FLORIDA HEALTH JUSTICE PROJECT, INC.

January 14, 2021

The Florida Bar – UPL Dept.
c/o Jeffrey T. Picker
651 E. Jefferson St.,
Tallahassee, FL 32399-2300
jpicker@floridabar.org

Submitted via email

Re: Request to Issue an Advisory Opinion That Answers in the Negative Whether Parents/Relatives of Medicaid Beneficiaries Assisting Those Beneficiaries in the Appeal of an Adverse Medicaid Fair Hearing Decision Constitutes the Unlicensed Practice of Law

Dear Mr. Picker:

The Florida Health Justice Project is a non-profit legal advocacy organization that recognizes that access to quality and affordable healthcare is a human right. We engage in comprehensive advocacy to expand healthcare access and promote health equity for vulnerable Floridians. This includes engaging in litigation at the administrative, state, and federal level to enforce the rights of Medicaid beneficiaries.

We write to request that the Florida Bar's Standing Committee on the Unlicensed Practice of Law (hereinafter "the UPL Committee") answer the questions submitted by Florida's Agency for Health Care Administration (hereinafter, "AHCA") on March 16, 2020 to the UPL Committee in the negative. Specifically, we ask that the UPL Committee find that parents of minor child Medicaid beneficiaries and parents/adult children of adult Medicaid beneficiaries with cognitive disabilities continue to be allowed to represent these beneficiaries on appeals from adverse Medicaid fair hearing decisions.

The issues at stake in Medicaid fair hearings are not to be taken lightly. They include determinations as to whether a beneficiary can receive personal care assistance with basic daily living needs like eating and bathing.[1] They also include coverage of life changing prescription drugs[2] and access to specialized medical equipment like wheelchairs, hospital beds, and feeding tubes.[3] Thus, depriving Medicaid beneficiaries of their right to seek judicial review of adverse Medicaid determinations poses grave consequences to those beneficiaries and the people who care for them. Accordingly, as discussed more fully below, we urge the UPL Committee to find that the representation described by AHCA in its request for an advisory opinion is not the

[1] *See e.g.*, *C.F. v. Dep't of Children and Families*, 934 So.2d 1 (Fla. 3d DCA 2005).
[2] *See e.g.*, *Q.H. v. Sunshine State Health Plan, Inc.*, 2020 WL 5937418 (Fla. 4th DCA October 7, 2020).
[3] *See e.g.*, *Bell v. Agency for Health Care Admin.*, 768 So.2d 1203 (Fla. 1st DCA 2000).

unlicensed practice of law. However, if the UPL Committee decides to answer AHCA's questions in the affirmative, we ask that it also find that the public interest is best served and individual rights best protected by creating a narrow exception to continue to allow parents of minor children and parents and children/parents of adult Medicaid beneficiaries with cognitive disabilities to assist in seeking judicial review of adverse Medicaid determinations on their behalf.

Background and relevant authority

The Florida Bar currently defines the Unlicensed Practice of Law as "the practice of law as prohibited by statute, court rule, and case law of the state of Florida." Rule 10-2.1 of the Rules Regulating the Florida Bar. There are no statutes on point, and while case law is informative, the Florida Supreme Court has aptly found that "any attempt to formulate a lasting, all encompassing definition of 'practice of law' is doomed to failure for the reason that under our system of jurisprudence such practice must necessarily change with the everchanging business and social order." *Florida Bar v. Brumbaugh*, 355 So.2d 1186, 1191-1192 (Fla. 1978). More recently, the Florida Supreme Court emphasized that "[t]he single most important concern in the Supreme Court's defining and regulating the practice of law is the protection of the public from incompetent, unethical, or irresponsible representation." *The Florida Bar Re: Advisory Opinion – Shore v. Wall, et al.*, 265 So.3d 447 (Fla. 2018). *See also*, The *Florida Bar v. Warren*, 655 So.2d 1131 (Fla. 1995) (it is the unlicensed practice of law "for nonlawyers to hold themselves out as lawyers."). In other words, the Florida Supreme Court has underscored that the rule exists to protect the public from incompetent, unethical representation, including by people fraudulently holding themselves out to be lawyers. None of those concerns apply to the issue here.

The unlicensed practice of law is a state crime punishable by a felony of the third degree. *See* Fla. Stat. 454.23. If the UPL Committee determines that the circumstances that AHCA describes in its request for advisory opinion falls under the unlicensed practice of law, then those family members – sometimes under a legal obligation to provide all possible care to the Medicaid beneficiary – will be threatened with criminal penalties for pursuing the healthcare that promotes the health, and in certain situations, safeguards the life of that beneficiary.

