STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA SENIOR LIVING
ASSOCIATION, INC.,

Petitioner,

vs. Case No. 18-2212RP

DEPARTMENT OF ELDER AFFAIRS,

Respondent.
_____/

FLORIDA ASSISTED LIVING
ASSOCIATION, INC.,

Petitioner,

vs. Case No. 18-2228RP

DEPARTMENT OF ELDER AFFAIRS,

Respondent.
_____/

FLORIDA SENIOR LIVING
ASSOCIATION, INC.,

Petitioner,

vs. Case No. 18-2340RX

DEPARTMENT OF ELDER AFFAIRS,

Respondent.
_____/

FINAL ORDER

On June 1 and 4, 2018, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing in Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues are whether proposed Florida Administrative Code Rule 58A-5.024(1)(p)1.a., a proposed amendment to Florida Administrative Code Rule 58A-5.024(3)(c), and, as recently amended or created, Florida Administrative Code Rules 58A-5.0131(41), 58A-5.0181(2)(b) (amending AHCA[1] Form 1823 (Form 1823)), 58A-5.0182(8)(a) and (8)(a)1., 58A-5.0185(3)(g), 58A-5.0191(3)(a), and 58A-5.031(2)(d)[2] are invalid exercises of

delegated legislative authority, pursuant to section 120.52(8), Florida Statutes, on the grounds set forth in the Joint Pre-hearing Stipulation filed on May 30, 2018 (Prehearing Stipulation) or such other grounds that were tried by consent.

PRELIMINARY STATEMENT

By Notice of Proposed Rule published on March 3, 2018, Respondent proposed amendments to 11 rules: rules 58A-5.0131, 58A-5.014, 58A-5.0181, 58A-5.0182, 58A-5.0185, 58A-5.019, 58A-5.0191, 58A-5.024, 58A-5.029, 58A-5.030 and 58A-5.031. These rules apply to assisted living facilities, which are referred to as "facilities" or "ALFs." No one timely filed a petition challenging any of these proposed amendments.

By Notice of Change published on April 13, 2018, Respondent withdrew 12 words from a proposed amendment to rule 58A-5.024.[3] Within the time allowed for challenging a proposed rule, two petitions were filed, although neither challenged the deletion of the 12 words. By Petition Seeking an Administrative Determination of the Invalidity of Proposed Rule 58A-5.024, Florida Administrative Code, which was filed on May 2, 2018, Petitioner Florida Senior Living Association, Inc. (FSLA) commenced DOAH Case 18-2212RP, in which FSLA challenged amendments to rule 58A-5.024. By Petition Challenging Validity of Proposed Rule 58A-5, F.A.C., which was filed on May 3, 2018, Petitioner Florida Assisted Living Association, Inc. (FALA)

commenced DOAH Case 18-2228RP, in which FALA challenged certain amendments to rules 58A-5.0131, 58A-5.0181, 58A-5.0182, 58A-5.0185, 58A-5.019, 58A-5.0191, 58A-5.024, and 58A-5.031.

After these petitions were filed, the Department of State filed all of the amendments, except those to rule 58A-5.024. Immediately after the filing of the amendments, on May 10, 2018, by Petition Seeking an Administrative Determination of the Invalidity of Rules 58A-5.0131, 58A-5.0181, 58A-5.0182, 58A-5.0185, 58A-5.0191, and 58A-5.031, FSLA commenced DOAH Case 18-2340RX, in which FSLA challenged these existing rules, now as amended.

By Orders entered May 14 and 15, 2018, the Administrative Law Judge consolidated DOAH Cases 18-2212RP, 18-2228RP, and 18-2340RX.

On May 14, 2018, Respondent filed a Motion to Dismiss. Respondent argued that the petitioners could not bootstrap a challenge to the proposed amendments to rule 58A-5.024 by filing petitions that were timely only as to the deletion of 12 words from the proposed amendments to this rule. By Order entered on May 18, 2018, relying in part on Florida Pulp and Paper Association Environmental Affairs, Inc. v. Department of Environmental Protection, 223 So. 3d 417 (Fla. 1st DCA 2017), the Administrative Law Judge ruled against Respondent because Respondent had published, for all of the proposed rules, a single

notice, rather than individual notices. The Administrative Law Judge ruled that both petitioners could challenge, as a proposed rule, any of the amendments to rule 58A-5.024 and FALA could challenge, as proposed rules, any of the recent amendments to the other rules.

Learning, at hearing, that the Department of State had already filed the amendments to all of the rules except rule 58A-5.024, without objection, the Administrative Law Judge allowed FALA to amend its petition to challenge these rules as existing, rather than proposed, rules.

On May 17, 2018, Respondent filed a Motion for Attorneys' Fees Pursuant to Section 120.595(2). The motion seeks an award of attorneys' fees against each petitioner. On May 23, 2018, FSLA filed a response in opposition to the motion. On July 24, 2018, Respondent filed a memorandum in support of its earlier request for reasonable attorneys' fees.

The Prehearing Stipulation designates the disputed issues of law and fact as follows:

> 1. Whether [petitioners] will be or are adversely affected[4] by the rules . . . .
>
> 2. Whether the rules . . . are inconsistent with a homelike environment, and if so, whether that could be the basis of a charge of a violation by AHCA [Agency for Health Care Administration] of Chapter 429.[5]
>
> * * *[6]

> 4. Whether rule 58A-5.0131(41) is arbitrary, capricious, or vague . . . .
>
> 5. Whether rule 58A-5.0181(2)(b) incorporating AHCA Form 1823[7] exceeds [Respondent]'s rulemaking authority or is arbitrary and[8] capricious . . . .
>
> 6. Whether rule 58A-5.0182(8)(a) is arbitrary and capricious . . . .
>
> 7. Whether rule 58A-5.0182(8)(a)1. is arbitrary, capricious or vague . . . .
>
> 8. Whether rule 58A-5.0185[3](g) is arbitrary and capricious . . ..
>
> 9. Whether rule 58A-5.0191(3)(a) is arbitrary and capricious . . . .
>
> 10. Whether rule 58A-5.024 exceeds [Respondent]'s statutory authority,[9] modifies the provisions of law implemented, [or] is arbitrary and capricious . . . .
>
> 11. Whether rule 58A-5.031(2)(d) exceeds [Respondent]'s statutory authority or is arbitrary and capricious.
>
> * * *[10]
>
> 12. Whether proposed rule 58A-5.0181(2)(b) regarding signatures on resident assessment forms [Forms 1823] is arbitrary or capricious . . . .
>
> * * *[11]
>
> 13. Whether proposed rule 58A-5.019(3) modifying minimum staffing standards [to include day care participants] is arbitrary or capricious . . . .

In its proposed final order, FSLA argued that proposed rule 58A-5.024(1)(p)1.a. is vague and violates the one-subject

requirement.[12] The former ground was tried by consent, but the latter ground was not, and the one-subject contention is stricken because it was not preserved in the Prehearing Stipulation. FSLA argued that rule 58A-5.0182(8)(a) and (8)(a)1. exceeds any grant of rulemaking authority, which was not tried by consent and is stricken because it was not preserved in the Prehearing Stipulation. FSLA argued that rule 58A 5.0182(8)(a)1. is vague, which was tried by consent. FSLA argued that rules 58A-5.0185(3)(g) and 58A-5.0191(3)(a) exceed any grant of rulemaking authority in their failing to set minimum standards for infection control policies (ICPs) for all ALFs, which was tried by consent. Lastly, FSLA argued that rules 58A-5.0185(3)(g) and 58A-5.0191(3)(a) are vague. These issues were not tried by consent and are stricken because they were not preserved in the Prehearing Stipulation.

In its proposed final order, FALA argued that rule 58A-5.013(2)(d) is vague and possibly that the rule enlarges, modifies, or contravenes the law implemented. These issues were not tried by consent and are stricken because they were not preserved in the Prehearing Stipulation. FALA seems to have argued that rule 58A-5.019(3) exceeds any grant of rulemaking authority or enlarges, modifies, or contravenes the law implemented. Neither of these issues was tried by consent and both are stricken because they were not preserved in the

Prehearing Stipulation. Lastly, FALA enlarged the thirteenth issue by challenging rule 58A-5.0131(12), which defines a "day care participant." The nature of the challenge to the definition is unclear, but the issue was not tried by consent, so FALA's challenge to rule 58A-5.0131(12) is stricken because it was not preserved in the Prehearing Stipulation.

At the hearing, the Administrative Law Judge took official notice of pages 10 through 42 of the 1997 Documentary Guidelines for Evaluation and Management Services, published by the Centers for Medicare and Medicaid Services (CMS Documentary Guidelines).[13] As the Administrative Law Judge stated at the hearing, the purpose of noticing the CMS Documentary Guidelines was to incorporate into the record a description of the scope of a medical examination.

