STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

W. D., C. V., K. E. AND K. M.,

Petitioners,

vs. Case No. 15-6009RP

DEPARTMENT OF HEALTH,

Respondent.
_____/

FINAL ORDER

Administrative Law Judge John G. Van Laningham conducted the final hearing in this rule challenge, which was brought pursuant to section 120.56(2), Florida Statutes, at the Division of Administrative Hearings in Tallahassee on November 20, 2015.

APPEARANCES

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STATEMENT OF THE ISSUES

The ultimate issue in this case is whether Respondent's proposed repeal of Florida Administrative Code Rule 64C-4.003, which would deregulate certain pediatric cardiac facilities, constitutes an invalid exercise of delegated legislative authority. Before that issue may be reached, however, it is necessary to determine whether Petitioners have standing to challenge the proposed rule.

PRELIMINARY STATEMENT

On October 22, 2015, Petitioners filed with the Division of Administrative Hearings ("DOAH") a Petition for Determination of Invalidity of Proposed Rule pursuant to section 120.56(2). Petitioners alleged that Respondent's proposed repeal of Florida Administrative Code Rule 64C-4.003 is an invalid exercise of delegated legislative authority.

The final hearing was held on November 20, 2015, as scheduled, with both parties present. Petitioners called as witnesses Doctors Louis B. St. Petery, Jr., and Ira H. Gessner. Petitioners offered, in addition, ten exhibits, namely Petitioners' Exhibits 4 through 13A-E, which were received in evidence without objection. Respondent's Exhibits 1 through 6 were admitted as well, with no objections, and Respondent rested without calling any witnesses.

Before adjourning the final hearing, and with the agreement of the parties, the undersigned established the deadline for filing proposed final orders, which was December 11, 2015. The final hearing transcript was filed on November 30, 2015. Each party filed a proposed final order.

Unless otherwise indicated, citations to the official statute law of the state of Florida refer to Florida Statutes 2015.

FINDINGS OF FACT

1. Respondent Department of Health (the "Department") administers the state of Florida's Children's Medical Services ("CMS") program, which provides financial assistance for medically necessary services, similar to the benefits available under Medicaid, to children with special health care needs who meet the program's eligibility requirements. The Department reimburses health care providers for services rendered through the CMS network, a statewide managed system of care in which providers may participate under contract with the program.

2. The Department is responsible for establishing the criteria for selecting health care providers, including both individuals and facilities, to participate in the CMS network. To that end, the Department has adopted Florida Administrative Code Chapter 64C-4, which comprises rule 64C-4.001, entitled

"CMS Physician and Non-Physician Providers"; rule 64C-4.002, entitled "Diagnostic and Treatment Facilities or Services – General"; and rule 64C-4.003, entitled "Diagnostic and Treatment Facilities or Services – Specific."

3. Rule 64C-4.003, whose proposed repeal is the subject of this challenge, provides as follows:

> (1) CMS Pediatric Cardiac Facilities. CMS Headquarters approves pediatric cardiac facilities for the CMS Network on a statewide basis upon consideration of the recommendation of the Cardiac Subcommittee of the CMS Network Advisory Council. CMS approved pediatric cardiac facilities must comply with the CMS Pediatric Cardiac Facilities Standards, October 2012 . . . . CMS approved pediatric cardiac facilities must collect and submit quality assurance data annually [using the prescribed forms].
>
> (2) CMS Cardiac Regional and Satellite Clinics. CMS Headquarters approves regional and satellite cardiac clinics for the CMS Network on a statewide basis upon consideration of the recommendation of the Cardiac Subcommittee of the CMS Network Advisory Council. CMS regional and satellite clinics must comply with the CMS Cardiac Regional and Satellite Clinic Standards, October 2012. . . .
>
> (3) The standards and forms are incorporated herein by reference and are available from CMS Headquarters, 4052 Bald Cypress Way, Bin A06, Tallahassee, FL 32399-1707.

(Emphasis added). The CMS Pediatric Cardiac Facilities Standards and the CMS Cardiac Regional and Satellite Clinic

Standards are referred to hereinafter, collectively, as the "Standards." For simplicity's sake, as well, the terms "facility," "clinic," and "hospital" are used interchangeably herein as inclusive of all such places within the purview of rule 64C-4.003.