And significantly, the Florida case that most directly addresses and analyzes the issues at hand found that the parent of a minor child could proceed *pro se* in appealing AHCA's adverse Medicaid determination. *A.C. v. Agency for Health Care Admin.*, 2019 WL 4291692 (Fla. 3d DCA, September 11, 2019). It is worth noting that *A.C.* prevailed in the substance of her appeal and the Third DCA reversed and remanded the case to AHCA for additional proceedings. *Id.* Had the Third DCA prohibited her from proceeding, AHCA's erroneous decision would have stood. And, of the six cases outlined in AHCA's request for an advisory opinion, only two opinions found that a non-lawyer family representative could not assist a *pro se* Medicaid beneficiary in seeking judicial review of AHCA's decisions (*T.A. v. AHCA*; *V.V. v. Molina*). The other four cases

either allowed the representative to assist without interference (*S.H.P. v. AHCA*; *C.D. v. AHCA*), asked the representative to provide proof of authority to assist, i.e., a DPOA or guardianship (*G.S. v. AHCA*), or affirmatively stated that the parent could proceed *pro se* on behalf of the minor child because she "should be allowed her day in Court." *A.C. v. Agency for Health Care Admin.* at *2.

The Right to Proceed in Appealing Adverse Decisions of the Social Security Administration with *Pro Se* Assistance is Analogous to the Right to Proceed in Appealing Adverse Medicaid Fair Hearing Decisions

A prime example of courts allowing non-lawyer representation is in the context of non-lawyers representing beneficiaries in challenging adverse Social Security Administration decisions. This is virtually indistinguishable from the issue at hand. *See Machadio v. Apfel,* 276 F.3d 103, 107 (CA2 2002); *Harris v. Apfel,* 209 F.3d 413, 416 (5th Cir. 2000); *Maldonado v. Apfel,* 55 F. Supp. 2d 296, 308 (S.D.N.Y. 1999).

While some courts have found that parents and adult children cannot assist a family member without capacity to pursue a claim in court, those cases are almost exclusively in the context of a tort claim, and they rest on concerns that the choice whether to proceed *pro se* or with counsel "is not a true choice" for *pro se* litigants if the choice is made by others, *Johns v. County of San Diego,* 114 F.3d 874, 877 (9th Cir. 1997) (quoting *Osei-Afriye v. Medical College of Penn.,* 937 F.2d 876, 882-83 (9th Cir. 1991), that children's rights will not be "fully protected" without trained legal assistance, *Osei-Afriye*, 937 F.2d at 883 and that permitting "guardians to bring *pro se* litigation *** invites abuse." *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 61 (2d Cir. 1990). These concerns are not at all applicable in the issue at hand.

Indeed, as the Social Security cases explain, none of the concerns raised in the line of aforementioned tort cases are present, when:

> (1) the representatives appeared on behalf of the beneficiaries throughout the administrative proceedings; (2) the appeal of the denial of benefits is a common and fairly simple proceeding that is often prosecuted without the assistance of counsel and the administrative record is set; (3) plaintiffs in these cases are often unable to obtain counsel; and (4) the benefits are intended to aid disabled beneficiaries whose rights must be vindicated in a timely manner. *Maldonado* at 305.

Here, all the *Maldonado* elements are met. First, parents and adult children appear on behalf of Medicaid beneficiaries in proceedings at the AHCA Office of Fair Hearings. Second, appealing the adverse action of AHCA is a simple proceeding since the administrative record and the issues to be decided are set. Third, appellants of Medicaid adverse decisions are often unable to obtain counsel. On review of 72 AHCA final orders obtained through a recent public records

request, it was determined that only 3 individuals had the assistance of counsel. Additionally, appellate attorney's fees are available only in the most egregious of situations where the appellant can demonstrate a "gross abuse of agency discretion." *See* Fla. Stat. §120.595(5). There are no monetary damages available. This is in stark contrast to tort claims where injured parties with meritorious claims have a wide range of counsel to choose from on a contingency fee basis. Notably, fees are also available in federal appeals from Social Security Administration decisions to the federal court, so the element is stronger here than it was in *Maldonado*. Fourth and finally, Medicaid beneficiaries, due to their indigent status do not have alternative sources of funding to cover medically necessary services. There rights must be vindicated in a timely manner so they can access critical healthcare for which they have no other option.

Not Allowing Adult Medicaid Beneficiaries with Cognitive Disabilities to Have Assistance in Pursuing Judicial Review of Adverse Medicaid Fair Hearing Decisions May Violate Title II of the Americans with Disabilities Act

As noted by the court in *A.C. v Agency for Health Care Admin*., A.C.:

> "by virtue of her physical and intellectual limitations…was unable to represent herself in the administrative proceeding and is unable to represent herself here….Florida Rule of Judicial Administration 2.540(a) addresses the duties of Florida's courts to provide qualified persons with disabilities 'with accommodations, reasonable modifications to rules, policies, or practices, or the provision of auxiliary aids and services, in order to participate in programs or activities provided by the courts of this state.' Such accommodations are intended to assure compliance with the Americans with Disabilities Act of 1990, 42 U.S.C. section 12101, et. seq."

