STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

METRO TREATMENT OF FLORIDA, L.P.,

Petitioner,

vs. Case No. 20-4323

DEPARTMENT OF CHILDREN AND FAMILIES,

Respondent,

and

CFSATC D/B/A CENTRAL FLORIDA TREATMENT CENTERS,

Intervenor.
_____/

RECOMMENDED ORDER

This cause arises from Petitioner Metro Treatment of Florida, L.P.'s (Metro) Petition for Formal Administrative Hearing Involving Material Disputed Facts, filed July 31, 2020. The Division of Administrative Hearings (Division) assigned Administrative Law Judge Robert J. Telfer III, to conduct a final hearing pursuant to section 120.57(1), Florida Statutes (2019). However, the parties filed, on November 10, 2020, Proposed Stipulated Facts, which stated that "[t]he parties have agreed to proceed without live testimony . . . ." On November 13, 2020, the undersigned entered an Order Cancelling Hearing, which stated that the undersigned "shall consider this matter based on the Pre-hearing Stipulation, as well as the parties' exhibits, depositions, and proposed recommended orders . . . ."

STATEMENT OF THE ISSUE

Whether the procedure utilized by Respondent, Department of Children and Families (Department), for breaking a tie for the award of a Methadone Medication-Assisted Treatment (MAT) license, pursuant to the "FY 2018/2019 Methadone Medication-Assisted Treatment Needs Assessment Notice of Intended Award for Brevard County, July 10, 2020," (Notice) is an unadopted rule under section 120.52(16) and thus cannot form the basis for the Department's decision to award an MAT in Brevard County to Intervenor CFSATC7 d/b/a Central Florida Treatment Centers (Central Florida), pursuant to section 120.57(1)(e).

PRELIMINARY STATEMENT

On July 10, 2020, the Department issued the Notice which, *inter alia,* stated that the Department "is awarding the opportunity to proceed to licensure to CFSATC dba Central Florida Treatment Centers for one (1) opioid treatment program based on the factors discussed below[]" in Brevard County, Florida.

Metro, which was one of six MAT providers that submitted letters of intent/applications for the Brevard County MAT license, timely filed a Petition for Formal Administrative Hearing Involving Material Disputed Facts (Petition) on July 31, 2020. The Department referred the Petition to the Division on September 29, 2020. Central Florida filed its Notice of Intervention on September 29, 2020.

The undersigned noticed the final hearing in this matter for November 16 through 17, 2020. The parties, in their Proposed Stipulated Facts, filed November 10, 2020, requested that this matter proceed upon stipulated facts, exhibits, and depositions, and agreed that live testimony was not necessary. The undersigned conducted a telephonic status conference on November 10,

2020, and clarified that the parties submit their exhibits, depositions, and proposed recommended orders no later than 5:00 p.m., on November 19, 2020, and further clarified that Metro intended to proceed in this matter pursuant to section 120.57(1)(e). The undersigned, on November 13, 2020, entered an Order Canceling Hearing, that cancelled the final evidentiary hearing, and ordered the parties to submit exhibits, depositions, and proposed recommended orders as agreed at the November 10, 2020, telephonic status conference.

The undersigned admitted Joint Exhibits 1 through 3 into evidence: (J.E. 1) the Notice; (J.E. 2) the Deposition of Ute Gazioch, the Director of Substance Abuse and Mental Health for the Department; and (J.E. 3) Florida Administrative Code Rule 65D-30.014.

The parties timely filed proposed recommended orders, which the undersigned has considered in the preparation of this Recommended Order.

All statutory references are to the 2019 codification of the Florida Statutes, unless otherwise indicated.

FINDINGS OF FACT

The Parties

1. Metro is a provider of specialized quality care for opioid disorder treatment and operates methadone medication treatment centers nationwide, including the state of Florida, and supports education and understanding of addiction as a disease, so that more patients and communities can find the care that is needed to address opioid addiction. Metro's MAT counseling and medical services programs are customized to a patient's needs, and services are delivered in a way that respects their dignity, value, and self-worth.

Metro currently has 18 licensed MAT clinics and one satellite clinic in Florida.

2. The Department is the agency with regulatory authority over the provision of substance abuse services. *See* § 397.321(1), Fla. Stat. These duties include, but are not limited to, the licensing and regulation of the delivery of substance abuse services, including clinical treatment and clinical treatment services such as "medication-assisted treatment for opiate addiction." §§ 397.321(1) and (6); 397.311(26)(a)7., Fla. Stat. The Department also promulgates rules governing substance abuse providers. *See* § 397.321(1), Fla. Stat.

