March 6, 2020

Standing Committee on Unlicensed Practice of Law  
of The Florida Bar  
651 E. Jefferson Street  
Tallahassee, Florida 32399-2300

Re: Request for Advisory Opinion Regarding Whether Representation by a Non-Attorney Parent or Other Relative in an Appeal from a Medicaid Fair Hearing Final Order Before a Florida Court Is Permissible Under the Rules Regulating the Florida Bar.

Dear Members of the Standing Committee on Unlicensed Practice of Law:

I am writing on behalf of the State of Florida, Agency for Health Care Administration ("AHCA" or "the Agency"), which is responsible for administering Florida's Medicaid program, to request an advisory opinion from the Florida Bar's Standing Committee on Unlicensed Practice of Law ("the UPL Standing Committee"). Specifically, the Agency requests an advisory opinion on whether or not the following representation is permissible under the Rules Regulating the Florida Bar, including Rule 10-9.1:

1. The representation of a minor child, who is Medicaid recipient, by a parent in an appeal from an Agency Final Order in a Medicaid fair hearing case pending before a Florida court.

2. The representation of an adult, who is a Medicaid recipient, by a parent or adult child in an appeal from an Agency Final Order in a Medicaid fair hearing case pending before a Florida court.

The issue in an AHCA Medicaid fair hearing case is generally whether a health care service that has been requested for a Medicaid recipient has been improperly denied, reduced in amount, or delayed. State and federal law permit a Medicaid recipient to be represented by a parent or adult child in the fair hearing proceeding. It is, however, unclear whether these same persons may represent the Medicaid recipient in an appeal from an adverse AHCA Final Order to a Florida court.

Many Medicaid recipients are minors, elderly, physically or mentally disabled, and/or indigent. As such, they may be unable to represent themselves and may have difficulty obtaining affordable representation for an appeal. The parent or adult child who represents the Medicaid recipient at the fair hearing may be a caretaker of and/or provide financial support to the recipient. As such, the parent or adult child representative may incur financial costs or other burdens if the recipient's health care services are denied, reduced, or delayed, and if the recipient is required to obtain counsel for an appeal. Thus, while the parent or adult child representative may not be a named party, he or she may very well have a vested interest in the outcome of both the fair hearing and appeal.
Nevertheless, concerns exist as to whether a minor child or adult Medicaid recipient may consent to the representation of their interests by a non-attorney in a Florida court. And the non-attorney parent or child may have difficulty providing adequate representation, given a lack of legal training and/or knowledge of the governing laws and Florida court procedures. Failure to understand and comply with court procedures and orders may result in cases being abandoned or dismissed. AHCA notes that, unlike court proceedings, its Medicaid fair hearings are governed by a single rule that a non-attorney can reasonably be expected to navigate.

Rule 10-9.1 authorizes an “individual or organization seeking guidance as to the applicability of the state’s prohibitions against the unlicensed practice of law” to “request a formal advisory opinion concerning [such] activity ... by sending a question to The Florida Bar’s UPL Department at the bar’s headquarters address in Tallahassee.” R. Reg. Fla. Bar 10-9.1(a)(2), (b). AHCA seeks an advisory opinion on the above-stated representation issues because Florida’s courts have taken inconsistent positions, and the Third District Court of Appeal has suggested that an advisory opinion would be helpful. Resolution of these representation issues is of public importance to the State of Florida, the Florida courts, the Agency, Medicaid recipients, and their parents and children. AHCA does not advocate the resolution of these issues in any particular manner, but simply seeks guidance from the Standing Committee on how to approach the representation issues going forward.