The state court system is subject to Title II of the ADA. *Tennessee v. Lane*, 541 U.S. 509 (2004). Thus, allowing those without disabilities to proceed *pro se*, while foreclosing a *pro se* option for those whose disabilities prevent them from proceeding without assistance would trigger concerns of ADA violations as noted by the Third DCA.

Requiring Parents/Adult Children of Medicaid Beneficiaries to Obtain Counsel to Enforce the Beneficiary's Right to Judicial Review of An Adverse Medicaid Fair Hearing Decision Deprives Them of Their Right to Equal Access to the Courts

The test for "determining the procedures that are necessary to ensure that a citizen is not 'deprived of life, liberty, or property, without due process of law' is the test that the Supreme Court articulated in *Mathews v. Eldridge*." *Hamdi v. Rumsfeld,* 542 U.S. 507, 529 (2004) (citation omitted). *Mathews* requires a careful balancing of three factors.

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335. In the issue at hand, balancing these factors leads to the conclusion that *pro se* representation by the parent of a minor child or a child/parent of an adult with cognitive disabilities seeking judicial review of an adverse Medicaid fair hearing decision must be protected.

1. The private interest affected is a fundamental interest.

The private interest implicated in the present case is of the highest constitutional order, that of access to courts. As Florida's 4th DCA reflected, "the right to go to court to resolve our disputes…is one of the most fundamental and necessary rights of a citizen in a society based on the rule of law." *Guerrero v. Humana, Inc.*, 548 So.2d 1187, 1187-88 (Fla. 4th DCA 1989) (J. Anstead's dissent in *Guerrero* was later adopted as opinion in *Psychiatric Associates v. Siegel*, 567 So.2d 52 (Fla. 4th DCA 1990)). This right is also enshrined in Florida's state constitution. FLA. CONST. art. I, § 21.

2. The risk of erroneous deprivation is great and permitting parents and adult children to represent Medicaid enrollees, who are unable to represent themselves, reduces this risk.

The second factor under the *Mathews* test examines the risk of erroneous deprivation and the value of additional procedural safeguards. *Id.* at 322. Here, the risk of erroneous deprivation is great if the UPL Committee finds that Medicaid enrollees, who due to age or cognitive disability are unable to request judicial review of an adverse agency action regarding Medicaid coverage themselves, are foreclosed from seeking that review unless they can retain an attorney. Given that there is no mandate for appointment of counsel, civil legal aid organizations in Florida are grossly underfunded and many do not have attorneys with expertise in Medicaid law, and pro bono assistance (while laudable and greatly impactful) has also been unable to bridge the justice gap,[4] there are no current additional procedural safeguards that can serve to defend against erroneous deprivation other than continuing to allow parents and adult children to act on behalf of those Medicaid beneficiaries who are not able to represent themselves.

3. The State's interests are insufficient to overcome the fundamental private right implicated.

[4] *See* Katherine Alterneder and Eduardo Gonazalez, "Voices in the Civil Justice System: Learning from Self-Represented Litigants and Their Trusted Intermediaries," Florida Commission on Access to Civil Justice, March 2020.

None of the possible State interests implicated in permitting parents and adult children to pursue judicial review of adverse Medicaid fair hearing decisions *pro se* are sufficient to justify infringing a fundamental liberty interest. Here, the State actually possesses an interest in ensuring that Medicaid beneficiaries can access medical services fairly and justly so that they can become productive members of society, reduce overall costs to the health system, and continue to participate in the community as opposed to living in an institution. Further, as noted by Justice Brandeis in discussing the value of oversight and disclosure for corporations -- "[s]unlight is said to be the best of disinfectants." *Buckley v. Valeo,* 424 U.S. 1, 67 (1976). Similarly, shining the light on how a hearing officer arrives at an adverse Medicaid decision, judicial review of AHCA's decisions can serve only to further the goal of ensuring equal and just access to critical medical services for low-income, vulnerable Florida residents.

