FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-4140

STATE OF FLORIDA, DEPARTMENT
OF ELDER AFFAIRS,

Appellant,

v.

FLORIDA SENIOR LIVING
ASSOCIATION, INC. and FLORIDA
ASSISTED LIVING ASSOCIATION,
INC.,

Appellees.

On appeal from the Division of Administrative Hearings.
Robert E. Meale, Judge.

May 29, 2020

ON MOTIONS FOR CLARIFICATION, REHEARING,
AND REHEARING EN BANC

WINOKUR, J.

Appellee Florida Assisted Living Association, Inc. (FALA) filed a motion for clarification of this Court's opinion and Appellee Florida Senior Living Association, Inc. (FSLA) filed a motion for rehearing, rehearing en banc, and to certify questions of great public importance. These motions are granted in part, as set forth below, and otherwise denied. The court's opinion filed January 29, 2020, is withdrawn and substituted with the following.

The Department of Elder Affairs (DOEA) brings this administrative appeal arguing that the Administrative Law Judge (ALJ) erred in 1) denying DOEA's Motion to Dismiss the proposed rule challenge petitions from Florida Senior Living Association, Inc. and the Florida Assisted Living Association, Inc.; 2) invalidating some of the proposed and subsequently enacted rules; and 3) denying DOEA's attorney's fees motion. We agree and reverse.

I.

On March 5, 2015, DOEA published its notice regarding eleven proposed rule amendments in Rule Chapter 58A-5 in the Florida Administrative Register. The proposed rules involved the regulation of assisted living facilities (ALFs).

On March 26, 2018, DOEA held a public hearing on the proposed rules and on April 13, published a "Notice of Change/Withdrawal" for proposed Florida Administrative Code Rule 58A-5.024 in the Florida Administrative Register. The change deleted the proposed rule's requirement that ALFs maintain records not only for their full-time residents, but also day care participants:

> Notice of Change/Withdrawal
>
> DEPARTMENT OF ELDER AFFAIRS
> Federal Aging Programs
> RULE NO.: RULE TITLE:
> 58A-5.024: Records
>
> NOTICE OF CHANGE
>
> Notice is hereby given that the following changes have been made to the proposed rule in accordance with subparagraph 120.54(3)(d)l., F.S., published in Vol. 44 No. 44, March 5, 2018 issue of the Florida Administrative Register.
> 58A-5.024 Records.
> 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. If records are maintained in an

electronic format, facility staff must be readily available to access the data and produce the requested information. 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 ~~and the term "resident" includes day care participants and respite care residents~~.

(1) through (4) No change.

In effect, only the proposed amendment to the rule was withdrawn and its pre-existing text remained unchanged.

On May 2, 2018, FSLA filed a petition with the Division of Administrative Hearings (DOAH) challenging provisions of proposed rule 58A-5.024. The petition, however, did not challenge the April 13 notice of change to the proposed rule. On May 3, 2018, FALA filed a petition with DOAH challenging DOEA's proposed rules. This petition also did not challenge the April 13 notice. On May 10, 2018, all the proposed rules, except for rule 58A-5.024, were filed with the Department of State and came into effect. On the same day, FSLA filed a second petition challenging all of DOEA's newly adopted rules.

On May 14, 2018, DOEA filed a Motion to Dismiss the FSLA's first rule challenge petition and FALA's petition, arguing that both petitions were untimely. On May 15, 2018, DOAH consolidated all three petitions and issued an order denying DOEA's motion. In response to DOEA's Motion to Clarify, DOAH issued a Superseding Order Denying Motion to Dismiss, finding that DOEA's April 13 notice of change restarted the statutory deadline for proposed rule challenges. The order also allowed FSLA and FALA to maintain their challenge to all eleven proposed rules even though only one proposed rule was the subject of DOEA's April 13 Notice of Change. During litigation of DOEA's Motion to Dismiss, DOEA filed a motion for attorney's fees.

In June 2018, DOAH held the Final Hearing on FSLA's and FALA's rule challenge. During the hearing, FALA withdrew two issues that it had raised in its Petition: DOEA's alleged failure to prepare a Statement of Estimated Regulatory Costs (SERC) and its challenge to proposed Rule 58A-5.0183(3)(b).

In August 2018, the ALJ issued a Final Order invalidating seven of the eleven proposed rules. The Final Order also denied DOEA's motion for attorney's fees, finding that it was not the prevailing party.