4. On July 29, 2015, a Notice of Proposed Rule was published in volume 41, number 146, of the Florida Administrative Register. The full text of proposed rule 64C-4.003, as set forth in this notice, is as follows:

> 64C-4.003 Diagnostic and Treatment Facilities or Services – Specific.
> *Rulemaking Authority 391.026(18), 391.035(1) FS. Law Implemented 391.026(10), 391.035(1) FS. History–New 1-1-77, Amended 2-11-85, Formerly 10J-5.09, 10J-5.009, Amended 12-20-05, 2-12-13, Repealed.*

The stated purpose of the proposed repeal of rule 64C-4.003 is to "eliminate imposed regulation of pediatric cardiac facilities, which extends beyond the Department's statutory authority."

5. Each Petitioner is a CMS beneficiary who suffers from a serious heart condition requiring pediatric cardiac services. Each Petitioner has received such services through the CMS program from participating CMS providers, including CMS approved pediatric cardiac facilities that currently must comply with the Standards and report quality assurance data annually to the

Department in accordance with existing rule 64C-4.003. Each Petitioner's special health care needs make it likely that he or she will require ongoing pediatric cardiac care in the future from CMS approved providers, including the facilities regulated by rule 64C-4.003.

6. Petitioners are concerned that the repeal of rule 64C-4.003 would reduce the quality of care available within the CMS program and thereby deprive them of a benefit (high quality pediatric cardiac services) to which they, as enrolled CMS beneficiaries, are entitled. Petitioners have failed to prove, however, that the proposed deregulation of CMS approved pediatric cardiac facilities would, in fact, have a real or immediate effect on the quality of care available through the CMS network.

CONCLUSIONS OF LAW

7. DOAH has personal jurisdiction in this proceeding pursuant to sections 120.56, 120.569, and 120.57(1), Florida Statutes.

8. In administrative proceedings, standing is a matter of subject matter jurisdiction. Abbott Labs. v. Mylan Pharms., Inc., 15 So. 3d 642, 651 n.2 (Fla. 1st DCA 2009). To have standing to challenge the validity of an administrative rule in a proceeding before an administrative law judge, a person must

be "substantially affected" by the rule in question. § 120.56(1)(a), Fla. Stat.

9. As the First District Court of Appeal has observed,

> [t]o establish standing under the "substantially affected" test, a party must show: (1) that the rule or policy will result in a real or immediate injury in fact; and (2) that the alleged interest is within the zone of interest to be protected or regulated. Jacoby v. Fla. Bd. of Med., 917 So. 2d 358, 360 (Fla. 1st DCA 2005).

Off. of Ins. Reg. v. Secure Enters., LLC., 124 So. 3d 332, 336 (Fla. 1st DCA 2013); see also, e.g., Fla. Medical Ass'n, Inc. v. Dep't of Prof'l Reg., 426 So. 2d 1112, 1114 (Fla. 1st DCA 1983). To satisfy the immediacy of injury requirement, the rule's harmful effect cannot be purely speculative or conjectural. Lanoue v. Fla. Dep't of Law Enf., 751 So. 2d 94, 97 (Fla. 1st DCA 1999).

10. The petitioner need not actually have realized the injury, however, to have standing. In NAACP, Inc. v. Florida Board of Regents, 863 So. 2d 294, 300 (Fla. 2003), for example, the Florida Supreme Court held that student members of the NAACP who were genuine prospective candidates for admission to a state university were, as African-Americans, substantially affected by the proposed repeal of rules which authorized certain affirmative action policies for which only minority applicants were eligible; thus, they had standing to challenge these

proposed rules without showing "immediate and actual harm" such as the rejection of an application for admission.

11. NAACP is potentially instructive here because, as in the instant case, the petitioners claimed that they would be negatively affected by the *repeal* of a rule whose implementation worked to their benefit. In NAACP, moreover, the rules targeted for repeal did not directly regulate, control, or govern the conduct of the petitioners, who were not required to attend state universities or forbidden from enrolling in other schools, and neither would the proposed rules have done so, if adopted.[1/] Rather, the rules at issue there regulated the state universities, whose compliance with them was mandatory—— although, to be sure, applicants were *subject to* the admission standards, which affected the likelihood of their being accepted. Similarly, the Standards directly regulate pediatric cardiac facilities and clinics, not patients such as Petitioners, and the regulatory scheme that would exist in the absence of the Standards would do likewise. At bottom, the petitioners in NAACP were protesting the planned replacement of a policy they viewed as advantageous to them by another that might prove disadvantageous; so, too, are Petitioners. A closer look at NAACP is warranted, therefore, to see whether the

principles announced in that case give Petitioners grounds to maintain this proceeding.