3. Central Florida is a Florida corporation licensed to operate MAT clinics within Florida. Central Florida currently operates numerous MAT clinics within Florida.

Methadone Medication-Assisted Treatment

4. MAT is the use of medications, in combination with counseling and behavioral therapies, to provide a whole-patient approach to the treatment of substance abuse. In Florida, MAT providers for opiate addiction may not be licensed unless they provide supportive rehabilitation programs such as counseling, therapy, and vocational rehabilitation. *See* § 397.427(1), Fla. Stat.

5. Generally, methadone treatment requires many patients seeking treatment to come to the clinic every day. During the initial induction period, the patient sees the clinic's physician and is monitored so that the clinic's medical professionals can ensure that the patient's medication is level and stable. Thereafter, a patient comes to the clinic every day to receive a methadone dose until the patient is eligible, through negative urine screens, for a limited supply of take-home medication.

6. The substance abuse regulatory scheme in Florida is designed to provide a statewide system of care for the prevention, treatment, and recovery of children and adults with serious substance abuse disorders. Substance abuse providers, which include MAT clinics, are subject to a strict

statutory, regulatory, and licensing scheme, which provides direction for a continuum of community-based services including prevention, treatment, and detoxification services. *See* Ch. 394 and 397, Fla. Stat.

7. The Department is responsible for the licensure and oversight of all substance abuse providers, and administers and maintains a comprehensive regulatory process for this purpose. Chapter 397, Florida Statutes, and Florida Administrative chapter 65D-30 govern and regulate this process.

8. The Department's duties include the licensing and regulation of the delivery of substance abuse services pursuant to chapter 397.

9. The licensed services include "medication-assisted treatment for opiate use disorders." § 397.311(26)(a)7., Fla. Stat.

10. The Department is tasked with determining the need for establishing MAT providers for opiate addiction. There is currently an unmet need for opioid treatment in Florida.

11. Generally, providers of MAT services for opiate addiction may only be established in response to the Department's determination and publication for additional medication treatment services. *See* § 397.427, Fla. Stat.

12. The primary reason for the Department's annual determination of need requirement is to make sure clinics are located where people need them, as timely access to treatment is a recognized public health strategy for addressing substance abuse.

Florida Administrative Code Rule 65D-30.014

13. Rule 65D-30.014 (Rule) specifies the "Standards for Medication and Methadone Maintenance Treatment" in Florida. Rule 65D-30.014(3)[1] requires that the following application procedures be followed:

[1] The undersigned notes that the Department has amended the Rule since conducting the determination of need and evaluations pertinent to this matter; however, the undersigned will refer to the version of the Rule (amended 6-15-19) that was promulgated and in effect at that time.

(3) Determination of Need.

(a) The Department shall annually perform the assessment detailed in the "Methodology of Determination of Need Methadone Medication-Assisted Treatment," CF-MH 4038, May 2019, incorporated by reference and available at http://www.flrules.org/Gateway/reference.asp?No=Ref-10669. The Department shall publish the results of the assessment in the Florida Administrative Register by June 30. Facilities owned and operated by the Florida Department of Corrections are exempt from the needs assessment process. However, these facilities must apply for a license to deliver this service.

(b) The publication shall direct interested parties to submit a letter of intent to apply for licensure to provide medication-assisted treatment for opioid use disorders to the Regional Office of Substance Abuse and Mental Health where need has been demonstrated.

1. The publication shall provide a closing date for submission of letters of intent.

2. Interested parties must identify the fiscal year of the needs assessment to which they are responding and the number of awards they are applying for per county identified in the assessment in their letter of intent.

(c) Within seven (7) business days of the closing date, the Regional Office shall notify parties who submitted a letter of intent on how to proceed.

1. If the number of letters of intent equals or is less than the determined need, parties shall be awarded the opportunity to proceed to licensure by completing an "Application for Licensure to Provide Substance Abuse Services" form, C&F-SA Form 4024, May 2019, incorporated by reference and available at http://www.flrules.org/Gateway/reference.asp?No=Ref-10668.