II.

Whether a petition challenging agency rulemaking is timely is a question of law requiring de novo review. *Fla. Pulp & Paper Ass'n Envtl. Affairs, Inc. v. Dep't of Envtl. Prot.*, 223 So. 3d 417, 419 (Fla. 1st DCA 2017).

An ALJ's findings of fact are reviewed for competent, substantial evidence, while conclusions of law and determinations of statutory interpretation are reviewed de novo. *J.S. v. C.M.*, 135 So. 3d 312, 315 (Fla. 1st DCA 2012). In the context of a proposed rule challenge, the proposed rule at issue is not presumed to be "valid or invalid." § 120.56(2)(c), Fla. Stat.

Similarly, whether an agency exceeded its rulemaking authority is an issue reviewed de novo. *State, Bd. of Trustees v. Day Cruise Ass'n, Inc.*, 794 So. 2d 696, 701 (Fla. 1st DCA 2001). Florida law defines "rulemaking authority" as the "statutory language that explicitly authorizes or requires an agency to adopt, develop, establish, or otherwise create any statement coming within the definition of the term 'rule.'" § 120.52(17), Fla. Stat. As a result, any agency "action that goes beyond the powers, functions, and duties delegated by the Legislature" constitutes an invalid exercise of delegated legislative authority. § 120.52(8), Fla. Stat.

A proposed or existing administrative rule is an invalid exercise of delegated authority if the agency "exceed[s] its grant of rulemaking authority," or if the rule 1) "enlarges, modifies, or contravenes the specific provisions of law implemented;" 2) "is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;" or 3) is arbitrary and capricious. § 120.52(8), Fla. Stat.

In making this determination, we focus on whether "the statute contains a specific grant of legislative authority for the

rule," as opposed to whether "the grant of authority is specific *enough*. Either the enabling statute authorizes the rule at issue or it does not." *Sw. Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc.*, 773 So. 2d 594, 599 (Fla. 1st DCA 2000). Recently, Florida enacted a constitutional amendment abolishing some agency deference in state administrative appeals and requiring de novo review of agency rulemaking.[1]

III.

DOEA argues that FSLA's May 2, 2018, petition and FALA's May 3 petition were untimely since they were filed more than twenty-one days after DOEA issued its March 5 notice of publication. In contrast, FSLA and FALA assert that DOEA's April 13 Notice of Change/Withdrawal restarted the deadline clock.

Section 120.56(2)(a), Florida Statutes, sets forth four deadlines for challenging proposed agency rules: 1) within twenty-one days after publication of a notice of proposed rules; 2) within ten days after the final public hearing; 3) within twenty days after the preparation of a SERC; or 4) within twenty days after publication of a notice of change or withdraw pursuant to section 120.54(3)(d), Florida Statutes. § 120.56(2)(a), Fla. Stat.

DOEA published its original notice for its proposed rules on March 5, 2018. On April 13, DOEA published its Notice of Change/Withdrawal deleting the proposed language for rule 58A-5.024. FSLA filed its proposed rule challenge petition on May 2, FALA filed its petition on May 3, and neither petition challenged the amendment withdrawal that was the subject of DOEA's April 13 notice.

FSLA and FALA primarily rely on this Court's recent decision in *Florida Pulp*, where an agency proposed amendments to two rules. 223 So. 3d at 417-18. After holding a public hearing, the

[1] *See* Art. V, § 21, Fla. Const. (holding that "[i]n interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute or rule, and must instead interpret such statute or rule de novo").

agency filed a Notice of Change for one of the proposed rule changes and a Notice of Correction on the other stating that it submitted a revised SERC. *Id*. at 418. Nearly a month later, the appellant filed a petition challenging one of the proposed rule amendments. *Id*. The agency responded by filing a motion to dismiss the petition, arguing "that no changes were made to the proposed amendments to [the rule] after publication of the rulemaking notice . . . and that [Appellant] 'cannot use [the agency's Notice of Change for one rule], which it has not challenged, to bootstrap its way into challenging proposed amendments to [the other proposed rule amendment].'" *Id*. The agency also argued that the revised SERC did not give Appellants a point of entry to challenge the proposed amendments. *Id*. After a hearing, the ALJ agreed with the agency and granted its motion dismissing the petition as untimely. *Id*.