12. The question of standing in NAACP divided the judicial panel at the First DCA, which first reviewed the case, where a majority found that the petitioners lacked standing to proceed. NAACP, Inc. v. Fla. Bd. of Regents, 822 So. 2d 1, 7 (Fla. 1st DCA 2002), rev'd, 863 So. 2d 294 (Fla. 2003). One of the individual petitioners was an African-American high school student, then in the tenth grade, who planned to attend a state university. The court held that this student——whose situation most resembles that of the present Petitioners as far as the issue of standing is concerned——had failed to establish a real or immediate injury in fact because he (i) had yet to apply for admission and would not be in a position to do so for a couple of years and (ii) was doing so well in school that he likely would be accepted at the university of his choice even without the benefit of affirmative action. Id. Thus, in the court's view, this student's claimed injury rested upon speculation. Id.

13. In a dissenting opinion, Judge Browning sharply disagreed with the majority's reasoning, explaining at length his reasons for concluding that "African-American students' admission to the [state universities] under legally established

affirmative action programs cannot be repealed by agency rules without giving those covered by such programs the right to challenge the repeal[.]" Id. at 14 (Browning, J., dissenting). The district court certified the question of standing to be one of great public importance.

14. The Supreme Court of Florida agreed with Judge Browning's conclusion and adopted substantial portions of his dissenting opinion.[2/] The Supreme Court focused on the effect that the proposed rules would have on admission standards for black applicants and observed that the repeal of affirmative action policies would raise the bar for *all* African-American applicants because, without the "boost" available only to minority students, they would *all* be subject to the same admission standards as non-minority students. NAACP, 863 So. 2d at 299. For that reason, it was irrelevant for standing purposes that a given black student might meet the higher standards and hence be admitted regardless of affirmative action; the relevant point was that after repeal, to be accepted, he (and every other African-American applicant) would *have* to meet the same admission standards as non-minority students, whereas under affirmative action, no African-American applicant *necessarily* had to satisfy the identical admission

standards as non-minority students (even though undoubtedly many would).

15. As the First DCA had recognized, the possibility exists that a tenth-grade student might not apply to a state university when the time comes. On the question of whether this possibility renders the student's claimed injury from changed admission standards too speculative to be considered real or immediate, the Supreme Court found that students who were "genuine prospective candidates for admission to" a state university were sufficiently affected by the proposed repeal of affirmative action to maintain a rule challenge. Id. at 300.

16. The undersigned has no difficulty concluding that Petitioners here are at least as likely to require future treatment at a pediatric cardiac facility or clinic as the African-American high school students in NAACP were to apply for admission to one of the state universities. In short, Petitioners are "genuine prospective" patients of CMS approved facilities or clinics regulated by the Standards being considered for repeal. Their claimed injury is not too remote or speculative, therefore, on the grounds that they might not need or seek treatment at such a facility or clinic after the Standards have been repealed, if the proposed rule is adopted.

17. In NAACP, however, it was readily apparent that the repeal of the state universities' affirmative action policies would "drastically change the admission standards that apply to African-Americans." Id. at 299. Because that was, in fact, one of the *purposes* of the proposed rules, no speculation or conjecture was required to determine whether the elimination of affirmative action from university admission policies would work such a change. The only uncertainties were as to whether a particular student would apply, and, if he applied, whether he would be denied admission without affirmative action.

18. Here, in contrast, it is clearly *not* the purpose of the Standards' proposed repeal to lower the quality of cardiac care provided to CMS recipients or other patients. Nor is it readily apparent that, in the absence of the Standards, CMS approved facilities and clinics will stop providing quality cardiac services. Therefore, even accepting that (i) each of the Petitioners will need future care in a CMS approved facility or clinic and that (ii) without quality cardiac services Petitioners are more likely to have adverse outcomes, this case is distinguishable from NAACP because the repeal of the Standards does not *by itself* take away the benefit (quality cardiac care) whose prospective loss Petitioners claim as the injury in fact for standing purposes.