At the hearing, FSLA called four witnesses and offered into evidence five exhibits: FSLA Exhibits 1 through 4 and 8. FALA called one witness and offered into evidence five exhibits: FALA Exhibits 1 through 5. Respondent called two witnesses and offered into evidence 20 exhibits: Respondent Exhibits 1 through 7, 9 through 11, 14, and 16 through 24. The parties offered into evidence four joint Exhibits: Joint Exhibits 1 through 4. All exhibits were admitted.

The court reporter filed the transcript by July 9, 2018. After obtaining two short extensions, the parties filed proposed final orders on July 24, 2018.

FINDINGS OF FACT

1. By "Notice of Proposed Rule" published on March 5, 2018, Respondent proposed amendments to 11 rules: rules 58A-5.0131, 58A-5.014, 58A-5.0181, 58A-5.0182, 58A-5.0185, 58A-5.019, 58A-5.0191, 58A-5.024, 58A-5.029, 58A-5.030, and 58A-5.031. For rulemaking authority, Respondent cited sections 429.07, 429.17, 429.178, 429.24, 429.255, 429.256, 429.27, 429.275, 429.31, 429.41, 429.42, 429.44, 429.52, 429.54, and 429.929. For the law implemented, Respondent cited sections 429.01 through 429.55 and 429.905 and chapter 2015-126, Laws of Florida.[14]

2. The proposed amendments to rule 58A-5.024 state[15]:

> The facility must maintain required records in a manner that makes such records readily available at the licensee's physical address for review by a legally authorized entity. . . . For purposes of this section, "readily available" means the ability to immediately produce documents, records, or other such data, either in electronic or paper format, upon request.[16]
>
> (1) FACILITY RECORDS. Facility records must include:
>
> * * *
>
> (p) The facility's infection control policies and procedures.

1. The facility's infection control policy must include:

a. A hand hygiene program which includes sanitation of the hands through the use of alcohol-based hand rubs or soap and water before and after each resident contact.

b. Use of gloves during each resident contact where contact with blood, potentially infectious materials, mucous membranes, and non-intact skin could occur.

c. The safe use of blood glucometers to ensure finger stick devices and glucometers are restricted to a single resident. Lancets should be disposed in an approved sharps container and never reused. Glucometers should be cleaned and disinfected after every use, per manufacturer's instructions, to prevent carry-over of blood and infectious agents.

d. Medication practices including adherence to standard precautions to prevent the transmission of infections in a residential setting.

e. Staff identification, reporting, and prevention of pest infestations such as bed bugs, lice, and fleas.

* * *

(3) RESIDENT RECORDS. Resident records must be maintained on the premises and include:

* * *

(c) . . . **Records of residents receiving nursing services from a third party must contain all orders for nursing services, all nursing assessments, and all nursing progress notes for services provided**

by the third party nursing services provider. Facilities that do not have such documentation but that can demonstrate that they have made a good faith effort to obtain such documentation may not be cited for violating this paragraph. A documented request for such missing documentation made by the facility administrator within the previous 30 days will be considered a good faith effort. The documented request must include the name, title, and phone number of the person to whom the request was made and must be kept in the resident's file.

3. The challenge to rule 58A-5.024(1)(p)1.a. is to the unconditional requirement of hand sanitizing "before and after each resident contact."[17] Resident contact is unqualified, so the challenged provision does not exclude casual or incidental contact between a staffperson and a resident. One of Respondent's witnesses assured that Respondent does not intend for "each residential contact" to include casual contact by staff, such as "high fives" during a bingo game or the brushing of shoulders in the hall, but this assurance cannot displace the unconditional language of the rule, as well as the fact that enforcement of the rule is left to the Agency for Health Care Administration (AHCA), not Respondent.[18] In its present form, the rule requires hand sanitizing before exchanging "high fives" or, somehow, even a pat on a staffperson's clothed shoulder initiated by a resident, so as to discourage such casual contact. Requiring hand sanitizing before and after each and every resident contact will encompass many contacts for which hand

sanitizing will have no effect on the control of infections and deter or abbreviate interactions between residents and staff, who would repeatedly be washing their hands during time that they otherwise might spend with residents.

4. Generally, a hand hygiene program is neither capricious nor arbitrary because it responds to a well-recognized means by which disease is transmitted——human to human--with sanitation as a well-recognized means to interrupt this transmission process. However, the proposed rule irrationally requires hand sanitation before incidental residential contact that, by its nature, is unplanned, and after residential contact with another part of a staffperson's body, such as an elbow or clothed back, rather than the staffperson's hand, where hand washing would not have any sanitizing effect. The rule is also unsupported by logic or the necessary facts.

5. On its face, rule 58A-5.024(1)(p)1.a. is not vague: a staffperson must sanitize her hands after every contact with a resident and before every contact with a resident, even, somehow, unplanned contacts that may be initiated by the resident. Respondent's promise that AHCA will apply this proposed rule reasonably--i.e., the inspector will know a violation when she sees one--makes the point that, to be spared findings of capriciousness and arbitrariness, rule 58A-5.024(1)(p)1.a. must

be construed so as to fail to establish adequate standards for agency decisions.

6. "Sanitary" means "of or relating to health[, as in] sanitary measure."[19]

7. The challenge to rule 58A-5.024(3)(c) is to the requirement that an ALF obtain and maintain the records of third party providers of nursing services. This requirement is supported by logic and the necessary facts and is not irrational. Maintaining a set of these records at the residence of an ALF resident promotes resident welfare.

8. Applicable only to a facility that intends to offer limited nursing services, rule 58A-5.031(2)(d) provides:

> Facilities licensed to provide limited nursing services must employ or contract with a nurse(s) who must be available to provide such services as needed by residents. **The facility's employed or contracted nurse must coordinate with third party nursing services providers to ensure resident care is provided in a safe and consistent manner.** The facility must maintain documentation of the qualifications of nurses providing limited nursing services in the facility's personnel files.

9. Coordinating a facility's nursing services with the nursing services of a third party to ensure that resident care is provided in a safe and consistent manner is neither capricious nor arbitrary. Resident welfare is served by a rule requiring coordination between any nurse employed or contracting with a

facility and a provider of third party nursing services, so this requirement is rationally related to resident care and supported by logic and the necessary facts.

10. "Coordination" means "the process of organizing people or groups so that they work together properly and well."[20] "Quality assurance" means "a program for the systematic monitoring and evaluation of the various aspects of a project, service, or facility to ensure that standards of quality are being met." "Ensure" means "to make sure, certain, or safe: guarantee."[21]

11. In addition to proposed rule 58A-5.024(1)(p)1., two rules pertain to a facility's infection control program (ICP). Rule 58A-5.0185(3)(g) provides: "**All trained staff must adhere to the facility's [ICP] and procedures when assisting with the self-administration of medication.**" Rule 58A-5.0191(3)(a) adds:

> Staff who provide direct care to residents . . . must receive a minimum of 1 hour in-service training in infection control including universal precautions and facility sanitation procedures, before providing personal care to residents. **The facility must use its [ICP] and procedures when offering this training.** . . .

12. Requiring the use of a facility's ICP in training or when assisting with the self-administration of medication is neither capricious nor arbitrary. These requirements are supported by logic and the necessary facts and are rational.

13. Rule 58A-5.0131(41) provides:

> **An "Unscheduled Service Need" means a need for a personal service, nursing service, or mental health intervention that ~~generally~~ cannot be predicted in advance ~~of the need for the service~~, and that must be met promptly to ensure ~~within a time frame that provides reasonable assurance~~ that the health, safety, and welfare of residents is preserved.**

14. On its face and based on its placement within a rule devoted to definitions, rule 58A-5.0131(41) is a definition. If so, an "Unscheduled Service Need" occurs: 1) when a need for a covered service arises unexpectedly and 2) the need must be met promptly to ensure the preservation of resident welfare. If the rule is a definition, an amendment making the second condition more rigorous would inure to the benefit of ALFs because fewer situations would rise to the level of an Unscheduled Service Need. For instance, there would be even fewer Unscheduled Service Needs if the second condition stated, "and that must be met promptly to save the life of a resident."

15. Two factors suggest that rule 58A-5.0131(41) is not merely a definition. A definition is normally incorporated in another provision of law that creates rights or enforces duties. However, "Unscheduled Service Need" occurs nowhere in the Florida Statutes and nowhere else in the Florida Administrative Code. "Unscheduled Service Need" might trigger action in a resident's care plan, but few residents are required to have a care plan.