On appeal, this Court reversed and, after outlining the four above-referenced deadlines, or "points of entry," to challenge proposed rules, found that "[t]he third point of entry is triggered when a revised SERC is 'prepared and made available.'" *Id*. Since Appellant's petition was filed within the statutorily mandated twenty-day deadline after the publication of the revised SERC, the petition was timely. *Id*. 419-20.

FSLA and FALA argue that their petitions are timely based on the fourth point of entry in section 120.56(2)(a), establishing a twenty-day deadline from the publication of an agency's Notice of Change/Withdrawal. The opinion in *Florida Pulp*, however, was limited to whether the third point of entry was triggered. Indeed, this Court noted that it "need not address whether the fourth point of entry was also triggered by the Notice of Correction and/or the Notice of Change." *Id*. at 419.

More importantly, after establishing the four points of entry, section 120.52(2)(a) states that "[a] person who is not substantially affected by the proposed rule as initially noticed, but who is substantially affected by the rule as a result of a change, may challenge any provision of the resulting proposed rule." As a result, the statute reasonably limits proposed rule challenges under the fourth point of entry to individuals affected by any additional change to a proposed rule. In fact, this Court quoted this provision

in *Florida Pulp* when rejecting the agency's argument that the third point of entry did not apply. *See* 223 So. 3d at 420 (noting that "[h]ad the Legislature intended that there be a different standing requirement when a rule challenge petition is filed after the point of entry created by the preparation of a revised SERC, it would have said so").

In this case, DOEA's April 13 Notice of Change/Withdrawal did not substantially change or affect the proposed rule. The notice simply restored the status quo. The change was the removal of the proposed additional language requiring the maintenance of records of ALF daycare participants. Accordingly, FSLA and FALA could not have been substantially affected by the April 13 notice and, therefore, their proposed rule challenge petitions are untimely.

The ALJ found that FALA could proceed with its challenge of all eleven proposed rules. The ALJ justified this conclusion by noting that all the proposed rules were jointly noticed on March 5. All of the proposed rules and amendments, however, are separate and distinct. Indeed, the Final Order analyzes the proposed rules separately. The April 13 notice only dealt with rule 58A-5.024. Any argument FALA might have regarding the timeliness of its petition must be limited to the four corners of DOEA's Notice of Change/Withdrawal. Since the notice only dealt with one rule, FALA cannot use it to bootstrap a challenge to the other proposed rules.

Although the May 2 and May 3 proposed rule challenge petitions were untimely, FSLA's May 10 petition challenged the proposed rules after they took effect. As a result, that petition is timely pursuant to section 120.56(3)(a), Florida Statutes, and we address that rule challenge in the following section.

IV.

DOEA is tasked with "[a]dminister[ing] human services and long-term care programs" focusing on elderly residents. § 430.04(1), Fla. Stat. DOEA "serve[s] as the primary state agency responsible for administering human services programs for the elderly and for developing policy recommendations for long-term

care. § 430.03(1), Fla. Stat. The legislature delegated DOEA rulemaking authority pursuant to the Administrative Procedures Act. § 430.08, Fla. Stat.

Chapter 429, Florida Statutes, relates to the administration of ALFs and defines "the department" as DOEA. § 429.02(9) Fla. Stat. Chapter 429 confers regulation of ALFs to DOEA with the express statutory intent "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 [and] [s]uch rules shall also ensure a safe and sanitary environment that is residential and noninstitutional in design or nature." § 429.41(1), Fla. Stat. Section 429.41, Florida Statutes, also sets forth specific areas of rulemaking delegated to DOEA.[2]

The ALJ's Final Order invalidated seven rules, including seven amendments to Form 1823, a questionnaire regarding an individual's suitability to live in an ALF. The Final Order found that the rules at issue were either arbitrary, capricious, vague, or exceeded DOEA's rulemaking authority. In response, DOEA asserts that its rules were a valid exercise of its delegated authority. The rules at issue will be discussed in turn.

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[2] In pertinent part, DOEA is given rulemaking authority over the following aspects of ALF administration: 1) residential elopement requirements; 2) number, training, and qualification of ALF personnel; 3) sanitary conditions; 4) enforcement of a resident bill of right; 5) care and maintenance of resident; 6) establishment of criteria regarding the appropriateness of resident admission and continued residency in an ALF; and 7) establishment of policies and procedures regarding resident elopement. § 429.41(1)(a)3., (1)(c), (1)(d), (1)(g), (1)(h), (1)(h), (1)(j), (1)(*l*), Fla. Stat.

