments on the client's behalf at 105 percent of an estimated "annualized expenditure amount" based on "at least 3 months of actual expenditure data" taken from the period *beginning in* "the fourth month after" (i) the commencement of initial services upon the client's enrollment; (ii) the resumption of interrupted services; or (iii) the approval of a more-than five percent change in the client's cost plan amount; *and ending on* "August 31, 2009." To meet these conditions, the "fourth month" needed to begin no later than June 1, 2009, a date which fell in FY 2008-2009. Clearly, therefore, the "previous state fiscal year" to which the Rebase Statute refers is FY 2008-2009.

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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 appeal with the Clerk of the Division of Administrative Hearings on behalf of the Department of Children and Families and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.