16. The parties have treated rule 58A-5.0131(41) as though it were a definitional rule that enforces a duty. FALA has challenged rule 58A-5.0131(41) as though the initial condition--the occurrence of an unexpected, covered need--is the definition and the duty is for the ALF to meet the need to ensure the resident's welfare. Agreeing, Respondent stated in its proposed final order: "A plain reading of the entire rule makes it clear that the rule requires a facility to respond to an unscheduled service need in a manner that does not delay addressing the residents' needs."[22] Although nearly all[23] of the other subsections of rule 58A-5.0131 seem to provide conventional definitions, under the circumstances, this final order will follow the parties' reading of this definitional rule, so as to include the imposition of a duty on the ALF to take prompt action to ensure the resident's welfare.

17. Rule 58A-5.0131(41) is neither arbitrary nor capricious. It is not irrational, illogical, or unsupported by the facts to define an unscheduled service need in the manner set forth in the rule and to require an ALF promptly to meet the need to ensure that the welfare of the resident.

18. Rule 58A-5.0131(41) is vague. On its face, it is a merely definitional rule with two conditions, but, in reality, it is a rule that encompasses a definition with but one condition

and an enforceable duty imposed upon an ALF. This fact, alone, establishes vagueness.

19. Construed as a definition with a single condition and an enforceable duty imposed on an ALF, rule 58A-5.0131(41) achieves greater vagueness. The condition, which is a condition precedent, is invariably clear, but the enforceable duty is contingent on a condition subsequent that is entirely independent from the condition precedent: i.e., the duty of the ALF arises only if its prompt discharge ensures the resident's welfare. This means that, even though the condition precedent is satisfied, the duty of the ALF is not imposed if prompt action is not required to ensure the resident's welfare--as in a minor problem that does not jeopardize the resident's welfare--or if prompt action will not ensure the resident's welfare--as in a catastrophic event, such as a massive cardiovascular event, that precludes the possibility of any action that would "ensure" the resident's welfare. The fatal ambiguity arises because the final 17 words of the rule announced, simultaneously, the mandated action by the ALF and a condition precedent to the duty to take this action.

20. Rule 58A-5.019(3) requires that an ALF maintain a specified number of minimum staff hours per week based on a specified "Number of Residents, Day Care Participants, and Respite Care Residents" in the facility. For instance, 6 to 15

such persons require a minimum of 212 staff hours weekly, and 16 to 25 such persons require a minimum of 253 staff hours weekly. Unchallenged, rule 58A-5.0131(12) defines "Day Care Participant" as "an individual who receives services at a facility for less than 24 hours per day."

21. The inclusion of "Day Care Participants" among the persons on whom minimum staff hours are calculated is not capricious or arbitrary. An ALF accepting Day Care Participants has assumed responsibility for the care of these persons, and the imposition of minimum staffing standards based on residents and Day Care Facilities is supported by logic and the necessary facts and is rational.

22. Rule 58A-5.0182(8)(a) and (8)(a)1. provides:

> (a) Residents Assessed at Risk for Elopement. All residents assessed at risk for elopement or with any history of elopement must be identified so staff can be alerted to their needs for support and supervision. **All residents must be assessed for risk of elopement by a health care provider or mental health care provider within 30 calendar days of being admitted to a facility. If the resident has had a health assessment performed prior to admission pursuant to Rule 58A-5.0181(2)(a), F.A.C., this requirement is satisfied.**
> . . .
>
> 1. . . . **Staff trained pursuant to Rule 58A-5.0191(10)(a) or (c), F.A.C., must be generally aware of the location of all residents assessed at high risk for elopement at all times.**

23. Rule 58A-5.0191(10) applies to ALFs that advertise that they provide special care for persons with Alzheimer's Disease and Related Disorders (ADRD) or that maintain certain secured areas (ADRD ALFs); the rule requires that ADRD ALFs must ensure that their staff receive specialized training. Rule 58A-5.0191(10)(a) and (c) specifies the training for staff who provide direct care to, or interact with, residents with ADRD.

24. By addressing the training received by staff, rather than whether the supervised residents suffer ADRD or whether an ALF employing the staffperson is an ADRD ALF, rule 58A-5.0182(8)(a)1. imposes higher supervisory duties strictly on the basis of the training received, at some point, when the staffperson may have been employed by an ADRD ALF. Thus, the level of supervision at an ALF that is not an ADRF ALF may vary from shift to shift and unit to unit, as the staffpersons who, at some point, received the additional training are distributed through the facility's workplace. Perhaps it is not irrational to impose a higher supervisory duty on more highly trained staffpersons, but, on these facts, rule 58A-5.0182(8)(a)1. is not supported by logic or the necessary facts.

25. Rule 58A-5.0182(8)(a)1. is vague. A "high risk" of elopement lacks meaning. As discussed below, in Form 1823,

Respondent asks in a yes-or-no format the question of whether the resident is an "elopement risk," which seems to suggest an elevated risk from the general population. A "high risk" of elopement seems to suggest an even more elevated risk, but the rule provides no means to determine the threshold, even though, with each elevation of risk from the general population, the prescribed threshold becomes less discernible.

26. Rule 58A-5.0182(8)(a)1. is also vague because of the phrase, "generally aware of the location" of all residents at high risk of elopement. "Generally" means "in disregard of specific instances and with regard to an overall picture generally speaking."[24] Treating "awareness" as synonymous with "knowledge," it is difficult to understand what is meant by general, not specific, knowledge of the location of a resident.[25] The troublesome qualifier modifies the knowledge of the staff person, not the location of the resident, which raises an obvious problem as to meaning, as well as proof. By inserting "generally," the rule rejects "knowledge" or "specific knowledge" in favor of knowledge of "an overall picture generally speaking" and introduces an unworkable level of ambiguity into the requirement.

27. Rule 58A-5.0182(8)(a) is not capricious. A rule requiring a timely assessment of elopement risk by a health care provider or mental health care provider[26] is not irrational; such

an exercise is not utterly senseless. But a closer question is whether this rule is supported by logic or the necessary facts.

28. A commonly used elopement risk tool, which was included in the exhibits of FSLA and Respondent, assigns numerical values on a scale of 0 to 4 to various resident behaviors or conditions. The predictive utility of each behavior or condition is a function of the value assigned to it: a 4 has the greatest predictive value. The only behavior or condition assigned a 4 is the resident's believing that he is late for work or needs to pick up the children, thus creating an urgency to leave the ALF. Four behaviors or conditions bear a 3: the resident's becoming lost outside of the facility, thus necessitating the intervention of staff to return him to the ALF; emphatically proclaiming that she is leaving the facility or saying that she is going somewhere, coupled with an attempt to leave; suffering paranoia or anxiety about where she is, disbelieving that she lives where she lives, or attempting to leave the ALF; and repeatedly trying to open the doors of the facility.

29. Ten[27] behaviors or conditions bear a 2: the resident's having a diagnosis of dementia; becoming confused outside of the community; wandering, looking for an exit from the ALF, or attempting to leave the ALF; getting up at night and leaving the room; suffering from disorientation as to place without any anxiety or effort to leave; dressing and presenting oneself in an

appropriate manner, but requiring staff supervision outside of the building; ambulating, but unsafe outside without supervision; using assistive devices, but unsafe outside without supervision; presenting as unsafe when outside alone; and taking walks, but requiring redirection to the entrance of the building or back to the property.

30. Five behaviors or conditions bear a 1: the resident's displaying evidence of early dementia; wandering at times, but not expressing a desire to leave the ALF or trying to leave the ALF; verbalizing the desire to be elsewhere; suffering occasional disorientation as to time and place, but reorienting easily; and presenting a disheveled and disorganized appearance, so as not to be confused for a visitor or staffperson.

31. Nine behaviors or conditions bear a 0: the resident's having no diagnosis of dementia; having no history of elopement; not wandering; not verbalizing a need to leave the ALF; sleeping all night or getting up occasionally and not leaving the room; displaying orientation to time and place; dressing and presenting self in an appropriate manner and not requiring staff supervision outside of the building; ambulating or propelling self in wheelchair safely; and presenting no other behaviors associated with memory impairment.

32. The elopement risk tool is completed by an ALF employee who is neither a health care provider nor or a mental health care

provider. Of the 30 predictive factors, essentially only one, involving dementia, requires a medical or psychiatric diagnosis. It is, of course, not necessary to solicit from the health care provider an elopement risk assessment in order to obtain her opinion as to dementia. More importantly, overshadowing the dementia predictors to the point of near elimination are high-value predictors involving current behaviors, historic behaviors, and, most importantly, the perceived need to leave the facility to get to work or discharge domestic duties. Of these, the health care provider would have no direct knowledge, so her assessment of elopement risk would either be based on insufficient information or hearsay whose precise accuracy would be doubtful.