Rule 58A-5.024(1)(p)1.a.

Rule 58A-5.024(1)(p)1.a. requires implementation of 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." The Final Order found the proposed rule arbitrary and capricious, as well as exceeding DOEA's grant of statutory authority noting that the rule set up an "unreasonable standard." Specifically, the ALJ found that the rule's language did not clearly define "contact" and could encompass *de minimis* contact between ALF residents and employees, making the requirement unduly burdensome.

The Final Order erred in determining that the rule exceeded DOEA's statutory authority. DOEA has a statutory mandate to maintain safe and sanitary conditions within ALFs. § 429.41(1), (1)(d), Fla. Stat. The Final Order's invalidation of the rule also found that the wording of the rule is arbitrary and capricious, leading to an unreasonable and unworkable standard.

"A rule is arbitrary if it is not supported by logic or the necessary facts" and "capricious if it is adopted without thought or reason or is irrational." § 120.52(8)(e), Fla. Stat. More importantly, this Court has held that when words in a rule are not defined, like in a statute, they are to be given "their plain and ordinary meaning." *Fla. E. Coast Indus. Inc. v. State, Dep't of Cmty. Affairs*, 677 So. 2d 357, 362 (Fla. 1st DCA 1996).

We disagree that the rule is invalid. A reasonable reading of the rule demonstrates that it is a logical and reasoned approach to ensure that ALF residents live in a sanitary environment. During the final administrative hearing, representatives for DOEA testified that the rule applied only to ALF employees and that it did not apply to casual contact. Additionally, a medical doctor testified that handwashing is a recognized way to prevent the spread of infectious diseases and that a "rigorous handwashing protocol" might increase the protection afforded. As such, the rule is not arbitrary or capricious because it reasonably does not apply to *de minimis* contact. Accordingly, DOEA had the rulemaking authority to enact Rule 58A-5.024(1)(p)1.a.

Rule 58A-5.024(3)(c)

Rule 58A-5.024(3)(c) requires ALFs to maintain the "[r]ecords of residents receiving nursing services from a third party." The Final Order found that the proposed rule exceeded DOEA's delegated statutory authority.

Section 429.41(1)(h), Florida Statutes, gives DOEA the responsibility for "[t]he care and maintenance of residents." In particular, section 429.41(1)(h)7. lists "[r]esident records" as an area of DOEA rulemaking. Furthermore, the statute clearly states that the areas delegated to DOEA for resident care and maintenance "include, *but is not limited to*" the listed areas in section 429.41(h). (emphasis added). Thus, DOEA was given flexible rulemaking authority in order to ensure the care of ALF residents.

Moreover, Rule 58A-5.0182(7)(c) already mandates that an ALF's "policies must require the third party to coordinate with the [ALF] regarding the resident's condition and the services being provided." The Final Order does not explain how this rule does not exceed DOEA's rulemaking authority, while Rule 58A-5.024(3)(c) does. At bottom, Rule 58A-5.024(3)(c) is a legitimate exercise of DOEA's rulemaking authority because it relates to maintaining resident care in general, and resident records in particular.

Rule 58A-5.031(2)(d)

Rule 58A-5.031(2)(d) "[r]equires a facility with a limited nursing services license to have its contracted nurse 'coordinate with third party nursing services providers to ensure resident care is provided in a safe and consistent manner.'" The Final Order invalidated the rule, finding that DOEA exceeded its statutory authority.

Based on the previous analysis for rule 58A-5.024(3)(c), it appears that DOEA already has in effect a rule, 58A-5.0182(7)(c), requiring ALFs to coordinate with third-party providers. Additionally, section 429.41(1)(h)8., Florida Statutes, authorizes rulemaking in order to facilitate "[i]nternal risk management and quality assurance." Section 429.41(1), Florida Statutes, directs

DOEA to promulgate rules to "ensure" both "consistent quality of resident care" and "a safe and sanitary environment."

Lastly, we do not accept the Final Order's conclusion that the use of the word "ensure" in the rule constitutes an impermissible "authorization of rulemaking to guarantee outcomes." The above-referenced statutory authority clearly mandates that DOEA enact rules to ensure positive outcomes for ALF residents. Thus, Rule 58A-5.031(2)(d) does not exceed DOEA's delegated statutory authority.

Rule 58.A-5.0131(41)

DOEA amended Rule 58.A-5.0131(41)'s definition of the term "unscheduled service need":

> 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.