BACKGROUND REGARDING THE MEDICAID LAW, FAIR HEARINGS, AND RECENT CONFLICTING DECISIONS IN THE APPELLATE COURTS

A. Medicaid State Plan and AHCA’s Role.

Medicaid is a cooperative federal-state program, established pursuant to Title XIX of the Social Security Act, for funding medical services for the needy. 42 U.S.C. § 1396, et seq.; §§ 409.901(16), 409.902, Fla. Stat. A state that chooses to participate in Medicaid submits a plan, known as the “State Plan,” to the federal government for approval. Harris v. James, 127 F.3d 993, 996 (11th Cir. 1997) (citation omitted). If approved, the state and federal governments jointly pay for medical services in accordance with the State Plan’s terms. Id.

AHCA is the “single State agency” responsible for administering the Florida Medicaid program in accordance with the State Plan, any approved waivers, and federal and state Medicaid law. 42 U.S.C. § 1396a(a)(5); 42 C.F.R. § 431.10(b); §§ 20.42(1), (3), 409.902(1), 409.963, Fla. Stat. AHCA is authorized to promulgate rules necessary to administer the program and comply with federal requirements. § 409.919, Fla. Stat. AHCA’s Medicaid rules are located at Chapter 59G, Florida Administrative Code.

AHCA also oversees a “statewide, integrated managed care program” called Statewide Medicaid Managed Care (“SMMC”) that contracts with health plans for Medicaid services. § 409.964, Fla. Stat. The SMMC program includes Managed Medical Assistance (“MMA”) and Long-Term Care (“LTC”) plans. §§ 409.964–409.984, Fla. Stat. Managed care plans typically cover dental, hospital, nursing, prescription drugs, and other health-related services. §§ 409.971, 409.973, Fla. Stat.
In Florida, the Department of Children and Families ("DCF") is responsible for determining whether an applicant is Medicaid-eligible and for holding fair hearings and issuing final orders pertaining to Medicaid eligibility. §§ 409.902(1), 409.285(1), Fla. Stat. DCF is also responsible for holding fair hearings for certain Medicaid programs and developmental services administered by the Agency for Persons with Disabilities. §§ 393.125(1)(a), 409.285(3), Fla. Stat. AHCA, in turn, is responsible for conducting fair hearings and issuing final orders for those Medicaid programs it directly administers, which includes the SMMC program and associated federal waivers. §§ 409.902(1), 409.285(2), Fla. Stat.; Fla. Admin. Code R. 59G-1.100(16)(b), (18).

B. Medicaid Fair Hearings.

An AHCA fair hearing is a de novo evidentiary hearing before a Hearing Officer with AHCA’s Office of Fair Hearings, governed by and conducted pursuant to 42 C.F.R. §§ 431.200-250, Section 409.285(2), Florida Statutes, and Florida Administrative Code Rule 59G-1.100(17)(b). Recipients receiving services on a fee-for-service ("FFS") basis are entitled to, and may request, a fair hearing when a previously authorized service is reduced, suspended, or terminated by the Agency or when a requested service is denied in-whole or in-part by the Agency. Fla. Admin. Code R. 59G-1.100(2)(a)-(b). Similarly, enrollees in a managed care plan are entitled to, and may request, a fair hearing when a requested service or supply is denied in-whole or in-part by a plan. Fla. Admin. Code R. 59G-1.100(2)(b). Enrollees may also request a fair hearing when a plan reduces, suspends, or terminates a previously authorized service, when a plan fails to provide services in a timely manner, or when a plan denies an enrollee’s request to dispute financial liability, including copayments and coinsurance. 42 U.S.C. § 1396a(a)(3); 42 C.F.R. §§ 431.200(a), 431.220(a)(1)(iv), 431.241(a); § 409.285(2)(a)-(b), Fla. Stat.; Fla. Admin. Code R. 59G-1.100(2)(b). Generally, “[t]he parties to a fair hearing regarding FFS benefits are the FFS recipient and the Agency” whereas “[t]he parties to a fair hearing regarding managed care benefits are the enrollee and the plan.” Fla. Admin. Code R. 59G-1.100(4)(a)-(b). However, “[u]pon request by the Agency, the Agency may be granted party status by the Hearing Officer.” Fla. Admin. Code R. 59G-1.100(4)(b). In either case, though, “[r]ecipients may represent themselves in a fair hearing, they may be represented by a non-attorney authorized representative, or, they may be represented by an attorney authorized to practice law in Florida retained by the recipient, or a person with authority to retain counsel for the recipient.” Fla. Admin. Code R. 59G-1.100(7)(a), (7)(c); 42 C.F.R. §§ 431.221(a), 435.923.