33. On these facts, the requirement in rule 58A-5.0182 (8)(a) for a health care provider or mental health provider to assess a resident's elopement risk is unsupported by logic and the necessary facts.

34. Rule 58A-5.0181(2)(b) incorporates Form 1823, which is divided into four sections. Sections 1, 2-A, and 2-B must be completed by a licensed health care provider. Section 3 must be completed by the ALF. The end of the form provides lines for the signatures of the resident and ALF. Under the signature of the resident, but not the ALF, the form states: "By signing this

form, I agree to the services identified above to be provided by the [ALF] to meet identified needs."

35. Section 1 is a "Health Assessment" that elicits information about allergies, medical history, height and weight, physical or sensory limitations, cognitive or behavioral status, nursing, treatment or therapy recommendations, special precautions, and "elopement risk." For all items except elopement risk, the form provides a block for comments; for elopement risk, the form provides only two boxes: one marked "yes" and one marked "no."

36. Section 1.A asks: "To what extent does the individual need supervision or assistance with the following?" Seven activities of daily living (ADLs) are listed: ambulation, bathing, dressing, eating, self care (grooming), toileting, and transferring. Boxes allow the health care provider to pick one of four levels from independent to total care. The form also provides a block for comments beside each ADL.

37. Section 1.B is: "Special Diet Restrictions." Four boxes are listed: regular, calorie controlled, no added salt, and low fat/low cholesterol. There are two lines for other dietary restrictions.

38. Section 1.C asks: "Does the individual have any of the following conditions/requirements? If yes, please include an explanation in the comments column." Five items are listed:

communicable disease, bedridden, pressure sores other than stage 1, "Pose a danger to self or others? (Consider any significant history of physically or sexually aggressive behavior.)," and 24 hour nursing or psychiatric care. The form provides a box for "yes/no" and a block for comments.

39. Section 1.D asks: "In your professional opinion, can this individual's needs be met in an [ALF], which is not a medical, nursing, or psychiatric facility?" The form provides a box for "yes" and a box for "no," as well as a line for additional comments.

40. Section 2-A is "Self-Care and General Oversight Assessment." Section 2-A.A is "Ability to perform Self-Care Tasks" and lists five tasks: preparing meals, shopping, making phone calls, handling personal affairs, handling financial affairs, and other. Boxes allow the health care provider to select one of three levels from independent to needs assistance. The form also provides a block for comments beside each task. Section 2-A.B is "General Oversight" and lists three tasks: "observing wellbeing," "observing whereabouts," "reminders for important tasks," and four spaces for "other." Boxes allow the health care provider to select one of four levels: independent, weekly, daily, and other. The form also provides a block for comments beside each task.

41. Section 2-A.C is three lines for additional comments or observations.

42. Section 2-B is "Self-Care and General Oversight Assessment--Medications." Section 2-B.A provides blocks for listing individual medications, dosages, directions for use, and route of administration. Section 2-B.B asks: "Does the individual need help with taking his or her medications (meds)?" The form provides a box for "yes" and a box for "no" with a direction, if yes is marked, to check one of the following three boxes: able to administer without assistance, needs assistance with self-administration, and needs medication administration. Section 2-B.C provides two lines for additional comments or observations.

43. Immediately following Section 2-B is a section that requires identifying information about the health care provider and the date of the examination.

44. Section 3 requires the ALF to identify the needs set forth in Sections 1 and 2 and provide the following information in blocks: identified needs, services needed, service frequency and duration, service provider name, and initial date of service.

45. Form 1823 is mentioned in rule 58A-5.0181(2)(b) through (d), which describes the required medical examination based on when it takes place relative to admission or whether it follows a placement by Respondent, Department of Children and

Families (DCF), or one of their private contractors. The rule states:

> (2) HEALTH ASSESSMENT. As part of the admission criteria, an individual must undergo a face-to-face medical examination completed by a health care provider as specified in either paragraph (a) or (b) of this subsection.
>
> (a) A medical examination completed within 60 calendar days before the individual's admission to a facility pursuant to section 429.26(4), F.S. The examination must address the following:
>
> 1. The physical and mental status of the resident, including the identification of any health-related problems and functional limitations,
>
> 2. An evaluation of whether the individual will require supervision or assistance with the activities of daily living,
>
> 3. Any nursing or therapy services required by the individual,
>
> * * *
>
> 7. A statement on the day of the examination that, in the opinion of the examining health care provider, the individual's needs can be met in an assisted living facility[.]
>
> * * *
>
> (b) A medical examination completed after the resident's admission to the facility within 30 calendar days of the admission date. The examination must be recorded on AHCA Form 1823, Resident Health Assessment for Assisted Living Facilities,

March 2017 ~~October 2010~~ . . . . The form must be completed as instructed.

1. Items on the form that have been omitted by the health care provider during the examination may be obtained by the facility either orally or in writing from the health care provider.

2. Omitted information must be documented in the resident's record. Information received orally must include the name of the health care provider, the name of the facility staff recording the information, and the date the information was provided.

3. Electronic documentation may be used in place of completing the section on AHCA Form 1823 referencing Services Offered or Arranged by the Facility for the Resident. The electronic documentation must include all of the elements described in this section of AHCA Form 1823.

(c) Any information required by paragraph (a), that is not contained in the medical examination report conducted before the individual's admission to the facility must be obtained by the administrator using AHCA Form 1823 within 30 days after admission.

(d) Medical examinations of residents placed by the department, by the Department of Children and Families, or by an agency under contract with either department must be conducted within 30 days before placement in the facility and recorded on AHCA Form 1823 described in paragraph (b).

46. For the same reasons that rule 58A-5.0182(8)(a) is arbitrary, but not capricious, the yes-or-no question as to elopement risk in section 1 is arbitrary, but not capricious.

47. The record lacks counterparts to the elopement assessment tool for the remaining items under challenge from the Form 1823, so it is necessary to obtain from the CMS Documentary Guidelines the scope of a typical medical examination to address whether the challenged items in the Form 1823 are supported by logic and the necessary facts.

48. A medical examination may cover any of ten organ systems or areas: cardiovascular; ears, nose, mouth, and throat; eyes; genitourinary; hematologic/lymphatic/immunologic; musculoskeletal; neurological; psychiatric; respiratory; and skin. Each organ system or area comprises several elements. Medical examinations may vary as to their scope. Between the two types of general multi-system medical examinations that are not focused on a particular problem, the less exhaustive examination, which is "detailed," typically requires an examination of at least a dozen elements spanning two to six organ systems or areas. If a multi-system medical examination includes a psychiatric examination, the examination typically involves no more than a "description of patient's judgment and insight" and "brief assessment of mental status including: orientation to time, place and person[;] recent and remote memory[; and] mood and affect (eg, depression, anxiety, agitation)[.]"

49. Even a full psychiatric examination encompasses only the following elements:

- Description of speech including: rate; volume; articulation; coherence; and spontaneity with notation of abnormalities (eg, perseveration, paucity of language)
- Description of thought processes including: rate of thoughts; content of thoughts (eg, logical vs. illogical, tangential); abstract reasoning; and computation
- Description of associations (eg, loose, tangential, circumstantial, intact)
- Description of abnormal or psychotic thoughts including: hallucinations; delusions; preoccupation with violence; homicidal or suicidal ideation; and obsessions
- Description of the patient's judgment (eg, concerning everyday activities and social situations) and insight (eg, concerning psychiatric condition)

Complete mental status examination including

- Orientation to time, place and person
- Recent and remote memory
- Attention span and concentration
- Language (eg, naming objects, repeating phrases)
- Fund of knowledge (eg, awareness of current events, past history, vocabulary)
- Mood and affect (eg, depression, anxiety, agitation, hypomania, lability)

However, a full psychiatric examination would unlikely meet the reasonable expectations of Respondent or ALFs of a medical examination because it excludes consideration of any nearly all other organ systems or areas.

50. The inquiry in Section 1.A about ADLs is not capricious, but is arbitrary as to some items. The scope of a typical medical examination will yield no information about a

patient's ability to bathe, dress, groom, or toilet. The scope of a typical medical examination may yield some information about a patient's ability to ambulate, eat (as to swallowing), and transfer between a bed, chair, wheelchair, scooter, and car, and the health care provider should be able to rate the extent of the ability of the patient to perform each of these ADLs. Requiring the health care provider to rate the extent of the ability of the patient to perform any of the other ADLs is therefore not supported by logic or the necessary facts.