The Final Order invalidated this definitional change as vague, finding that the rule "fails to express clearly exactly when and what is required of ALFs." The Final Order also noted that the rule was not "merely a definitional rule with two conditions, but in reality, it is a rule that encompasses a definition with but one condition and an enforceable duty."

The Final Order seems to agree with FSLA's argument that the deletion of the phrase "within a time frame that provides reasonable assurance" to the rule is the product of a random agency decision that DOEA itself does not understand. FSLA points to the testimony of a DOEA representative who stated that she did not know why that change in the rule's language was made and speculated "that maybe the term 'reasonable' was found to be wordy . . . and they shortened it to just say "ensure." The representative, however, emphasized that she did not know the

impetus behind the change in language because she "wasn't with [DOEA] when [the rule] was changed."

First, the ALJ's belief that the rule change was vague and problematic because it combines a definition with an enforceable duty lacks legal support. The Final Order does not point to any case law or statute that prevents an agency from both defining a word and imposing a duty in a single rule. Neither does FSLA or FALA.

Second, the change in the definition does not render the rule impermissibly vague. "An administrative rule is invalid under section 120.52(8)(d) if it requires the performance of an act in terms that are so vague that men of common intelligence must guess at its meaning." *Sw. Fla. Water Mgmt. Dist. v. Charlotte Cty.*, 774 So. 2d 903, 915 (Fla. 2d DCA 2001). The amendment at issue causes no such confusion and is reasonably read to state that an unscheduled service need refers to an unforeseen need for facility intervention that must be responded to promptly to ensure a resident's well-being. An ALF employee could reasonably interpret "promptly to ensure" the same as the original language of "within a time frame that provides reasonable assurance," i.e. an employee must not delay in responding to the need.

Lastly, the testimony of an agency representative suggesting that she was not aware of the rationale behind a rule change, when she testified that she was not employed by the agency when the rule was changed, does not, without more, constitute competent substantive evidence that the rule is vague.

Rule 58A-5.0182(8)(a)

Rule 58A-5.0182(8)(a) requires that all residents be assessed for the risk of elopement by either a health care or mental health care provider within thirty days of admission to an ALF. The Final Order found that the rule was arbitrary and "unsupported by logic and the necessary facts." The ALJ relied on the fact that only one of the thirty "predictive factors" used in the elopement risk assessment (dementia) requires "medical or psychiatric diagnosis."

FSLA points to the testimony of Regional Trainer and Memory Care Specialist and Licensed Practical Nurse, Dawn Platt, who stated that an elopement assessment is a long-term collaborative process that is not effectively done during a one-time medical examination. Platt also testified about the importance in assessing a resident's potential for elopement.

Section 429.41(1)(*l*), Florida Statutes, specifically directs DOEA to establish "specific policies and procedures on resident elopement" as well as coordinate "two resident elopement drills each year." This grant of statutory authority is unambiguous: DOEA must safeguard ALF residents who are at risk of elopement. Having incoming residents screened by a health care or mental health care professional within thirty days of admission is a reasonable approach to fulfill this statutory duty.

Additionally, Platt's testimony does not undermine DOEA's decision to amend the rule. ALFs have a continuing duty to monitor residents that are at risk for elopement. An initial screening by a health care professional is not contrary to this reality and, in fact, complements the statutory duty of DOEA to ensure a safe environment for its residents. Therefore, Rule 58A-5.0182(8)(a) is not arbitrary.

Rule 58A-5.0182(8)(a)1.

Rule 58A-5.0182(8)(a)1. directs that ALF employees "must be generally aware of the location of all residents assessed at high risk for elopement at all times." The Final Order found the rule arbitrary and vague due to its use of the term "generally aware." Based on the analysis in the preceding section regarding rule 58A-5.0182(8)(a), DOEA was within its statutory duty to mandate that ALF staff be aware of where residents at high risk of elopement are throughout the day. Moreover, the term "generally aware" is self-evident to a person of "common intelligence." *Sw. Fla. Water Mgmt. Dist.*, 774 So. 2d at 915.

Rule 58A-5.0181(2)(b)

Rule 58A-5.0181(2)(b) incorporated Agency for Health Care Administration (AHCA) Form 1823, a questionnaire that must be

completed by a licensed medical provider assessing whether an individual is suited to live at an ALF. The Final Order invalidated the following proposed sections to the form:

- Section 1 as to the question about a resident's elopement risk was found to be arbitrary.