Accord 42 C.F.R. § 431.246. Further, the Final Order must include “notice to the recipient or enrollee of the right to seek judicial review, the procedure which must be followed, and the time limits which apply.” 42 C.F.R. § 431.245(b); §§ 120.68, 409.285(2)(a), Fla. Stat.; Fla. Admin. Code R. 59G-1.100(2)(l), (18)(g).

C. Conflicting Recent Decisions by Florida Appellate Courts.

Florida appellate courts have historically been inconsistent in their approach to the representation of Medicaid recipients by non-lawyer family. Likely factors contributing to this inconsistency are the fact that fair hearing cases are confidential and are usually sealed, and that many are affirmed per curiam or otherwise disposed of in unpublished orders. AHCA provides the following non-exhaustive list of examples to aid the UPL Committee’s consideration of the representation issues.

In T.A. o/b/o D.A. v. Agency for Health Care Administration, Case No. 2D17-4548, L.T. No. 17-FH0603, the non-attorney adult son of a 90 year-old Medicaid recipient sought to dispute a Final Order finding that a health plan’s denial of his mother’s request for personal care services was moot. Ex. A 1-65. The Second District sua sponte rendered an order finding that “[t]he notice of appeal had been signed by the appellant’s son,” and “[a] nonlawyer may not represent another on appeal.” Ex. B 66. The order noted that T.A.’s mother may have been incapable of signing documents or representing herself and stated, “Within 30 days of the date of this order, a notice of appearance must be filed by a licensed attorney on appellant’s behalf, or this appeal may be dismissed.” Ex. B 66. Neither T.A. nor his mother retained an attorney, and the Second District rendered an order dismissing the appeal. Ex. C 67.

Similarly, in G.S. v. Agency for Health Care Administration, Case No. 4D11-957, L.T. No. 10F-8888, the Fourth District dismissed a fair hearing appeal filed by a non-attorney father on behalf of his adult daughter, G.S., whose home health services had been denied. Ex. D 68-75. In that case, the court sua sponte recognized that G.S.’s father filed the notice of appeal and rendered an order to show cause why the notice of appeal should not be stricken. Ex. E 76. When G.S.’s father failed to respond to the order to show cause, the court rendered another order, stating that “[t]he appellant is over the age of 18, and thus must represent herself, or have an attorney, unless she has a guardian or other representative. If the father is the guardian of the appellant or otherwise has the authority to represent her, the father shall furnish this court with documentation of his representation, such as an order of guardianship. The father shall supply it within 15 days.” Ex. F 77. G.S.’s father never responded to any of the court’s orders, and the Fourth District ultimately dismissed the appeal. Ex. G 78.

But in another case from the Fourth District, the court made no mention of non-attorney representation and even suggested that the non-attorney family member could have filed a brief. In S.H.P. o/b/o J.P. v. Agency for Health Care Administration, Case No. 4D14-3252, L.T. No. 14F-3956, a non-attorney mother filed an appeal on behalf of her disabled minor son, J.P., to challenge a Final Order upholding the reduction of skilled nursing services. Ex. H 79-89. During the appeal, J.P.’s mother received notification that the requested hours had been reinstated, and AHCA filed an unopposed motion to dismiss. Ex. I 90-93. Rather than granting AHCA’s motion, the Fourth District rendered an order to show cause for lack of prosecution because the Initial
Brief had not been filed. Ex. J 94. The order stated that if the Initial Brief was filed within a specified time period, the order to show cause would be discharged. Ex. J 94. When J.P.’s mother failed to respond, the Fourth District rendered an order dismissing the appeal for lack of prosecution and denying AHCA’s motion as moot. Ex. K 95. As such, the court appears to have implicitly recognized that J.P.’s mother was authorized to file a brief on her son’s behalf.

