STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA ARGENTUM,

Petitioner,

v. Case No. _____

STATE OF FLORIDA,
DEPARTMENT OF ELDER AFFAIRS,

Respondent.
_____/

PETITION SEEKING AN ADMINISTRATIVE DETERMINATION OF THE INVALIDITY OF PROPOSED RULES 58A-5.0131, 58A-5.0181, 58A-5.0182, 58A-5.0185, 58A-5.0191, 58A-5.024, and 58A-5.031, FLORIDA ADMINISTRATIVE CODE

Petitioner, Florida Argentum, ("FL Argentum") pursuant to section 120.56(2), Florida Statutes, files this petition requesting a formal administrative hearing and seeking a final order determining that proposed rules 58A-5.0131, 58A-5.0181, 58A-5.0182, 58A-5.0185, 58A-5.0191, 58A-5.024 and 58A-5.031 , Florida Administrative Code, ("the proposed rules"), noticed by Respondent, State of Florida, Department of Elder Affairs ("DOEA") constitute invalid exercises of delegated legislative authority, and in support thereof alleges:

I. PARTIES AND BACKGROUND

1. Petitioner, FL Argentum is an association representing companies that operate professionally managed senior living communities and industry partners that serve senior living operators in the State of Florida. Members of FL Argentum include the largest assisted living providers in the State. For purposes of this proceeding, FL Argentum's address shall be that of undersigned counsel.

2. Respondent, DOEA is one of the state agencies charged with implementing the

Assisted Living Facilities Act ("the Act") under Part I of Chapter 429, Florida Statutes. DOEA's address is: 4040 Esplanade Way, Tallahassee, Florida 32399-7000.

3. DOEA is charged by sections 429.24, 429.255, 429.256, 429.275, 429.41, and 429.52, Florida Statutes, to adopt rules administering the Act and thus is the proper respondent in this proceeding. DOEA published a Notice of Proposed Rule in the Florida Administrative Register on April 11, 2016 stating its intent "to implement changes to the assisted living facility regulatory statutes enacted in Ch. 2015-126, L.O.F., and to address the safety and quality of services and care provided to residents within assisted living facilities while being mindful of unnecessary increases in regulation given the many variations in services provided, the number of residents or the size of the facility, and the makeup of resident populations in the facilities." A copy of the Notice is attached as Exhibit "A." In the Notice, DOEA listed proposed changes to eleven rules in Chapter 58A-5, Florida Administrative Code.

4. DOEA held hearings on the proposed rules on May 16, 2016, August 3, 2016 and September 20, 2016. In response to an October 31, 2016 letter from the Joint Administrative Procedures Committee ("JAPC") notifying DOEA that JAPC was considering an objection to the proposed rules, DOEA requested that the statutory timeframe for rulemaking be tolled. Copies of the October 31, 2016 letters from JAPC and DOEA are attached as Composite Exhibit "B."

5. On July 13, 2017--over a year and three months after DOEA published its original Notice of Proposed Rule, DOEA published a Notice of Change in the Florida Administrative Register making substantial revisions to the proposed rules. *See* Notice of Change attached as Exhibit "C."

6. In an effort to engage in discussions with DOEA regarding the rule revisions, including the incorporation of new forms and a 150-page guide that had not previously been

vetted with stakeholders, on July 27, 2017 FL Argentum requested that DOEA hold an additional hearing to allow input from interested parties. DOEA denied that request on August 1, 2017, resulting in the filing of this Petition. A copy of DOEA's email denying FL Argentum's hearing request is attached as Exhibit "D."

7. This Petition challenging the proposed rules, including materials incorporated into the proposed rules, as invalid exercises of delegated legislative authority, is filed within twenty days of the publication of the Notice of Change and is thus timely pursuant to section 120.56(2)(a), Florida Statutes.

II. STATEMENT OF FACTS WHICH SHOW THAT THE PROPOSED RULES CONSTITUTE INVALID EXERCISES OF DELEGATED LEGISLATIVE AUTHORITY

A. DOEA's Statutory Authority under the Assisted Living Facilities Act

8. DOEA has statutory authority in conjunction with the Agency for Health Care Administration, the Department of Children and Families, and the Department of Health to implement the Assisted Living Facilities Act under Part I of Chapter 429, Florida Statutes.