- Section 1.A as to the question regarding "to what extent does the individual need supervision or assistance . . ." was found to be capricious as to the following "activities of daily life": bathing, dressing, grooming, and toileting.

- Section 1.C as to the question about posing a danger to self or others was found to be arbitrary.

- Section 1.D as to the question about whether the patient's needs can be met in an ALF was found to be arbitrary.

- Section 2-A.A as to the question about a resident's "[a]bility to perform [s]elf-[c]are [t]asks" was found to be arbitrary.

- Section 2-A.B as to the comment block provided for "[g]eneral [o]versight" was found to be arbitrary.

- Section 3 providing "a description of services to be provided by an ALF," as well as the signature lines for the patient and the ALF was found to exceed DOEA's grant of rulemaking authority.

The ALJ found that "[n]o statute grants [DOEA] rulemaking authority for Form 1823, as such." The Final Order highlighted the difference between the statutory authority of DOEA to conduct an admission medical examination and the description of the form as a "questionnaire" in its findings. Finally, the Final Order found that pertinent statutory authority allowed AHCA to formulate the examination or form and not DOEA.

Section 429.41(1)(j), Florida Statutes, authorizes DOEA to establish "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." More importantly, section 429.26(1), Florida Statutes, requires an ALF to "determin[e] the appropriateness of admission of an individual to the [ALF] and [to] determin[e] the continued appropriateness of residence of an individual in the [ALF] [and this] determination shall be based upon an assessment of the strengths, needs, and preferences of the resident."

Similarly, section 429.26(4), Florida Statutes, requires a medical examination within sixty days of admission to an ALF, and the examination report "shall be submitted to the owner or administrator of the facility who shall use the information contained therein to assist in the determination of the appropriateness of the resident's admission and continued stay in the facility." If not done within sixty days prior to admission, an examination is to be conducted within thirty days following admission in order "to determine the appropriateness of the admission." § 429.26(5), Fla. Stat.

As a result, DOEA did have the statutory authority to incorporate the form. We reject the ALJ's finding that the examination authorized in the aforementioned statutes differs from a "questionnaire." Medical examinations may employ a questionnaire in order for patients to self-report their current medical state, as well as their past medical history.

Additionally, the Final Order concluded that the questionnaire went beyond the "typical medical examination" required by the statutes and, as a result, was arbitrary and capricious. We disagree. Section 429.26 does not mention the phrase "typical medical examination." On the contrary, sections 429.26(4)-(5) and 429.41(1)(j) all require that ALF residents be screened and evaluated to ensure the appropriateness of their admission based on their individual needs. Such language clearly goes beyond a "typical medical examination." It should also be noted that the rule also incorporated the form by reference when it was last amended in 2014. Neither the Final Order nor FSLA or FALA attempt to explain why the 2014 incorporation of the form was permissible, but the current incorporation is not.

Accordingly, the DOEA was authorized to incorporate the form and include the proposed sections. The content of the seven sections at issue all relate to DOEA's specific statutory directives regarding elopement risks, resident supervision, internal risk management, and the provision of social and leisure activities. Given these legislative directives, it is hard to reconcile the form and the proposed sections with the Final Order's finding that they were not supported by logic or without reason.

Lastly, the ALJ erred in finding that only AHCA was authorized to formulate the examination or questionnaire. Section 429.26(5) does state that the "medical examination form [is] provided by the agency" and section 429.02(3) defines "agency" as the AHCA. Part I of Chapter 429 is named "Assisted Living Facilities" and states that DOEA is responsible for adopting "rules, policies, and procedures to administer [Part I]." § 429.41(1), Fla. Stat. Section 429.26 is contained within Part I, which DOEA is mandated to administrator "*in consultation with [AHCA]*, the Department of Children and Families, and the Department of Health." § 429.41(1), Fla. Stat. (emphasis added). Thus, the form and its proposed sections fall squarely within DOEA's statutory rulemaking authority.

V.

FALA's rule challenge petition both challenged DOEA's proposed rules and alleged that DOEA failed to file a SERC regarding the economic impact of the proposed rules as mandated by section 120.541, Florida Statutes. The Final Order denied DOEA's attorney's fees motion, finding that it was not the prevailing party.