51. The inquiry in Section 1.C about whether the patient poses a danger to self or others and directive to consider any significant history of physically or sexually aggressive behavior is arbitrary, but not capricious. Although a psychiatric examination would include a determination of whether the patient suffers from homicidal or suicidal ideations, a psychiatric examination is unlikely to take the place of a conventional medical examination, whose inclusion of limited psychiatric elements would not yield a reasonable basis for opining whether the patient poses a danger to self or others. Nor does the record suggest that the medical examinations of the type conducted for the admission of the patient to an ALF are conducted by psychiatrists, physician assistants specializing in psychiatry, or advanced registered nurse practitioners specializing in psychiatry. This finding necessitates the

invalidation of the directive to consider significant history of physically or sexually aggressive behavior in responding to the question--a directive that is meaningless without the question of whether the patient poses a danger to self or others.

52. The inquiry in Section 1.D about whether, in the "professional opinion" of the health care provider, the patient's needs can be met in an ALF that is not a medical, nursing, or psychiatric facility is arbitrary, but not capricious. No ALF is a medical facility, which likely means a hospital; nursing facility, which likely means a skilled nursing facility; or psychiatric facility, which likely means a psychiatric hospital. The addition of this information, which is superfluous to anyone who understands the nature of ALFs, reveals the concern of AHCA or Respondent that the health care providers lack even this basic knowledge of the nature of ALFs. Due, in fact, to their lack of knowledge of the specific features of an ALF, health care providers lack the foundation to answer this question intelligently.

53. The request in section 2-A.A about the ability of the patient to perform self-care tasks and the request in section 2-A.B about the need of the patient for general oversight, are arbitrary, but not capricious, for the same reasons as set forth concerning the ADLs of bathing, dressing, grooming, and toileting.

54. Section 3 is neither arbitrary nor capricious. The collection of needs identified in the preceding sections and identification of services to meet these needs, as well as the additional information, are not irrational and are supported by logic and the necessary facts.

55. Due to section 3, the requirement that the resident and ALF sign the Form 1823 is neither arbitrary nor capricious. By signing, the resident explicitly agrees to receive the identified services, and the ALF implicitly agrees to provide the identified services; so it is not irrational or unsupported by logic or the necessary facts to require both parties to sign the Form 1823. However, if section 3 were invalidated, as it is below, the requirement of the signatures of the patient and ALF would be irrational and unsupported by logic and the necessary facts because there is no reason for the patient or ALF to sign a medical examination form, that does not also contain a statement of the services to be provided by the ALF. The only signature on a medical examination form that might rationally be required would be that of the health care professional in order to authenticate the completed form.

56. A "form" is "the shape and structure of something as distinguished from its material--the building's massive form"; or "a printed or typed document with blank spaces for insertion of required or requested information tax forms."

CONCLUSIONS OF LAW

57. DOAH has jurisdiction. § 120.56(1)(a), Fla. Stat. Each petitioner is substantially affected by each rule. § 120.56(1)(b)2.

58. A person is substantially affected by a rule that regulates the person. See, e.g., Lanoue v. Fla. Dep't of Law Enf., 751 So. 2d 94 (Fla. 1st DCA 1999); Cole Vision Corp. v. Dep't of Bus. & Prof'l Reg., 688 So. 2d 404 (Fla. 1st DCA 1997); Ward v. Bd. of Trs. of the Int. Imp. Trust Fund, 651 So. 2d 1236 (Fla. 4th DCA 1995) (per curiam). A person is not required to violate a regulatory rule to be substantially affected. Prof'l Firefighters of Fla. v. Dep't of HRS, 396 So. 2d 1194 (Fla. 1st DCA 1981).

59. In Florida Home Builders Association v. Department of Labor and Employment Security, 412 So. 2d 351 (Fla. 1982), the Florida Supreme Court held that a trade association may be substantially affected by a rule if its members are substantially affected by the rule that does not otherwise affect the association. In Coalition of Mental Health Professions v. Department of Professional Regulation, 546 So. 2d 27 (Fla. 1st DCA 1989), the court applied to an association the well-established principle concerning regulatory rules set forth in the preceding paragraph, so that, if the association's members

are regulated by the challenged rule, the association is also substantially affected by the rule.

60. For some rules, Respondent argued that AHCA does not enforce requirements, such as items included in a Form 1823.[28] As a matter of law, if a rule states a requirement, an ALF is a substantially affected person because section 429.19(1) predicates discipline on the violation of, among other things, any rules applicable to ALFs. All of the challenged rules impose enforceable duties on ALFs, regardless of whether the current policy of Respondent or AHCA is to enforce each of these requirements; if Respondent wishes to adopt unenforceable rules, so as to deprive ALFs of the ability to challenge them, the burden is on Respondent to draft the rules so that they clearly state that they are mere suggestions, preferences, or recommendations and are not enforceable.

61. In part, Respondent argued that certain amendments restate already-existing duties imposed upon ALFs by rules not at issue in these cases. An example of this argument is that rule 58A-5.0182(6)(d)8. requires that a facility prepare a written statement of its "requirements for coordinating the delivery of services to residents by third party providers." Because rule 58A-5.031(2)(d) requires the same thing, specifically as to nursing services, Respondent claimed that the petitioners could not be substantially affected by such a

proposed rule. It is unnecessary to address this argument because, as explained in the Preliminary Statement, except for proposed rule 58A-5.024, the pending challenges are to existing rules.

62. Petitioners must prove that an existing rule is an invalid exercise of delegated legislative authority. § 120.56(3)(a). Respondent must prove that a proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised. § 120.56(2)(a). The standard of proof is a preponderance of the evidence. § 120.56(1)(e). The above-stated findings would have been the same, regardless of which party bore the burden of proof.

63. An "invalid exercise of delegated legislative authority"

> means action that goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
>
> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
>
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;

(d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;

(e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational; or

(f) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.

64. At times, the parties have struggled to identify the invalidation grounds cited to invalidate each rule. Petitioners' above-noted confusion on these issues was complemented by Respondent's confusion in failing to object at hearing to evidence or argument pertaining to an issue not preserved in the Prehearing

Stipulation.[29] At various points, the parties' proposed final orders reflect the same confusion.

65. In the Prehearing Stipulation, the petitioners waived all invalidation grounds not preserved therein. See, e.g., Delgado v. Ag. for Health Care Admin., 2018 Fla. App. LEXIS 1012, 43 Fla. L. Weekly D 245 (Fla. 1st DCA 2018). Equally well established in the case law is the principle of trial by consent. See, e.g., Dep't of Rev. v. Vanjaria Enters., 675 So. 2d 252 (Fla. 5th DCA 1996) (invalidation grounds for rule challenge evidently not pled). The obvious issue is whether the waiver in the Prehearing Stipulation overrides the trial by consent. When opposing parties litigate an issue, without objection, even though it was not preserved by a prehearing stipulation, it would seem that they are impliedly amending their prior agreement. A sensible approach to this issue would impose upon the potentially aggrieved party the necessity of objecting, so the Administrative Law Judge may rule on whether an issue is covered by a prehearing stipulation and save time, if the objection is sustained. But a definitive resolution of this issue of law will require judicial, not administrative, action.[30]

66. An ALF may operate under a "standard license," an "extended congregate care license," or a "limited nursing services license," § 429.07, or a "limited mental health license." § 429.075. References in the statutes to "Department" mean

Respondent and to "Agency" mean the Agency for Health Care Administration. § 429.02(3) and (9).

67. Section 429.41 states:

> (1) It is the intent of the Legislature that rules published and enforced pursuant to this section shall include criteria by which a reasonable and consistent quality of resident care and quality of life may be ensured and the results of such resident care may be demonstrated. Such rules shall also ensure a safe and sanitary environment that is residential and noninstitutional in design or nature. It is further intended that reasonable efforts be made to accommodate the needs and preferences of residents to enhance the quality of life in a facility. Uniform firesafety standards for assisted living facilities shall be established by the State Fire Marshal pursuant to s. 633.206. The agency, in consultation with the department, may adopt rules to administer the requirements of part II of chapter 408. In order to provide safe and sanitary facilities and the highest quality of resident care accommodating the needs and preferences of residents, the department, in consultation with the agency, the Department of Children and Families, and the Department of Health, shall adopt rules, policies, and procedures to administer this part, which must include reasonable and fair minimum standards in relation to:
>
> (a) The requirements for and maintenance of facilities, not in conflict with chapter 553, relating to plumbing, heating, cooling, lighting, ventilation, living space, and other housing conditions, which will ensure the health, safety, and comfort of residents suitable to the size of the structure.
>
> * * *

3. Resident elopement requirements.—Facilities are required to conduct a minimum of two resident elopement prevention and response drills per year. All administrators and direct care staff must participate in the drills which shall include a review of procedures to address resident elopement. Facilities must document the implementation of the drills and ensure that the drills are conducted in a manner consistent with the facility's resident elopement policies and procedures.