2. If the number of letters of intent exceeds the determined need, parties shall be invited to submit a "Methadone Medication-Assisted Treatment (MAT) Application to Proceed to Licensure Application" form, CF-MH 4041, May 2019, incorporated by reference and available at http://www.flrules.org/Gateway/reference.asp?No=Ref-10671. Applications may not be rolled over for consideration in response to a needs assessment published in a different year and may only be submitted for a current fiscal year needs assessment.

a. The Department shall utilize an evaluation team made up of industry experts to conduct a formal rating of applications as stipulated in the "Methadone Medication-Assisted Treatment (MAT) Application Evaluation" form, CF-MH 4040, May 2019, incorporated by reference and available at http://www.flrules.org/Gateway/reference.asp?No=Ref-10670. The evaluation team members shall not be affiliated with the Department, current methadone medication-assisted treatment providers operating in Florida, or the applicants.

b. The selection of a provider shall be based on the following criteria:

(I) Capability to Serve Selected Area(s) of Need and Priority Populations. Area(s) of Need are the counties identified as having a need for additional clinics. Priority Populations are pregnant women, women with young children, and individuals with financial hardships;

(II) Patient Safety and Quality Assurance/ Improvement;

(III) Scope of Methadone Medication-Assisted Treatment Services;

(IV) Capability and Experience; and

(V) Revenue Sources.

c. Applicants with the highest-scored applications in each county shall be awarded the opportunity to apply for licensure for the number of programs specified in their letter of intent to meet the need of that county. If there is unmet need, the next highest scored applicant(s) will receive an award(s) based on the remaining need and the number of programs specified in their letter of intent. This process will continue until the stated need is met. Regional offices shall inform the highest-scoring applicant(s) in writing of the award.

d. All awarded applicants must submit a letter of intent to apply for licensure to the appropriate regional office within 30 calendar days after the award. If an applicant declines an award or fails to submit the letter of intent within the specified time, the Department shall rescind the award. After the Department rescinds the original award for that selected area of need, the applicant with the next highest score shall receive the award.

(d) Awarded applicants must receive at least a probationary license within two (2) years of the published needs assessment connected to their application. See rule 65D-30.0036, F.A.C. for licensure application requirements. Applicants may submit a request to the State Authority and Substance Abuse and Mental Health Program Office for an exception if unable to meet timeframes due to a natural disaster that causes physical damage to the applicant's building(s). Proof of natural disaster and impact on physical property must accompany the request. Upon receipt of the request for exception and accompanying proof,
a one-time extension shall be granted for six (6) months. Providers who are delayed for a reason other than a natural disaster may petition the Department for a rule waiver pursuant to
section 120.542, F.S.

14. Rule 65D-30.014(3)(c)2.a. through c. are the portions of the Rule that address the application process of how providers will be selected to apply for licensure, and are applicable to this proceeding.

15. The Rule cites section 397.321(5) as rulemaking authority, and cites sections 397.311(26), 397.321, 397.410, and 397.427 as the laws implemented.

16. Rule 65D-30.014(3)(c)2.a., requires that applicants for a particular clinic be evaluated by industry experts who are independent of the Department, and not Department personnel.

17. Rule 65D-30.014(3)(c)2.b., further provides that industry experts would select the best-suited applicant for each county pursuant to the process set forth in the Rule.

18. The Rule limited the evaluation team to the following five criteria:

> (a) Capability to Serve Selected Area(s) of Need and Prior Populations. Area(s) of Need are the counties identified as having a need for additional clinics. Priority Populations are pregnant women, women with young children, and individuals with financial hardships;
>
> (b) Patient Safety and Quality Assurance/Improvement;
>
> (c) Scope of Methadone Medication-Assisted Treatment Services;
>
> (d) Capability and Experience; and
>
> (e) Revenue Sources.

19. Pursuant to the Rule, the applicants with the highest-rated score in each county shall be awarded the opportunity to apply for licensure for the number of programs specified in the applicant's letter of intent to meet the need of that county.

20. Neither chapter 397, nor the Rule, contain a procedure to break a tie score between applicants.

FY 2018/2019 Needs Assessment

21. The Department conducted an MAT needs assessment for fiscal year 2018/2019, and determined that 42 new MAT clinics were needed in Florida, including one in Brevard County.

22. Six providers, including Metro and Central Florida, submitted letters of intent/applications for Brevard County, which is the subject of the Notice.

23. As described in the Rule—specifically, rule 65D-30.014(3)(c)2.a.—a team of external evaluators received and scored the applications received for Brevard County.

24. The evaluators' scoring of applications for Brevard County resulted in a tie for the highest score between Metro and Central Florida.