19. To have standing, therefore, Petitioners needed to prove that repeal of the Standards would be the proximate cause of a real or immediate diminution in the quality of cardiac care provided to CMS recipients. They did not succeed in carrying this burden but can hardly be faulted for the failure. Predicting the effects of the repeal of the Standards is an inherently speculative enterprise, as it would be practically impossible to establish, through conventional methods of proof, such things as the myriad incentives and disincentives that motivate the operators of individual hospitals, which compete for business in a relatively free (albeit heavily regulated) market, where a reputation for quality (good or bad) is likely to matter; the personal dedication, diligence, and professional pride of the individual health care providers on the hospitals' staffs, men and women such as Petitioners' doctors whose internal desires to deliver quality care are probably driven by many factors besides (and more important than) regulatory compliance; even the efficacy of the Standards themselves, whose unintended consequences might include adverse effects on the quality of care.

20. It should not and cannot reasonably be assumed that people do what's right in their private conduct, whether at work, in their homes, or out in public, only because the

government has ordered them to behave in a particular fashion. Many people derive personal satisfaction from doing a job well, whether the job is, e.g., painting a house or performing open-heart surgery, and they strive to deliver a quality product, not in obedience to the superintending guidance of the administrative state, but because they *want to*. The notion, therefore, that every facility in the CMS network would suddenly stop providing quality pediatric cardiac services immediately upon the repeal of the Standards rests on pure speculation——and is a little insulting to the health care professionals who personally deliver those services.[3/] Such an imagined across-the-board loss of quality care is not reasonably foreseeable and cannot qualify as a real or immediate injury in fact for purposes of standing.

21. To elaborate, further discussion of NAACP, or rather its unexamined implications, will be helpful. Although the Supreme Court did not explore the ways in which its decision might be used in other contexts, the proposition that African-American students have standing to challenge the repeal of rules authorizing affirmative action policies leads logically to the conclusion that those same students would have standing to challenge any proposed amendment to such rules that would weaken the advantage that affirmative action affords. Thus, for

example, if the proposed rules in NAACP had sought, instead of repealing affirmative action, to reduce the percentage of students who could be admitted under such polices from 10 percent to, say, five percent, the students who had standing to challenge the actual proposed repeal would have had standing, surely, to challenge the hypothetical proposed amendment. The harm (loss of advantage) is the same in either case, the only difference being a matter of degree. For standing purposes, the question is whether the party is substantially affected by the rule, not whether he is substantially affected *enough*.

22. Of course, if a party has standing to challenge the proposed repeal or amendment of a rule on the grounds that he faces the prospect of receiving a smaller advantage if the proposed rule is adopted, then logically he must also have standing to challenge the existing rule, on the grounds that it does not provide a sufficient advantage. Thus, for example, the students in NAACP should have been able to challenge the previously existing affirmative action policies whose proposed repeal substantially affected them, on the theory that the existing affirmative action policies failed to afford African-American students enough of a boost——that, e.g., the percentage of students admitted under affirmative action should be, say, 25 percent instead of 10 percent.

23. If affirmative action were not controversial for reasons having nothing to do with administrative rule challenges, perhaps the court would have held, simply, that genuine prospective applicants to state universities (regardless of race) are substantially affected by rules which establish admission standards and hence have standing to challenge them. For the reasons stated above, this is arguably the rule of NAACP anyway, once the baggage that attaches to disputes over preferential treatment is carted off. Seen in this light, NAACP is of a piece with cases holding that potential applicants for licensure in the state of Florida have standing to challenge the rules governing licensing procedures. See, e.g., Jacoby v. Fla. Bd. of Med., 917 So. 2d 358, 360 (Fla. 1st DCA 2005); Prof'l Firefighters of Fla. v. Dep't of HRS, 396 So. 2d 1194, 1196 (Fla. 1st DCA 1981). Genuine prospective applicants to a state university are, after all, subject to the admission standards in much the same way that potential applicants for state licensure are subject to the licensing requirements, and the impact that such rules have on a prospective applicant's ability to attend school or work in Florida, as the case may be, is analogous.

24. Petitioners here, however, are not directly affected by the Standards in the way that a would-be applicant for licensure or admission to a university is affected by the rules

governing acceptance. The repeal of the Standards will not affect Petitioners' eligibility for CMS benefits, restrict their access to (or choice of) providers or facilities, or place new limitations or conditions on coverage. Petitioners, in short, are not analogous to applicants for licensure or admission to a state university, but rather more resemble genuine prospective patrons of those who, out of all such applicants, succeed in obtaining licensure or a degree. Indeed, when it comes to it, Petitioners are not unlike any prospective customer, client, or patient of a licensee who desires a quality service from the regulated provider.[4/]

25. And that, ultimately, is the irreducible problem with Petitioners' standing position. If these Petitioners have standing, then there would be no intellectually honest limiting principle by which to deny standing to the person who routinely gets his teeth cleaned and wants to challenge the rules regulating dental hygienists on the grounds that they are insufficiently stringent to ensure quality care; or to the man who needs regular haircuts when he challenges the rules regulating barbers for not doing enough to guarantee his safety; or to anyone else who benefits from similar rules protecting the health, safety, or welfare of the public once he or she

inevitably brings a rule challenge alleging that some such rule does too little (or too much) to achieve its goals.