* * *

(c) The number, training, and qualifications of all personnel having responsibility for the care of residents. The rules must require adequate staff to provide for the safety of all residents. Facilities licensed for 17 or more residents are required to maintain an alert staff for 24 hours per day.

(d) All sanitary conditions within the facility and its surroundings which will ensure the health and comfort of residents. The rules must clearly delineate the responsibilities of the agency's licensure and survey staff, the county health departments, and the local authority having jurisdiction over firesafety and ensure that inspections are not duplicative. The agency may collect fees for food service inspections conducted by the county health departments and transfer such fees to the Department of Health.

(e) License application and license renewal, transfer of ownership, proper management of resident funds and personal property, surety bonds, resident contracts, refund policies, financial ability to operate, and facility and staff records.

* * *

(h) The care and maintenance of residents, which must include, but is not limited to:

1. The supervision of residents;

2. The provision of personal services;

3. The provision of, or arrangement for, social and leisure activities;

4. The arrangement for appointments and transportation to appropriate medical, dental, nursing, or mental health services, as needed by residents;

5. The management of medication;

6. The nutritional needs of residents;

7. Resident records; and

8. Internal risk management and quality assurance.

(i) Facilities holding a limited nursing, extended congregate care, or limited mental health license.

(j) The establishment of specific criteria to define appropriateness of resident admission and continued residency in a facility holding a standard, limited nursing, extended congregate care, and limited mental health license.

* * *

(l) The establishment of specific policies and procedures on resident elopement. Facilities shall conduct a minimum of two resident elopement drills each year. All administrators and direct care staff shall participate in the drills. Facilities shall document the drills.

68. Rule 58A-5.024(1)(p)1.a. is not vague. A rule is vague "if it forbids or requires the performance of an act in terms that are so vague that persons of common intelligence must guess at its meaning and differ as to its application." State v. Peter R. Brown Constr., Inc., 108 So. 3d 723, 728 (Fla 1st DCA 2013). After every contact with a resident, a staffperson must wash his hands. As applied in accordance with Respondent's assurance that the inspector will know, upon sight, the kind of contact that requires hand sanitizing, the rule is vague and fails to establish adequate standards for agency decisions, but resolution of this issue is unnecessary because this rule is invalidated on other, facial grounds.

69. As explained in the Findings of Fact, rule 58A-5.024(1)(p)1.a. is arbitrary and capricious because of its failure to define residential contact sensibly and in a workable manner.

70. Rule 58A-5.024(1)(p)1.a. exceeds any grant of rulemaking authority. The second sentence of section 409.41(1) authorizes Respondent to adopt rules to ensure a sanitary environment that is residential and noninstitutional in design or nature. But this and much of the statutory language in section 429.41(1) preceding section 429.41(1)(a) falls within the scope of the flush left caveat of section 120.52(8) because these provisions of section 429.41(1) do not describe the "specific powers and duties granted by the enabling statute." As is relevant to this case,

the portion of section 429.41(1) preceding section 429.41(1)(a) that specifies the powers and duties granted to Respondent for rulemaking is that the agency rules "must include reasonable and fair minimum standards" in relation to subsections (a) through (l) of section 429.41(1).

71. Potential sources of rulemaking authority for rule 58A-5.024(1)(p)1.a. are section 429.41(1)(d), which authorizes Respondent to adopt rules that set "reasonable and fair minimum standards in relation to . . . [a]ll sanitary conditions within the facility and its surroundings which will ensure the health and comfort of residents," and section 429.41(1)(h), which authorizes Respondent to adopt rules that set "reasonable and fair minimum standards in relation to . . . [t]he care and maintenance of residents."

72. Sanitary conditions within the facility certainly encompass sanitary furniture and fixtures, such as floors, bathrooms, kitchens, bedrooms, and common area and likely include a hand hygiene program. The care and maintenance of residents likely include a hand hygiene program. But, as explained in the Findings of Fact, rule 58A-5.024(1)(p)1.a. sets unreasonable standards, so this rule exceeds the grant of rulemaking authority in section 429.41(1).

73. Rule 58A-5.024(1)(p)1.a. modifies or contravenes the law implemented. The flush left language of section 120.52(8)

applies to rulemaking authority, but not to the law implemented. Thus, the law implemented includes the general language of section 429.41(1) preceding section 429.41(1)(a). The legislative mandate is for rules that "ensure a safe and sanitary environment that is residential and noninstitutional." The need to balance these objectives is underscored by their inclusion in a single sentence. As explained in the Findings of Fact, rule 58A-5.024(1)(p)1.a. does not even attempt such a balancing and, if conformed to and enforced literally, would preclude even the semblance of a homelike environment at an ALF, as staff repeatedly sanitized their hands after and, to the extent possible, before every resident contact of any sort.

74. Rule 58A-5.024(3)(c) is not arbitrary or capricious.

75. Rule 58A-5.024(3)(c) exceeds any grant of rulemaking authority. There is no specific grant of rulemaking authority that encompasses a rule requiring a facility to maintain copies of the records of a provider of third party nursing services. Section 429.41(1)(h)7. authorizes Respondent to adopt rules setting reasonable and fair minimum standards in relation to resident records, but the focus of each of the subparagraphs under section 429.41(1)(h) is on services directly provided by the facility, not on the same services supplied by a third party provider. Thus, the statute's reference to "[r]esident records" does not mean nursing records created and maintained by a third

party providing nursing services any more than the provision of social and leisure activities means activities provided by, say, a third party movie theater or golf course or the provision of personal services means hairdressing or other beauty services provided by a third party. Thus, these subparagraphs do not authorize this rule, even without consideration of whether imposing on a facility these burdens of obtaining and maintaining third party nursing records is "reasonable and fair."

76. Under the circumstances, this final order does not address whether rule 58A-5.024(3)(c) enlarges, modifies, or contravenes the law implemented.

77. Rule 58A-5.031(2)(d) is not arbitrary or capricious.

78. Rule 58A-5.031(2)(d) exceeds any grant of rulemaking authority. As cited above, section 429.41(1)(h)8., which authorizes rulemaking for internal risk management and quality assurance, is part of a series of subparagraphs that focus on the internal activities of the facility. Also, a quality assurance program systematically monitors and evaluates various aspects of resident services to ensure that quality standards are met. If limited to organizing the ALF's nurse so that she works well together with third party providers of nursing services, "coordination" may satisfy the internal focus of section 429.41(1)(h)8. But "coordination" does not fit within a quality assurance program because it is not part of an effort to

monitor and evaluate services. Coordination of services may promote the delivery of superior services, which would be confirmed by the monitoring and evaluation elements of a quality assurance program.

79. The final 12 words of the rule--"to ensure resident care is provided in a safe and consistent manner"--raise additional issues regarding Respondent's rulemaking authority. Consistent with the preceding discussion, the authorization of rulemaking as to a quality assurance program is not an authorization of rulemaking to guarantee outcomes. One of Respondent's witnesses unpersuasively defined "ensure" as though it meant "promote," but such an unconventional interpretation of "ensure" would render the rule vague. In any event, substituting "promote" for "ensure" still would not be sufficient to conclude that the rule falls within the reach of section 429.41(1)(h)8. because guaranteeing that resident care is provided safely and consistently is not part of a monitoring or evaluation program.

80. Rule 58A-5.0185(3)(g) and 58A-5.0191(3)(a) are not arbitrary or capricious.

81. Rule 58A-5.0185(3)(g) and 58A-5.0191(3)(a) do not exceed any grant of rulemaking authority. In general, the rulemaking authority for a rule requiring ICPs is section 429.41(1)(d) and (h), which was discussed above in connection with

rule 58A-5.024(1)(p)1.a. Section 429.41(1)(d) authorizes rulemaking for "sanitary conditions within the facility. Section 429.41(1)(h) authorizes rulemaking for the "care and maintenance of residents," and section 429.41(1)(h)1. through (h)8. provides a nonexhaustive list of examples of what falls under the "care and maintenance of residents." Infection control and, thus, ICPs are paramount concerns when addressing the care and maintenance of ALF residents.

82. As discussed, all rules authorized under section 429.41(1) must set "reasonable and fair minimum standards." This requirement is for minimum standards, not minimum comprehensive standards. Respondent has prescribed minimum standards for all ALFs in terms of ICPs. As cited above, rule 58A-5.024(1)(p)1.b. through 1.e. sets minimum standards for ICPs in terms of the use of gloves for certain resident contacts, the safe use of glucometers, medication practices, and the control of certain pests that may transmit disease.