25. The individual scores from the evaluators varied; however, the combined scores for both Metro and Central Florida totaled 641 points each. The individual scoring, as reflected within the Notice, provides as follows:

Brevard County Team 1 Evaluation Scores				
Applicant by County	Academic	Medical	Public Policy	Total
CFSATC dba Central Florida Treatment Centers	215	211	215	641
Metro Treatment of Florida, LP	205	218	218	641
CRC Health Treatment Clinics, LLC	214	187	212	613
Maric Healthcare, LLC	200	205	198	503
Psychological Addiction Services, LLC	143	177	149	469
Treatment Centers of America	156	120	167	443

The Tiebreaker

26. The Notice further provides the following concerning the tie scores between Metro and Central Florida:

> The evaluator scoring of applications for Brevard County resulted in a tie for the highest score between Metro Treatment of Florida (Metro Treatment) and Central Florida Treatment Centers (Central Florida). The individual scores from the evaluators varied; however, the combined scores totaled 614 [sic] points each.[2]
>
> There is no tie breaking procedure set forth in rule 65D-30.014, F.A.C., or other rules in the Florida Administrative Code. To resolve the tie in this circumstance, the Department reviewed a variety of possible factors in order to recommend an award. These factors included performance indicators, corporate status, and Florida operations as follows:
>
> - An average score for licensure inspections over the past three years
>
> - Data from the Department's Central Registry System from 10/1/2019 to 5/1/2020. Methadone medication-assisted treatment providers are required to register and participate in a Department-approved electronic registry system by rule 65D-30.014(4)(f), F.A.C. The data points considered were:
>
>   - Percentage of a provider's failure to enter required demographic information
>
>   - Percentage of a provider's failure to enter required photographs
>
>   - Percentage of a provider's failure to enter required dosing information
>
> - Whether the provider operates exclusively in Florida
>
> - Involvement of women in senior management positions

[2] The parties do not dispute that the total combined score should reflect 641, and not 614.

27. The Notice further provided:

Award Recommendation Criteria (Top Score Highlighted in Bold Italics)				
Provider	**Inspection Average**	**% Missing Demographics**	**% Missing Photograph**	**% Missing Dosing**
Central Florida Treatment Centers	**96.6%**	**1.6%**	**3.71%**	**2.33%**
Metro Treatment of Florida	93.6%	11.31%	1.62%	9.75%

28. Additionally, the Notice stated:

> Based on the four performance-based measures, Central Florida demonstrated a higher level of adherence to licensure requirements and entering data into the Central Registry System. In addition, Central Florida operates exclusively in Florida and has a woman as the Chief Executive Officer of the corporation. Based on these factors, the Department recommends award of the opportunity for licensure in Brevard County to Central Florida.

29. Metro challenges the agency statements in the Notice—as quoted in paragraphs 27 and 28 above—that set forth the Department's tiebreaking procedure, as constituting an unadopted rule.[3]

30. Ms. Gazioch testified that, after receiving the scoring for Brevard County from the evaluation team, which was a tie, "the Department made the final decision of who to award to." She stated that the Rule did not address what the Department should do in the event of a tie. After consulting with officials within the Department, she testified as to the decision the Department ultimately made:

[3] The Petition only challenges the tie breaking criteria the Department utilized as an unadopted rule upon which agency action cannot be based, pursuant to section 120.57(1)(e), and does not challenge any other aspect of the Department's handling of the evaluation of the letters of intent for the Brevard County license.

> [T]he course of action that the Department took was to award the opportunity to apply for licensure in Brevard County to Central Florida Treatment Centers. And that was based on looking at the average inspection scores, licensing inspection scores, looking at data entered into the central registry and compliance with certain items, such as missing demographics, as well as missing photographs in the central registry system, and also missing dosing in the central registry system.

31. Ms. Gazioch further testified as to the reason the Department considered these particular tie-breaking factors:

> Because they were factors that are equally – that could be equally measured across, really, any licensed methadone opioid treatment provider. The inspection average obviously speaks to compliance with rule and statue in terms of implementing an opioid treatment program.
>
> And then, obviously, the documentation that is entered into the registry is very, very important to make sure that, you know, as clients move through the system and they move from one provider to another, or in the event of a hurricane where somebody might have to get a guest dose, it's always very important to have the information accurate and updated in the central registry system. So that's another quality indicator that we felt was important to look at compliance with the information in that system.

32. Ms. Gazioch also testified that as a result of the tie, the Department was concerned that it might not be able to open a clinic in Brevard County, even though "the need was clear based on the needs assessment. So we felt that we were in a position that we had to move forward with a tiebreaker to at least be able to establish one clinic that was needed in that county."