Of course, the state interest most relevant to the discussion here is the interest in regulating the practice of law. This state interest is not, however, absolute. For example, the Ohio Supreme Court acknowledges that in certain circumstances the interest in requiring an attorney "is outweighed by other important considerations." *Cleveland Bar Ass'n v. CompManagement, Inc.,* 818 N.E.2d 1181, 1189 (Ohio 2004). The Court, which like Florida, has the power to regulate the state's practice of law, found that "in certain limited settings the public interest is better served by authorizing laypersons to engage in conduct that might be viewed as the practice of law." *Id.* What constitutes the unlicensed practice of law should also be defined in a manner that acknowledges that "practice must necessarily change with the everchanging…social order." *Florida Bar v. Brumbaugh*, 355 So.2d 1186 at 1191-1192. Here, the public interest would be served by creating a narrow exception to continue to allow parents of minor children and parents and children/parents of adult Medicaid beneficiaries with cognitive disabilities to assist in seeking judicial review of adverse Medicaid determinations on their behalf.

The primary concern that legitimizes the State's interest in regulating the unauthorized practice of law is protecting the public from poor or incompetent legal representation. *See Bates v. State Bar of Arizona*, 433 U.S. 350, 361 (1977); *see also*, *The Florida Bar Re: Advisory Opinion – Shore v. Wall, et al.*, 265 So.3d 447. That concern does not exist here. The types of persons – parents and adult children of Medicaid beneficiaries -- are not offering representation to members of the public; they are merely seeking to represent their minor and adult children or elderly parents whose interests align with their own. Any statement that this does not safeguard the Medicaid beneficiary's interest in competent legal counsel is not credible given that the alternative is the beneficiary will be totally unable to access judicial review as a mechanism for challenging arbitrary or unsupported administrative agency decisions. Further, the State's interest in regulating the practice of law is misplaced in this case by the fact that the individuals named by AHCA have already represented the Medicaid beneficiary at the AHCA fair hearing. *See* Fla. Admin. Code R. 59G-1.010 & 42 C.F.R. §435.923.

In short, per se indigent individuals (due to their status as Medicaid enrollees), are unable to afford or otherwise obtain legal counsel. If the UPL Committee decides that AHCA's description in its request for advisory opinion is the unlicensed practice of law, it will deprive these Medicaid beneficiaries of their day in court and their rights guaranteed under federal and state law will be rendered unenforceable.

Florida's Administrative Procedure Act Confers Standing on All Parties Adversely Affected by Agency Action and Therefore Some Parents/Adult Children Have Standing in their Own Right

The right to seek judicial review of an adverse Medicaid fair hearing decision, like the right to seek judicial review from any state agency action, stems from Fla. Stat. §120.68(1)(a) which states that a "party who is adversely affected by agency action is entitled to judicial review." Therefore, any individual has standing to seek judicial review of an adverse agency decision in Florida's District Court of Appeal if they are a "party" as defined by Fla. Stat. §120.52(13) and their interests have been "adversely affected." Fla. Stat. §120.68(1)(a)

Fla. Stat. §120.52 (13) defines a "party" as:

> "(a) Specifically named persons whose substantial interests are being determined in the proceeding.
>
> (b) Any other person who, as a matter of constitutional right, provision of statute, or provision of agency regulation, is entitled to participate in whole or in part in the proceeding, or whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party.
>
> (c) Any other person, including an agency staff member, allowed by the agency to intervene or participate in the proceeding as a party. An agency may by rule authorize limited forms of participation in agency proceedings for persons who are not eligible to become parties….

A party has been "adversely affected" by agency action when the party articulates more than a general interest in the outcome of an appeal but instead shows a direct impact causing specific injury. *See O'Connell v. Florida Dept. of Community Affairs*, 874 So. 2d 673, 677 (Fla. 4th DCA 2004).

Here, at least some of the parents/adult caregivers of Medicaid beneficiaries are parties "adversely affected by agency action…[and therefore are] entitled to judicial review." Fla. Stat. §120.68(1)(a). For example, in several cases cited by AHCA in its request to the UPL Committee for an advisory opinion, AHCA names the adult child or parent representing the incapacitated Medicaid recipient in the case style thereby acknowledging their participation as parties to the

administrative proceeding. The direct impact causing significant injury to these parties can be great. For example, as T.A. was the primary caregiver to D.A., then, where Medicaid denies funding for personal care assistance, T.A. must provide the care to the detriment of his own concerns such as employment or financial security. FHJP is aware of caregivers who forgo their own needs to fill in the service gaps created by Medicaid refusing coverage. As such, these individuals are entitled to judicial review under Fla. Stat. §120.68 and should be able proceed *pro se* in their own right.

Thank you for considering these concerns. As previously stated, we urge you to answer the questions posed to the UPL Committee on March 14, 2020 in the negative, or alternatively, created a narrowly tailored exception such that the rights of Medicaid beneficiaries are safegaurded. We welcome the opportunity to continue to provide comment to the UPL Committee as it may deem useful in reaching a final decision.

With Sincere Appreciation,

/s/Katy DeBriere

Katy DeBriere
Fla. Bar No.: 58506
Legal Director
Florida Health Justice Project, Inc.