83. More particularly, Respondent has another source of rulemaking authority for rule 58A-5.0185(3)(g). Section 429.41(1)(h)5. authorizes rulemaking as to the "management of medication." Infection control is an issue of overriding relevance in the management of medication, so as to fall within this subparagraph. And, for rule 58A-5.0191(3)(a), section 429.52(2) authorizes rulemaking as to the "minimum

training and education requirements" to be provided ALF staff. Again, training in infection control is an issue of overriding importance, so as to fall within this subsection. Applicable to both rules, section 429.52(3)(e) requires that Respondent require training as to "medication management," including "assisting residents with self-administered medication."

84. Rule 58A-5.0131(41) is not arbitrary or capricious, but is vague. A statutory definition merely informs the reader's understanding of the statutory act of which it is a part, as the statutory definition "neither creates rights nor enforces duties." Owens v. Republic of Sudan, 864 F.3d 751, 775-776 (D.C. Cir. 2017) (meaning of "extrajudicial killing"). The same principle applies to a definition in a rule. Cf. Dep't of Prof'l Reg. v. Fla. Soc. of Prof'l Land Surveyors, 475 So. 2d 939, 941 (Fla. 1st DCA 1985) (interpreting former version of section 120.52(8), court accepts agency's argument that a definitional rule invokes the agency's authority "to explain the meaning of technical terms contained within the statutory provisions"). Forced to perform the twin duties of defining terms and enforcing duties, rule 58A-5.0131(41) fails to express clearly exactly when and what is required of ALFs.

85. Rule 58A-5.019(3) is not arbitrary or capricious. FALA argued that the rule is arbitrary or capricious, not because it is not based on logic or the necessary facts or because it is

irrational, but because it either exceeds rulemaking authority or contravenes the law implemented. These are not the tests for whether a rule is arbitrary or capricious, and, as noted in the Preliminary Statement, FALA failed to preserve in the Prehearing Stipulation the invalidation grounds of rulemaking authority and law implemented.

86. Rule 58A-5.0182(8)(a)1. is arbitrary and vague, but not capricious. As to one of the bases for the finding of vagueness, in the "Deflategate" case, a court considered the arbitrator's finding that NFL quarterback Tom Brady was "generally aware" that the team's equipment assistants had deflated his footballs in violation of the rules. NFL Mgmt. Council. v. NFL Players Ass'n, 125 F. Supp. 3d 449, 466 n.16 (S.D.N.Y. 2015) (in exchange with counsel, an obviously exasperated judge complained, "I am not sure I understand what in the world ["generally aware"] means").

87. Rule 58A-5.0182(8)(a) is not capricious, but it is arbitrary.

88. As incorporated by rule 58A-5.0181(2)(b), section 1 of Form 1823, as to the yes-or-no question about elopement risk, is arbitrary, but not capricious.

89. As incorporated by rule 58A-5.0181(2)(b), section 1.A of Form 1823 is not capricious, is not arbitrary as to the ADLs of ambulating, eating, and transferring; and is arbitrary as to the ADLs of bathing, dressing, grooming, and toileting.

90. As incorporated by rule 58A-5.0181(2)(b), section 1.C of Form 1823, as to the posing a danger to self or others, is arbitrary, but not capricious. This is a fraught question with considerable liability concerns to the ALF, see, e.g., Pollock v. CCC Invs. I, LLC, 933 So. 2d 572 (Fla. 4th DCA 2006), and possibly the health care provider. A false positive may substantially reduce the placement options for a person seeking to enter an ALF. In judicial proceedings, the question of whether a person poses a danger to self or others demands psychiatric testimony. Hill v. State, 358 So. 2d 190, 206 (Fla. 1st DCA 1978). A rule requiring a health care provider, who likely does not specialize in psychiatry, to provide a "yes" or "no" answer to this important question is unlikely to generate reliable information and is not supported by logic or the necessary facts.

91. As incorporated by rule 58A-5.0181(2)(b), section 1.D of Form 1823, as to whether the patient's needs can be met in an ALF, is arbitrary, but not capricious.

92. As incorporated by rule 58A-5.0181(2)(b), section 2-A.A of Form 1823, as to the extent to which the patient can perform self-care tasks, is arbitrary, but not capricious. As incorporated by rule 58A-5.0181(2)(b), section 2-A.B of Form 1823, as to the extent to which the patient requires general oversight, is arbitrary, but not capricious.

93. As incorporated by rule 58A-5.0181(2)(b), section 3 of Form 1823, as to the listing of the patient's needs and services, is not arbitrary or capricious.

94. The requirement that the resident and ALF sign the Form 1823 is not arbitrary or capricious, as long as section 3 is part of the form. With the invalidation of section 3, as discussed below, the requirement of the signatures of the patient and ALF is arbitrary and capricious.

95. The final issue is whether any of the above-cited provisions of Form 1823, except for the requirement of the signatures of the patient and ALF, exceeds any grant of rulemaking authority.

96. No statute grants Respondent rulemaking authority for Form 1823, as such. Section 429.26(4) alludes to a "signed and completed medical examination report" by the health care provider who conducts the medical examination within 60 days prior to admission. More to the point, section 429.26(5) and (6) refers to a "medical examination form provided by [AHCA]" and the "examination form provided by [AHCA]." However, these statutory references to a form provided by AHCA fail to confer rulemaking authority because they fail to comply with the flush left language of section 120.52(8). These statutory references to a form, which presumably is Form 1823,[31] do not suggest what the form is to contain, so they do not grant to Respondent or AHCA specific

powers or duties to populate the form with anything but, at most, the minimum information that a "form" documenting a medical examination would supply, such as the names of the health care provider and patient, the date of the examination, and a brief statement of relevant findings.

97. Of course, other statutes may grant Respondent rulemaking authority for specific provisions of Form 1823. The inquiry as to elopement risk in section 1 requires analysis of section 429.41(1)(l), which authorizes rulemaking of "reasonable and fair minimum standards" establishing "policies and procedures on resident elopement." This statutory grant is insufficient to support rulemaking where the inquiry is posed to a health care provider conducting a typical medical examination because, as discussed above, such an inquiry is unreasonable and, due to the inherent reliability of any response, unfair to the patient and ALF, as well as the health care provider. Respondent has thus exceeded any grant of rulemaking authority in posing the yes-or-no question about elopement risk in section 1 of Form 1823.

98. The inquiry as to ALFs in section 1.A suggests consideration of section 429.41(1)(j), but this provision authorizes rulemaking for "reasonable and fair minimum standards" establishing "specific criteria to define appropriateness of resident admission and continued residency in a facility holding a standard, limited nursing, extended congregate care, and limited

mental health care license." Section 1.A. does not establish appropriateness criteria; it seeks data that, if reliable, may support an appropriateness determination. Also, as discussed above, posing this inquiry as to all of the ADLs except ambulating, eating, and transferring to a health care provider conducting a typical medical examination is unreasonable and, due to the inherent unreliability of any response, unfair to the patient and ALF, as well as the health care provider. Respondent thus has exceeded any grant of rulemaking authority in section 1.A of Form 1823.

99. The inquiry in section 1.C as to whether the patient is a danger to self or others finds no corresponding statutory authority for rulemaking. Respondent has thus exceeded any grant of rulemaking authority in section 1.C of Form 1823.

100. The inquiry in section 1.D as to whether the patient's needs may be met in an ALF that is not a medical, nursing, or psychiatric facility has no corresponding statutory authority for rulemaking. Respondent has thus exceeded any grant of rulemaking authority in section 1.D of Form 1823.

101. The inquiry in section 2-A.A for rating the patient's ability to perform self-care tasks has no corresponding statutory authority for rulemaking. The inquiry in section 2-A.B for rating the patient's need for general oversight has no corresponding statutory authority for rulemaking. Respondent has thus exceeded

any grant of rulemaking authority in section 2-A.A and 2-A.B of Form 1823.

102. The statement of services needed and their provision by the ALF in section 3 suggest consideration of section 429.24(8), but this provision authorizes rulemaking by Respondent to "clarify terms, establish procedures, clarify refund policies and contract provisions, and specify documentation as necessary to administer this section." An ALF must enter into a contract with each resident. § 429.24(1). The contract must specify the services and accommodations to be provided by the ALF, the rates or charges, a provision for at least 30 days' notice of a rate increase, the rights, duties and obligations of a resident, and other matters that the parties choose to address. § 429.24(2). The remaining provisions deal mostly with handling payments and refunds.