33. The Department's decision to award the opportunity to apply for licensure in Brevard County to Central Florida was based on the tiebreaking

factors contained in the Notice and listed in paragraph 26 above. Obviously, these tiebreaking factors are not found in the Rule.

34. There is no evidence in the record that establishes whether the Department had time to initiate rulemaking to adopt a tiebreaking procedure for the Rule.

35. There is no evidence in the record that establishes whether rulemaking (to establish a tiebreaking procedure) was feasible or practicable.

36. There is no evidence in the record that establishes whether the Department would have utilized a different tiebreaking procedure in another county, if one had occurred. However, if a tie happened involving an applicant that did not currently operate in Florida, or only recently began operating in Florida, many of the tiebreaking criteria utilized by the Department for Brevard County would be inapplicable.

37, Although the Department developed and utilized the tiebreaking procedures in arriving at its decision to award the opportunity to apply for licensure in Brevard County to Central Florida, the external evaluators scored the applications pursuant to the Rule, and the Department did not change the scores from the external evaluators in arriving at its decision to award the opportunity to apply for licensure in Brevard County to Central Florida.

CONCLUSIONS OF LAW

38. The Division has jurisdiction over the subject matter and the parties to this proceeding in accordance with sections 120.569 and 120.57(1).

Standing

39. Standing under chapter 120 is guided by the two-pronged test established in *Agrico Chemical Corporation v. Department of Environmental Regulation,* 406 So. 2d 478 (Fla. 2d DCA 1981). Specifically, the court held:

> We believe that before one can be considered to have a substantial interest in the outcome of the proceeding, he must show 1) that he will suffer an injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of the injury. The second deals with the nature of the injury.

Id. at 482.

40. Although the parties stipulated that Metro and Central Florida have standing to participate in this proceeding, the undersigned finds that Metro, as a competing applicant to Central Florida, has standing as the Department's decision to award the opportunity to proceed to licensure in Brevard County will cause Metro to suffer an injury-in-fact. Additionally, Central Florida has standing to participate as its substantial interests will be affected in the event Metro prevails.

Nature of the Proceeding

41. Section 120.57(1)(e) provides, in pertinent part, as follows:

> (e)1. An agency or an administrative law judge may not base agency action that determines the substantial interests of a party on an unadopted rule or a rule that is an invalid exercise of delegated legislative authority. This subparagraph does not preclude application of valid adopted rules and applicable provisions of law to the facts.
>
> 2. In a matter initiated as a result of agency action proposing to determine the substantial interests of a party, the party's timely petition for hearing may challenge the proposed agency action based on a rule that is an invalid exercise of delegated legislative authority or based on an alleged unadopted rule. For challenges brought under this subparagraph:

* * *

> c. Section 120.56(4)(c) applies to a challenge alleging an unadopted rule.

* * *

> 3. Notwithstanding subparagraph 1., if an agency demonstrates that the statute being implemented directs it to adopt rules, that the agency has not had time to adopt those rules because the requirement was so recently enacted, and that the agency has initiated rulemaking and is proceeding expeditiously and in good faith to adopt the required rules, then the agency's action may be based upon those unadopted rules if the administrative law judge determines that rulemaking is neither feasible nor practicable and the unadopted rules would not constitute an invalid exercise of legislative authority if adopted as rules.

42. Metro has the burden of proof to establish, by a preponderance of the evidence, that the Department's tiebreaking procedure contained in the Notice was an unadopted rule. *See* § 120.57(1)(e) and (j), Fla. Stat.; *Ag. for Pers. with Disab. v. C.B.,* 130 So. 3d 713, 717 (Fla. 1st DCA 2013).

43. Section 120.52(16) defines a rule, in pertinent part, as:

> [E]ach agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule.

44. An unadopted rule is "an agency statement that meets the definition of the term 'rule,' but that has not been adopted pursuant to the requirements of s. 120.54." § 120.52(20), Fla. Stat.

45. In the instant matter, the issue is whether the tiebreaking procedures found in the Notice are an unadopted rule. And, more specifically, whether the tiebreaking procedures are of "general applicability" to meet the definition of a rule.

46. In determining whether the tiebreaking procedures are an unadopted rule, the undersigned must consider its effect. "An agency statement that either requires compliance, creates certain rights while adversely affecting others, or otherwise has the direct and consistent effect of law is a rule." *Dep't of Rev. v. Vanjaria Enterprises, Inc.,* 675 So. 2d 252, 255 (Fla. 5th DCA 1996) (citing *Dep't of Transp. v. Blackhawk Quarry Co.,* 528 So. 2d 447, 450 (Fla. 5th DCA 1988)).