DOEA's Notice of Proposed Rule contained a detailed SERC disclosure:

> SUMMARY OF STATEMENT OF ESTIMATED REGULATORY COSTS AND LEGISLATIVE RATIFICATION:
> The Agency has determined that this rule will not have an adverse impact on small business or likely increase directly or indirectly regulatory costs in excess of

> $200,000 in the aggregate within one year after the implementation of the rule. A SERC has been prepared by the Agency.
> A statement of estimated regulatory costs has been prepared for rules 58A-5.0185 and 58A-5.019 and is available from the person listed below. Following is a summary of the SERC:
> Dr. George MacDonald, Ph.D., and Reginald Lee, M.A., Ph.D. candidate, of the Center for Research, Evaluation, Assessment, and Measurement at the University of South Florida analyzed the proposed rules and the SERC is based on their report. For proposed rule 58A-5.0185, F.A.C., there are no additional costs as facilities are already required to comply with the provisions of s. 429.256(3), F.S. For proposed rule 58A-5.019, F.A.C., there are no additional costs as assisted living facilities are already required to provide sufficient staff to serve and care for persons in their facility. As such, it is not anticipated that the proposed rule will directly or indirectly have an adverse impact or increase regulatory costs.
> The Agency has determined that the proposed rule is not expected to require legislative ratification based on the statement of estimated regulatory costs or if no SERC is required, the information expressly relied upon and described herein: A SERC has been prepared by the Agency for rules 58A-5.0185 and 58A-5.019.
> Any person who wishes to provide information regarding a statement of estimated regulatory costs, or to provide a proposal for a lower cost regulatory alternative must do so in writing within 21 days of this notice.

It is clear that DOEA included a SERC in its original notice. Additionally, it is clear that the SERC differentiated among the proposed rules in the notice stating which did not have a substantial economic effect requiring a SERC and how an individual may request said SERC. Thus, we reject FALA's argument that the SERC only applied to two of the eleven proposed rules.

More importantly, FALA conceded that DOEA filed the requisite SERC during the hearing. The Final Order also noted that DOEA prevailed as to the validity of proposed rules 58A-5.0185(3)(g), 58A-5.0191(3)(a), and 58A-5.019(3).

If the agency prevails in the proceedings, the appellate court must award reasonable costs and reasonable attorney's fees against a party if the court determines that a party participated in the proceedings for an "improper purpose." § 120.595(2)-(3), Fla. Stat. "Improper purpose" means participation in a proceeding "primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing the approval of an activity." *See* § 120.595(1)(e)(1), (2)-(3). Additionally, attorney's fees pursuant to section 120.595 are authorized even if a party has limited success in the administrative proceedings. *See Bd. of Regents v. Winters*, 918 So. 2d 313, 314 (Fla. 2d DCA 2005) (ordering a reduction in the amount of attorney's fees awarded to appellee pursuant to lodestar approach due to appellee's partial success). Because DOEA was partially successful and because FALA's assertion was plainly frivolous, DOEA is entitled to reasonable attorney's fees from FALA in relation to the SERC allegation only.

VI.

In conclusion, FALA and FSLA filed proposed rule challenge petitions that were untimely. Additionally, the Final Order incorrectly invalidated administrative rules that were within the statutory rulemaking authority conferred upon on DOEA by the legislature. Finally, DOEA was partially successful below and was entitled to a partial award of attorney's fees in relation to the SERC allegation. Therefore, we reverse the order denying DOEA's Motions to Dismiss FALA and FSLA's proposed rule challenges, the Final Order's invalidation of the above-discussed administrative rules, and the denial of DOEA's motion for attorney's fees. We remand the matter to DOAH so that the ALJ can modify his findings consistent with this opinion.

REVERSED and REMANDED.

NORDBY, J.,[3] and SHARRIT, MICHAEL S., ASSOCIATE JUDGE, concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Kenneth G. Oertel and M. Christopher Bryant, of Oertel, Fernandez, Bryant & Atkinson, P.A., Tallahassee; Francis A. Carbone, II, General Counsel, and Jeanne B. Curtin, Senior Attorney, Florida Department of Elder Affairs, Tallahassee, for Appellant.

Amy W. Schrader and Lauren D. Brooks of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., Tallahassee, for Appellee Florida Senior Living Association, Inc.; John F. Gilroy III of John F. Gilroy III, P.A., Tallahassee, for Appellee Florida Assisted Living Association, Inc.

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[3] Judge Nordby, who was substituted for an original panel member, has reviewed the briefs, record, and video recording of the oral argument.