9. Specifically, DOEA has been given rulemaking authority in the following sections of Chapter 429, as detailed below[1]:

- "The department may by rule clarify terms, establish procedures, clarify refund policies and contract provisions, and specify documentation as necessary to administer this section." §429.24(8), Fla. Stat. (2017) ("Contracts").

- "Persons under contract to the facility, facility staff . . . and others defined by rule, may administer medications to residents, take residents' vital signs, manage individual weekly pill organizers for residents who self-administer medication . . ." §429.255(1)(a), Fla. Stat. (2017). "The Department of Elderly Affairs may adopt rules to implement the provisions of this section relating to use of an automated external defibrillator." §429.255(5), Fla. Stat. (2017) ("Use of personnel; emergency care.").

[1] This Petition only references rulemaking authority set forth in those sections of Chapter 429, Florida Statutes, cited by DOEA as rulemaking authority for the proposed rules at issue in this Petition.

- "The department may by rule establish facility procedures and interpret terms as necessary to implement this section." §429.256(6), Fla. Stat. (2017) ("Assistance with self-administration of medication.").

- "The department may by rule clarify terms and specify procedures and documentation necessary to administer the provision of this section relating to the proper management of residents' funds and personal property and the execution of surety bonds." §429.27(8), Fla. Stat. (2017) ("Property and personal affairs of residents.").

- "The department may by rule clarify terms, establish requirements for financial records, accounting procedures, personnel procedures, insurance coverage, and reporting procedures, and specify documentation as necessary to implement the requirements of this section." §429.275(4), Fla. Stat. (2017) ("Business practice; personnel records; liability insurance.").

- "[T]he 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:" maintenance of facilities, including fire safety requirements and elopement prevention drills; preparation of an annual comprehensive emergency management plan; staffing plans and training; sanitary conditions of facilities; facility licensing and business operations; facility inspection and complaint processes; enforcement of the resident bill of rights; the care and maintenance of residents; and "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;" the use of physical or chemical restraints; the establishment of specific policies and procedures on resident elopement. §429.41(1), Fla. Stat. (2017) ("Rules establishing standards.").

  "(3) The department shall submit a copy of proposed rules to the Speaker of the house of Representatives, the President of the Senate, and appropriate committees of substance for review and comment prior to the promulgation thereof. Rules promulgated by the department shall encourage the development of homelike facilities which promote the dignity, individuality, personal strengths, and decisionmaking ability of the residents." §429.41(3), Fla. Stat. (2017).

- "(2) Administrators and other assisted living facility staff must meet minimum training and education requirements established by the Department of Elderly Affairs by rule. . .

  (3) The department shall establish a competency test and a minimum required score to indicate successful completion of the training and educational requirements. . . .

  * * *

  (6) Staff involved with the management of medications and assisting with the self-administration of medications under s. 429.256 must complete a minimum of 6 additional hours of training provided by a registered nurse, licensed pharmacist, or department staff. the department shall establish by rule the minimum requirements of this additional

training.

* * *

(9) The department shall adopt rules related to these training requirements, the competency test, necessary procedures, and competency test fees and shall adopt or contract with another entity to develop a curriculum, which shall be used as the minimum core training requirements. The department shall consult with representatives of stakeholder associations and agencies in the development of the curriculum."

§429.52, Fla. Stat. (2017) ("Staff training and educational programs; core educational requirement.").

10. Section 120.52(8), Florida Statutes, defines "invalid exercise of delegated legislative authority" as:

> 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)l.;
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)l.;
>
> (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.

(Emphasis added.)

11. In a proposed rule challenge pursuant to section 120.56(2), Florida Statutes, the agency "has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised." This is a burden DOEA cannot meet.

12. The proposed rules violate sections 120.52(8)(b), (c) and (e), Florida Statutes, in that: DOEA has exceeded its grant of rulemaking authority; the proposed rules modify and contravene the provisions of law implemented; and because the proposed rules are arbitrary and capricious.

B. The Proposed Rules Exceed DOEA's Statutorily Delegated Authority, Modify the Provisions of Law Implemented and are Arbitrary and Capricious.

13. DOEA's proposed rules are invalid because DOEA has exceeded its statutory authority by imposing additional requirements that are not authorized by statute.