47. In *Department of Highway Safety and Motor Vehicles v. Schluter*, 705 So. 2d 81 (Fla. 1st DCA 1997), the First District held that certain policies of the Florida Highway Patrol that were applied "in certain circumstances" did not constitute rules, holding "[t]hey cannot be considered statements of general applicability because the record establishes that each was to apply only under 'certain circumstances.'" *Id.* at 82. The court further held that these policies were not "'intended by their own effect to create rights, or to require compliance, or otherwise to have the direct and *consistent effect* of law.'" *Id.* (quoting *McDonald v. Dep't of Banking & Fin.*, 346 So. 2d 569, 581 (Fla. 1st DCA 1977) (emphasis added)).

48. In *Florida League of Cities, Inc. v. Administration Commission*, 586 So. 2d 397 (Fla. 1st DCA 1991), the First District held that a policy that imposes sanctions against municipalities who submitted comprehensive plans that were late, or not in compliance, was not an unadopted rule. The court held:

> With regard to the provisions of section 120.52(16), the policy isn't one of "general applicability" as it applies only to municipalities who are late or not in compliance in submitting their comprehensive

> plans. Every municipality in the state subject to the requirements of the Growth Management Act is potentially subject to the policy, but only those which fail to comply with the statutory and rule requirements will actually be considered for application of the policy. The policy has been applied, for the first time, to the first municipalities to ever come before the Administration Commission for "nonsubmission." On the record before this court, the "noncompliance" portion of the policy has never been applied to any one at all. The sanctions policy is also not one of "general applicability" because it is not intended by its own effect to create rights or to require compliance.

Id. at 406.

49. The undersigned concludes that the tiebreaking procedures found in the Notice do not meet the definition of a "rule," as they cannot be considered a statement of "general applicability" that implements, interprets, or prescribes law or policy. The tiebreaking procedures in the Notice contain the following qualifier: "[t]o resolve the tie in this circumstance . . . ." The record in this proceeding reveals that the Department used these tiebreaking procedures in only one of the 42 reviews of applications for MAT licensure in Florida, and there is no evidence that the Department would, or could, use these tiebreaking procedures in any other Florida county if a tie were to occur in an application for MAT licensure (as the Rule does not require applicants to be current MAT providers, it is possible that the Department would resort to different tiebreaking procedures if a tie occurred involving a "new" applicant). Because the tiebreaking procedures apply in

this "certain circumstance" and do not otherwise have the "consistent effect" of law, the undersigned concludes that they are not an unadopted rule.[4]

50. Metro also raises the questions of whether the tiebreaking procedures are (a) arbitrary or capricious, or (b) enlarge, modify, or contravene the specific provisions of law implemented. These are not legal considerations for an unadopted rule challenge under section 120.57(1)(e). The only relevant inquiry for the undersigned in this matter is whether the tiebreaking procedures in the Notice constitute an unadopted rule.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby RECOMMENDS that the Department of Children and Families enter a final order dismissing the Petition for Formal Administrative Hearing Involving Material Disputed Facts of Metro Treatment of Florida, L.P., and awarding the MAT license in Brevard County to CFSATC d/b/a Central Florida Treatment Centers.

[4] The undersigned also finds instructive the administrative law judge's determination that a "coin toss" tie-breaking procedure in a competitive procurement that was not supported by the applicable statute or rule was not an unadopted rule because the procedure was "not a statement of general applicability because it was, in essence, an *ad hoc* decision, for obscure reasons, by which the Department elected to break the tie purportedly involved in the case at hand, solely applicable to these two applicants." *T.S. v. Dep't of Educ., Div. of Blind Servs.,* Case No. 05-1695BID, RO at p. 29-30 (DOAH Oct. 7, 2005), *rejected in part,* Case No. DOE-2005-1076 (Fla. DOE Nov. 23, 2005). The undersigned notes that the Department of Education, in its final order, rejected the administrative law judge's findings and conclusions as "immaterial, irrelevant, and unnecessary" on this issue because it determined that there was in fact no tie between the applicants.

DONE AND ENTERED this 9th day of December, 2020, in Tallahassee, Leon County, Florida.

ROBERT J. TELFER III
Administrative Law Judge
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Filed with the Clerk of the
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.