Likewise, in C.D. o/b/o N.D. v. Agency for Health Care Administration, Case No. 5D15-777, L.T. No. 14F-9860, the Fifth District made no mention of family representation when the non-attorney father of an adult Medicaid recipient, N.D., filed an appeal from a Final Order upholding the denial of out-of-pocket prescription medication that he paid during a lapse in N.D.’s Medicaid eligibility. Ex. L 96-120. In that case, N.D.’s father was not an attorney, he was not ordered to retain counsel, and no one argued that such representation was prohibited. The parties filed briefs, and the Fifth District per curiam affirmed the Final Order. Ex. M 121-29, Ex. N 130-70, Ex. O 171-74, Ex. P 175, Ex. Q 176, Ex. R 177.

However, in early 2019, a fair hearing appeal from the Second District appeared to bring clarity to the question of non-attorney family representation. In V.V. v. Molina Health Care of Florida, Case No. 2D19-171, L.T. Nos. 18-FH-1302 and 18-FH1304, the Second District rendered an order stating that a non-attorney father was not authorized to represent his minor daughter, V.V., in a fair hearing appeal and that V.V. should retain counsel. Ex. S 178-96, Ex. T 197, Ex. U 198-200. V.V.’s father filed a mandamus petition in the Florida Supreme Court in Case No. SC19-302, arguing that he had the right to represent his daughter in the appeal. Ex. V 201-70, Ex. W 271, Ex. X 272. The Florida Supreme Court ordered AHCA, Molina (the recipient’s Medicaid managed care plan), and the Second District to file responses to the petition. Ex. Y 276. After considering the parties’ responses about non-attorney representation, the Florida Supreme Court denied the petition, finding that “petitioner has failed to show a clear legal right to the relief requested.” Ex. Z 277-79, Ex. AA 280-97, Ex. BB 298-321, Ex. CC 322. On September 9, 2019, the Florida Supreme Court denied V.V.’s father’s motion for rehearing. Ex. DD 323-35, Ex. EE 336.

Two days after the Florida Supreme Court denied rehearing in V.V., confusion was again created when the Third District came to a different conclusion on similar facts. In A.C. c/o V.R. v. Agency for Health Care Administration, Case No. 3D19-365, L.T. No. 18-FH1770, a non-attorney mother filed a notice of appeal in a Medicaid fair hearing case on behalf of her disabled minor child, A.C. Ex. FF 337-40, Ex. GG 341-44, Ex. HH 345. The Third District rendered an order finding that A.C.’s mother had a duty to care for her, that A.C. was unable to represent herself, and that A.C. and/or her mother were indigent. Ex. II 346-51. Rather than ordering A.C.’s mother to retain an attorney, the Third District determined that “A.C. should be allowed her day in Court,” and “absent further order or guidance from The Florida Bar or Florida Supreme Court, [the mother] is not precluded from filing papers in this case.” Ex. II 350-51. The Third District also suggested that if AHCA is concerned about the mother’s representation, AHCA can seek a formal advisory opinion from the Bar’s Standing Committee on Unlicensed Practice of Law under Rule 10-9.1. Ex. II 350.

In sum, AHCA and its attorneys have an obligation to Florida’s courts and the Bar to act in the public good. Based on V.V., A.C., and the previously discussed cases, AHCA and its
attorneys are unclear whether a non-attorney parent or adult child is authorized to represent a
minor child or adult Medicaid recipient in an appeal before a Florida court. In order to provide
consistency to the public, courts, and state employees, and in light of the Third District’s
suggestion that an advisory opinion would be helpful, AHCA seeks guidance from the Standing
Committee on how to approach these representation issues going forward.

Respectfully submitted,

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