14. A rule exceeds an agency's rulemaking authority where it seeks to prohibit practices that are currently allowed by Florida law, which is something only the Legislature has the power to do. *See B.H v. State,* 645 So. 2d 987 (Fla. 1994) (the separation of powers doctrine prohibits the Legislature from delegating authority to an agency to "say what the law is"); *Bd. of Trustees of the Internal Improvement Trust Fund v. Day Cruise Ass 'n, Inc.,* 794 So. 2d 696, 705- 06 (Fla. 1st DCA 2001) (Browning, J., concurring) (explaining that an agency's authority to regulate certain activities does not give it authority to prohibit otherwise lawful activities).

15. Further, section 120.54, Florida Statutes, which is applicable to this rulemaking proceeding, states that: "Rulemaking is not a matter of agency discretion."

16. The proposed rules are also invalid under section 120.52(8)(e), Florida Statutes, because they arbitrary and capricious. "A rule is arbitrary and capricious 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." §120.52(8)(e), Fla. Stat. (2017); *see also Agrico Chemical Co. v. Dept. of Environ. Reg.*, 365 So. 2d 759, 763 (Fla. 1st DCA 1979).

17. Specifically, FL Argentum has identified the following rule provisions which either lack statutory authority or are arbitrary and capricious as explained herein:

a. Rule 58A-5.0131: The proposed rule contains several definitions that are inconsistent with statutory requirements or exceed DOEA's rulemaking authority:

- (7) "Assistance with Transfer" adds the following language to the definition: "The term does not include total physical assistance with transfer provided by staff to residents." This revised definition would prohibit the use of assistive devices, such as sit-to-stand lifts that assist otherwise able residents who can bear some weight and are not permanently bedridden. These types of devices are further suggested by OSHA for use in ALFs to prevent injuries to employees during manual transfers.
- (41) "Unscheduled Service Need" removes language that allowed ALFs to respond to an unscheduled need within a "timeframe that provides reasonable assurance that the health, safety, and welfare of residents is preserved," to requiring that ALFs "ensure" the unscheduled need be met "promptly." It is arbitrary, capricious and further vague to require ALFs to guarantee an unforeseen need is met promptly instead of within a reasonable timeframe.

b. Rule 58-5.0181(1)(c): The proposed rule unnecessarily limits the ability of assisted living facilities ("ALFs") to admit residents who require services outlined in proposed rule 58-5.0181(1)(b) if the nurse providing the services is not employed or under contract with the ALF. The effect of this proposed rule would be to prohibit residents from contracting with third parties to provide needed services--a practice which is currently commonplace.

c. Rule 58A-5.0181(2): The proposed rule incorporates AHCA Form 1823, Resident Health Assessment for Assisted Living Facilities, March 2017. This proposed form was first introduced in the Notice of Change filed by DOEA on July 13, 2017, with no opportunity for input by stakeholders. The proposed Form 1823 is an invalid exercise of delegated legislative authority for a number of reasons. First, page one of the proposed form adds requirements regarding elopement that are not authorized by statute given that the health care provider must now bear the responsibility of assessing "elopement risk." Further, the health care provider is required to state whether the resident poses a danger to self or others based upon a history of physically or sexually suggestive behavior. There is no statutory authority for requiring health care providers to make this type of assessment and to potentially assume liability should a resident with this type of history cause harm to others.

Page three, Section 2-A of the proposed form further impermissibly exceeds DOEA's rulemaking authority in that all of the items included in this section are directly derived from Medicaid assessment requirements and have no bearing on whether an individual may appropriately be placed in an assisted living facility. CMS and nursing home requirements are inappropriate, and indeed arbitrary and capricious, in a rule

governing ALFs where approximately 85% of the residents are private pay and not covered under Medicaid.

Finally, Form 1823 also impermissibly creates a contract for a plan of care between the resident and the ALF as both parties must sign and agree regarding services to be provided. DOEA has no authority to create a mandatory contract form, thereby disregarding the right of private parties to enter into a bargained-for contract.

d. Rule 58A-5.0181(4)(c)3: The proposed rule exceeds DOEA's delegated legislative authority whereby it shifts control of the development of the interdisciplinary plan to care for a resident in need of hospice services to the hospice and no longer requires a joint consultation. Under this scenario, the hospice would determine the services to be provided by the ALF's staff even though the ALF administrator is still ultimately responsible for ensuring the proper delivery of services to a resident in the ALF's care. It is especially important that the joint consultation remain in place given that ALF's staff cannot perform services beyond the scope of the facility's license even though an individual RN on staff may otherwise be qualified to perform certain procedures. The hospice, therefore, would need to provide staff under its license to perform certain procedures that residents require at the end of life for comfort.