103. Section 3 is a description of services to be provided by an ALF, but it is not a description of a services based on the agreement reached by the resident and the ALF. Instead, section 3 represents an attempt by Respondent to identify the services that an individual resident will need--based on, as noted above, largely unreliable data from a health care provider--and to require the parties to agree upon the provision of these services. Section 429.24 does not confer upon Respondent such a duty or power.

104. The largely unreliable data from the health care provider precludes reliance on section 429.41(1)(h)2. or (1)(j) as authority for adopting section 3 of Form 1823. The unreliability of the data from sections 1 and 2 means that the demands of section 3 cannot satisfy the threshold requirement of constituting "reasonable and fair minimum standards." This assumes that the services identified in section 3 are described by the "personal services" of section 429.41(1)(h)2. In any case, the services identified in section 3 are not described as "specific criteria to define appropriateness" for admission of section 429.41(1)(j) because needed services are not appropriateness criteria for admission.

105. Because no other statute authorizes rulemaking as to section 3, Respondent has exceeded any grant of rulemaking authority in section 3 of Form 1823.

ORDER

It is

ORDERED that:

1. The challenged amendments, as detailed in the Findings of Fact, to the following rules are declared invalid exercises of delegated legislative authority: rules 58A-5.024(1)(p)1.a., 58A-5.024(3)(c), 58A-5.031(2)(d), 58A-5.0131(41), 58A-5.0182(8)(a), 58A-5.0182(8)(a)1., and, as incorporated by rule 58A-5.0181(2)(b), Form 1823, section 1 as to the question

about elopement risk, section 1.A, section 1.C as to the question about posing a danger to self or others, section 1.D, section 2-A.A, section 2-A.B, section 3, and the signature lines for the patient and the ALF.

2. Any and all challenges to amendments, as detailed in the Findings of Fact, to the following rules are dismissed: rules 58A-5.0185(3)(g), 58A-5.0191(3)(a), and 58A-5.019(3).

3. Respondent's request for attorneys' fees is denied because it is not the prevailing party, as required by section 120.595(2) and (3).

DONE AND ORDERED this 30th day of August, 2018, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of August, 2018.

ENDNOTES

[1] "AHCA" is the Agency for Health Care Administration.

[2] "Rule" or "rules" describes a rule or an amendment to a rule, regardless of whether the rule or amendment is proposed or filed.

[3] See endnote 16 below.

[4] The jurisdictional prerequisite for a rule challenge is that the challenger must be "substantially affected" by a rule. § 120.56(1)(a). The parties stipulated to the jurisdictional prerequisite for a bid challenge. § 120.57(3)(b). This final order applies the language of section 120.56(1)(a).

[5] This issue alleges that a challenged rule enlarges, modifies, or contravenes any implemented statute that prescribes a homelike environment for an ALF. This issue applies only to rule 58A-5.024(1)(p)1.a. because this is the only rule that could impede a facility's ability to maintain a homelike environment. The tenth issue thus encompasses this issue; the verbiage about a violation is disregarded as mere argument.

[6] One issue has been omitted. It pertains to the economic impact of the rules. See endnote 10 below.

[7] The Prehearing Stipulation does not specify the challenged provisions of Form 1823. FSLA's petition challenges the following provisions: page 1, section 1; page 2, section 1(A); page 2, section 1(C); page 2, section 1(D); page 3, section 2-A; and page 5, section 3. At hearing, the parties addressed considerable testimony to each of these parts of Form 1823, as have their proposed final orders, so it is clear that this issue focuses on these sections of Form 1823. FALA preserved its sole issue concerning the Form 1823 as the twelfth issue stated below.

[8] The statutory language is arbitrary "or" capricious, section 120.52(8)(e). This final order applies the language of section 120.52(8)(e).

[9] The Administrative Law Judge construes this language as raising the issue of whether Respondent has exceeded its grant of rulemaking authority.

[10] Two issues have been omitted. They pertain to a statement of estimated regulatory costs, pursuant to section 120.541. At the start of the hearing, the Administrative Law Judge granted

Respondent's motion in limine to limit FALA's evidence to the existence, rather than the adequacy, of a statement of estimated regulatory costs. After the ruling, FALA withdrew its allegations concerning this issue.

[11] One issue has been omitted. It pertains to a requirement in rule 58A-5.0185(3)(b) for a staffperson to read aloud a medication label prior to administering the medication. FALA withdrew this allegation in its proposed final order.

[12] The issues are whether proposed rule 58A-5.024(1)(p)1.a. violates section 120.54(1)(g), which limits a rule to "one subject," and, if so, whether the proposed rule falls under section 120.52(8)(a), which defines as an invalid exercise of delegated legislative authority an agency's failure "materially . . . to follow the applicable rulemaking procedures or requirements set forth in this chapter." FSLA's one-subject contention seems to be that this proposed rule, which specifies that a hand hygiene program must be part of an ALF's infection control policy, is found in a rule that otherwise describes the documentation that an ALF must maintain, not the contents of the documentation.

[13] As found at https://www.cms.gov/Outreach-and-Education /Medicare-Learning-Network-MLN/MLNProducts/downloads/ referenceii.pdf[.]

[14] For rulemaking authority, Respondent cited 15 statutes. For the law implemented, Respondent cited 46 statutes and an enacted bill. Most of these statutes have no bearing on these rules.

[15] When citing rules, this final order shows the amendments by underlining, challenged amendments by boldfacing, and, where necessary, deletions by striking through.

[16] The Notice of Proposed Rule added the following language at this point: "and the term 'resident' includes day care participants and respite care residents." The Notice of Change, which is described in the Preliminary Statement, deleted this language.

[17] The parties did not challenge the omission from the rule of any reference to the class of persons covered by the hand-hygiene program. During the hearing, when the Administrative Law Judge inadvertently offered a different reading of this provision in connection with another matter, the parties seemed to share a common understanding that this provision applies only to ALF

staff, as distinct, it seems, from third party service providers, visitors, and other residents. Thus, in this final order, the Administrative Law Judge joins the parties in this shared understanding.

[18] § 429.14, Fla. Stat.

[19] Webster's online dictionary, at https://www.merriam-webster.com/dictionary/sanitary[.]

[20] Webster's online dictionary, at https://www.merriam-webster.com/dictionary/coordination[.]

[21] Webster's online dictionary, at https://www.merriam-webster.com/dictionary/ensure[.]

[22] Respondent's proposed final order, p. 21.

[23] The lone exception is rule 58A-5.0131(29).

[24] Webster's online dictionary, at https://www.merriam-webster.com/dictionary/generally[.]

[25] In its proposed final order, Respondent argued that an Administrative Law Judge recognized a duty of an ALF to know the "general whereabouts" of its residents. Ag. for Health Care Admin. v. Rise and Shine Assisted Living Facility, DOAH Case 16-7558, ¶ 74. Of course, this phrasing qualifies location, not awareness, but the Recommended Order reveals that the Administrative Law Judge's finding was part of a general discussion of the acts and omissions of the ALF, not fact finding in support of a charge of violating rule 58A-5.0182(8)(a)1. Neither this rule nor the facts found as to the "general whereabouts" of the residents were discussed in the Conclusions of Law. Id. at ¶ 78 et seq. Although hardly outcome-determinative for the present cases, the Rise and Shine ALF was cited for a failure to complete items on the "health assessment form," which was likely the Form 1823. Id. at ¶ 78 et seq.

[26] A "health care provider" is a physician, physician's assistant, or advanced registered nurse practitioner. Fla. Admin. Code R. 58A-5.0131(19). A "mental health care provider" is "an individual, agency, or organization providing mental health services to clients of [DCF]; an individual licensed by the state to provide mental health services; or an entity employing or contracting with individuals licensed by the state

to provide mental health services." Fla. Admin. Code R. 58A-5.0131(25).

[27] There is an eleventh condition: "Lives in AL and is a moderate risk." "AL" probably means "assisted living"; if so, this condition would apply to the present case. But the classification as a moderate risk is circular because the point of the tool is to determine the risk level. For this reason, the final order omits this factor.

[28] But see endnote 25 above.

[29] During the hearing, the Administrative Law Judge granted Respondent's sole attempt to restrict the invalidation grounds. See endnote 10 above.

[30] For three practical reasons, the Administrative Law Judge chose trial by consent over the binding waiver of a prehearing stipulation: 1) the parties elicited testimony on, or argued, the issues tried by consent, 2) if the Administrative Law Judge were reversed on appeal on either choice, it is easier for the appellate court or Administrative Law Judge to delete the offending portions of the final order than to add portions that are improperly omitted, and 3) if not resolved in these cases, substantially affected persons later may challenge these rules on the same invalidation grounds.

[31] This final order ignores the fact that these statutory references to what is likely Form 1823 are not to the subject amendments to Form 1823.

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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 administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.