26. Such an expansive view of standing might be consistent with the original understanding of the term "substantially affected," but it seems untenable in the light of several decades' worth of judicial interpretations of the concept, which teach that a claimed injury to a common good such as quality health care is too abstract to confer standing, because at that level of generality practically everyone has an interest in the subject matter. E.g. Sch. Bd. v. Blackford, 369 So. 2d 689, 691 (Fla. 1st DCA 1979)(parents and children lack standing to challenge rules adopting school attendance zones). A zone of interest comprising such a universal interest would be, in effect, no "zone" at all.[5/] While the undersigned is personally receptive to the idea that the "substantially affected" test should not be applied with overzealous strictness (unnecessarily allowing potentially unlawful rules to evade review), neither should it be applied with excessive leniency (unnecessarily exposing the agencies to potentially burdensome litigation). To open the door to these Petitioners would relax the test to an unprecedented degree. If that is to be done, it is a job for the appellate court.

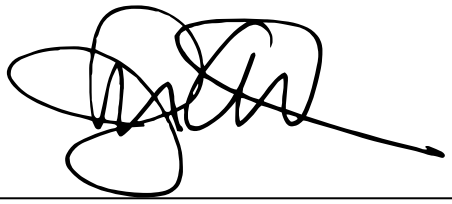
27. It is concluded, therefore, that Petitioners do not have standing to challenge the proposed rule.

28. Because Petitioners lack standing to maintain this proceeding, the undersigned is without jurisdiction to rule on the merits of the rule challenge. See Abbott Labs. v. Mylan Pharms., Inc., 15 So. 3d 642, 651 n.2 (Fla. 1st DCA 2009).

ORDER

Based on the foregoing findings and conclusions, it is ORDERED that this case is dismissed for lack of jurisdiction.

DONE AND ORDERED this 16th day of December, 2015, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
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ENDNOTES

[1/] In other words, these were not generally applicable rules of private conduct for prospective students of state universities.

[2/] The three dissenting justices would not have answered the certified question on the grounds that the case might have become moot. NAACP, 863 So. 2d at 301 (Wells, J., dissenting).

[3/] If, in fact, compliance with the Standards is necessary for the provision of quality care, it is at least as reasonable to assume that, following repeal, facilities will continue voluntarily to comply with the Standards, or their equivalent, as it is to imagine facilities seizing the "opportunity" to deliver substandard care.

[4/] Designation as a CMS approved network provider of cardiac care is a "license" as defined in section 120.52(10), Florida Statutes. S. Broward Hosp. Dist. v. Brooks, 799 So. 2d 280, 281 (Fla. 1st DCA 2001). These CMS "licensed" hospitals do not treat CMS patients *only*, of course, and so if the proposed deregulation were to lower the quality of care available from CMS approved providers, *all* pediatric cardiac patients would be similarly affected. Petitioners contend nevertheless that, as CMS beneficiaries, they are uniquely entitled to quality pediatric cardiac services. The undersigned rejects this contention as unfounded and unpersuasive. What Petitioners might be "entitled" to, unlike all pediatric cardiac patients, is public *financial assistance* to pay for their medical treatment (which the proposed rule does not reduce, restrict, or retract). As for having an interest in *quality health care*, however, Petitioners are no different from other pediatric cardiac patients in this state and are surely no more entitled to quality care than those who do not receive subsidized medical treatment. Simply put, everyone who needs pediatric cardiac care has the same interest in receiving quality treatment, regardless of the funding source for the treatment.

[5/] To be fair, the qualifiers "pediatric" and "cardiac" reduce the level of generality in this case somewhat——but not so much as to be material. Every concerned parent has an interest in the availability of quality pediatric health care, including cardiac care should that be necessary. And parents are not the only adults who have such an interest, for most adults have children in their extended families or in their circle of friends. The ready availability of quality pediatric cardiac care contributes to the commonweal and as such constitutes a shared interest of concern to practically everyone.

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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 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.