e. Rule 58A-5.0182: The proposed rule requires determination of elopement risk prior to admission. This provision is inconsistent with section 429.26(5), Florida Statutes, which allows for completion of the required medical examination within 30 days following the resident's admission to the facility.

f. Rule 58A-5.0185: The proposed rule is arbitrary and capricious in that it requires ALF staff to read each medication label out loud when assisting a resident with self-

administration of medications. This very specific requirement unnecessarily leaves very little flexibility for ALFs to engage in normal conversational interactions with residents and instead moves toward an institutionalized setting, which is discouraged under the Act.

g. Rule 58A-0191: The proposed rule incorporates the 150-page Assistance with Self-Administration of Medication Guide. While the Guide may be useful reference material, there is no statutory authority for DOEA to give the Guide the force and effect of law by incorporating it into the rule. Pursuant to section 429.52(6), Florida Statutes, staff involved with the self-administration of medications are required to complete "a minimum of 6 additional hours of training provided by a registered nurse, licensed pharmacist, or department staff. The department shall establish by rule the minimum requirements of this additional training." Therefore, while DOEA can prescribe minimum requirements to be covered in the training, the statute clearly anticipates that one of the listed professionals will actually provide the training. Further, there are numerous inconsistencies between the content of the Guide and other existing laws and regulations which dictate that adoption of the Guide would constitute an invalid exercise of delegated legislative authority.

h. Rule 58A-5.024: The proposed rule specifies that day care participants and residents are both considered "residents" for the purposes of record requirements. This is contrary to the statutory definition of "resident" in section 429.02(20), Florida Statutes, which requires that the person actually "reside" at the facility. The use of another definition for "resident" can only serve to cause unneeded confusion, and is thus arbitrary and capricious. Next, the proposed rule creates new minimum requirements for a

facility's infection control policies and procedures. In these procedures, ALF staff are required to use alcohol-based hand rubs or soap and water before and after each resident contact. This is in contravention of rulemaking directives in Chapter 429 that aim to promote a home-like environment instead of an institutional environment. Further, the frequency of the required hand hygiene appears excessive, and is arbitrary and capricious.

The proposed rule also now makes ALFs responsible for maintaining paperwork documenting services provided by third parties without regard to the particular third party's practice requirements and responsibilities. This requirement arbitrarily and capriciously places an additional burden on the ALF and may potentially subject the ALF to additional liabilities based on services provided by a third party.

i. Rule 58A-5.031(2)(d): The proposed rule adds a requirement that the facility's staff nurse must coordinate with third party nursing providers to ensure that care provided to residents is safe and consistent. Again, this requirement arbitrarily and capriciously places responsibility on the ALF to, in essence, regulate the third party provider.

18. Therefore, for the above-stated reasons the proposed rules should be deemed invalid exercises of delegated legislative authority.

III. STANDING OF PETITIONER

21. Petitioner is adversely affected by the proposed rules because DOEA regulates Petitioner's members that operate assisted living facilities. FL Argentum has been authorized to file this Petition on behalf of its members, a substantial number of which would be adversely affected should the proposed rules be adopted.

22. The Petitioner has retained the services of the undersigned counsel to represent it in this proceeding, and has agreed to pay reasonable costs and attorneys' fees.

IV. REQUEST FOR RELIEF

WHEREFORE, Petitioner requests:

A. That a formal hearing be conducted before an Administrative Law Judge of the Division of Administrative Hearings pursuant to section 120.56, Florida Statutes, and that a final order be entered determining that the proposed rules constitute invalid exercises of delegated legislative authority; and

B. That Petitioner be awarded its fees and costs in this action pursuant to section 120.595(2), Florida Statutes.

Dated this 2nd day of August, 2017.

/s/ Amy W. Schrader
AMY W. SCHRADER
Florida Bar No. 0621358
Primary E-mail: aschrader@bakerdonelson.com
Secondary E-mail: lterry@bakerdonelson.com
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, PC
Monroe Park Tower
101 North Monroe Street, Suite 925
Tallahassee, FL 32301
Ph: (850) 425-7500
Attorney for Petitioner, Florida Argentum