The Florida Senate

COMMITTEE MEETING EXPANDED AGENDA

HEALTH REGULATION
Senator Garcia, Chair
Senator Sobel, Vice Chair

MEETING DATE: Tuesday, February 8, 2011
TIME: 9:00 —11:00 a.m.
PLACE: *Pat Thomas Committee Room,* 412 Knott Building

MEMBERS: Senator Garcia, Chair; Senator Sobel, Vice Chair; Senators Altman, Bennett, Diaz de la Portilla, Fasano, Gaetz, Gardiner, Jones, Latvala, Norman, and Ring

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
1	**SB 246** Joyner (Identical H 477)	Human Trafficking; Specifies documents that must be possessed by each person providing or offering to provide massage services in certain circumstances. Requires presentation of such documents upon request of a law enforcement officer. Requires operators of massage establishments to maintain valid work authorization documents on the premises for each employee who is not a United States citizen, etc. HR 02/08/2011 Fav/CS CJ BC	Fav/CS Yeas 12 Nays 0
2	**SB 406** Sobel (Identical H 245)	Florida Kidcare Program; Requires that the application form for the school breakfast and lunch programs also allow application for the Kidcare program or provide information about applying for the program. Requires the Florida Health Kids Corporation to include use of the school breakfast and lunch application form in the corporation's plan for publicizing the program. HR 02/08/2011 Fav/CS ED BC	Fav/CS Yeas 12 Nays 0
3	**SB 414** Oelrich (Identical H 137)	Prostate Cancer Awareness Program; Revises the structure and objectives of the Prostate Cancer Awareness Program. Authorizes the University of Florida Prostate Disease Center, in collaboration with other organizations and institutions, to establish a prostate cancer task force to replace the advisory committee. Provides for membership and duties of the task force. Requires an annual report to the Governor, Legislature, and State Surgeon General. HR 02/08/2011 Fav/CS BC RC	Fav/CS Yeas 12 Nays 0

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
4	**SB 420** Health Regulation	OGSR/Florida Center for Brain Tumor Research; Provides that personal identifying information pertaining to a donor to the central repository for brain tumor biopsies or the brain tumor registry of the Florida Center for Brain Tumor Research is confidential and exempt from public records requirements. Provides an exception under certain conditions for information disclosed to a person engaged in bona fide research. Provides for future legislative review and repeal of the exemption under the Open Government Sunset Review Act, etc. HR 02/08/2011 Favorable GO RC	Favorable Yeas 11 Nays 0
5	Consideration of proposed committee bill (Interim Project 2011-125 - Review the Moratorium on Nursing Home Certificates of Need):		
	SPB 7048	Certificates of Need; Extends until July 1, 2016, provisions authorizing the Agency for Health Care Administration to automatically grant a nursing home's request for a reduction in annual Medicaid patient days as a condition of its certificate of need in specified circumstances. Extends the moratorium on nursing home certificates of need until July 1, 2016. Provides conditions to be met by nursing homes in order to qualify for an exemption to the moratorium on certificates of need for nursing home facilities.	Submitted as Committee Bill

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Health Regulation Committee

BILL: CS/SB 246

INTRODUCER: Health Regulation Committee; and Senators Joyner and Margolis

SUBJECT: Human Trafficking

DATE: February 8, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Callaghan	Stovall	HR	**Fav/CS**
2.			CJ	
3.			BC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

This committee substitute (CS) for SB 246 requires operators of massage establishments to maintain valid work authorization documents on the premises for employees who are not U.S. citizens, and present these documents to a law enforcement officer upon request. The CS makes it unlawful for a massage establishment operator to knowingly use a massage establishment for the purpose of lewdness, assignation, or prostitution. Criminal penalties are established for a violation of any of the provisions set forth in the CS.

The effective date of this CS is October 1, 2011.

This CS creates section 480.0535, and substantially amends section 921.0022, of the Florida Statutes.

II. Present Situation:

Human Trafficking

Human trafficking is a form of modern-day slavery. Victims of human trafficking are young children, teenagers, men and women. Victims of human trafficking are subjected to force, fraud, or coercion, for the purpose of sexual exploitation or forced labor.[1]

The International Labor Organization (ILO), the United Nations agency charged with addressing labor standards, employment, and social protection issues, estimates that there are at least 12.3 million adults and children in forced labor, bonded labor, and commercial sexual servitude at any given time.[2] The Federal Government has estimated that the number of persons trafficked into the United States each year range from 14,500-17,500.[3] Additionally, an estimated 200,000 American children are at risk for trafficking into the sex industry each year, according to the U.S. Department of Justice.[4]

After drug dealing, trafficking of humans is tied with arms-dealing as the second largest criminal industry in the world, and is the fastest growing. Many victims of human trafficking are forced to work in prostitution or the sex entertainment industry. However, trafficking also occurs in forms of labor exploitation, such as domestic servitude, restaurant work, janitorial work, sweatshop factory work, and migrant agricultural work.[5]

Traffickers use various techniques to instill fear in victims and to keep them enslaved. Some traffickers keep their victims under lock and key. However, the more frequent practice is to use less obvious techniques including:

- Debt bondage - financial obligations, honor-bound to satisfy debt.
- Isolation from the public - limiting contact with outsiders and making sure that any contact is monitored or superficial in nature.
- Isolation from family members and members of their ethnic and religious community.
- Confiscation of passports, visas or identification documents.
- Use or threat of violence toward victims or families of victims.
- The threat of shaming victims by exposing circumstances to family.
- Telling victims they will be imprisoned or deported for immigration violations if they contact authorities.
- Control of the victims' money, and holding their money for "safe-keeping."[6]

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[1] U.S. Department of Health and Human Services, Administration for Children & Families, *About Human Trafficking*, available at http://www.acf.hhs.gov/trafficking/about/index.html# (Last visited on January 31, 2011).
[2] *See* U.S. Department of State, *The 2009 Trafficking in Persons (TIP) Report*, June 2009, available at http://www.state.gov/g/tip/rls/tiprpt/2009/ (Last visited on February 1, 2011).
[3] Sonide Simon, *Human Trafficking and Florida Law Enforcement,* Florida Criminal Justice Executive Institute, pg. 2, March 2008, available at http://www.fdle.state.fl.us/Content/getdoc/e77c75b7-e66b-40cd-ad6e-c7f21953b67a/Human-Trafficking.aspx (Last visited on February 1, 2011).
[4] *Id.* at 3.
[5] *Supra* fn. 1.
[6] *Id.*

Federal Trafficking Law

In 2000, Congress enacted the Trafficking Victims Protection Act (TVPA) to "combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims."7 The TVPA not only criminalizes human trafficking, but also requires that victims, who might otherwise be treated as criminals (e.g. engagement in prostitution), be treated as victims of crime and be provided with health and human services, if they cooperate with prosecutions.

The Trafficking Victims Protection Reauthorization Act of 2003 (TVPRA 2003), Pub. L. 108-193, reauthorized the TVPA and added responsibilities to the U.S. Government's anti-trafficking portfolio. In particular, the TVPRA 2003 mandated new information campaigns to combat sex tourism, added refinements to the federal criminal law provisions, and created a new civil action that allows victims to sue their traffickers in federal district court. In addition, the TVPRA 2003 required an annual report from the Attorney General to Congress.[8]

The Trafficking Victims Protection Reauthorization Act of 2005 (TVPRA 2005), Pub. L. 109-164, reauthorized the TVPA and authorized new anti-trafficking resources, including grant programs to assist state and local law enforcement efforts and expand victim assistance programs to U.S. citizens or resident aliens subjected to trafficking; authorized pilot programs to establish residential rehabilitative facilities for trafficking victims, including one program aimed at juveniles; and provided extraterritorial jurisdiction over trafficking offenses committed overseas by persons employed by or accompanying the federal government.[9]

The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008), Pub. L. 110-457, reauthorized the TVPA for 4 years and authorized new measures to combat human trafficking. The TVPRA 2008:

- Created new crimes imposing severe penalties on those who obstruct or attempt to obstruct the investigations and prosecutions of trafficking crimes;
- Changed the standard of proof for the crime of sex trafficking by force, fraud, or coercion by requiring that the government merely prove that the defendant acted in reckless disregard of the fact that such means would be used;
- Broadened the reach of the crime of sex trafficking of minors by eliminating the requirement to show that the defendant knew that the person engaged in commercial sex was a minor in cases where the defendant had a reasonable opportunity to observe the minor;
- Expanded the crime of forced labor by providing that "force" is a means of violating the law; imposed criminal liability on those who, knowingly and with intent to defraud, recruit workers from outside the U.S. for employment within the U.S. by making materially false or fraudulent representations;
- Enhanced the penalty for conspiring to commit trafficking-related crimes; and

[7] Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, (2000).

[8] Attorney General's Annual Report to Congress and Assessment of U.S. Government Activities to Combat Trafficking in Persons, pg. 2 (July 2010), available at http://www.justice.gov/ag/annualreports/tr2009/agreporthumantrafficking2009.pdf (Last visited on February 1, 2011).

[9] *Id.* at 3.

- Penalized those who knowingly benefit financially from participating in a venture that engaged in trafficking crimes.[10]

Between Fiscal Years 2001-2009, the FBI's Civil Rights Division and U.S. Attorneys' Offices, under authority of the TVPA, prosecuted 645 defendants, secured 466 convictions and guilty pleas, and opened 1,187 new investigations.[11]

Florida Statewide Task Force on Human Trafficking

The Florida Statewide Task Force on Human Trafficking was created in 2009[12] with the express purpose of examining the problem of human trafficking and recommending strategies and actions for reducing or eliminating the unlawful trafficking of men, women, and children into Florida. The Florida State University Center for the Advancement of Human Rights (CAHR) was directed to submit a statewide strategic plan to the task force by November 1, 2009.[13] The strategic plan was required to address the following five subjects:

- A description of available data on human trafficking in Florida;
- Identification of available victim programs and services;
- Evaluation of public awareness strategies;
- Assessment of current laws; and
- A list of recommendations produced in consultation with governmental and non-governmental organizations.[14]

The CAHR's strategic plan is broken up into five goals or objectives to meet the five subjects required to be addressed by the CAHR under ch. 2009-95, Laws of Florida. In summary, the strategic plan provided the following:

- Labor trafficking is the most prevalent type of human trafficking in Florida, while domestic minor sex trafficking is also prevalent and the most under-reported and under-prosecuted human trafficking offense in Florida.
- There is a need to have and maintain an up-to-date resource directory for all persons and organizations that assist victims of trafficking in Florida.
- Public awareness is at the heart of Florida being able to successfully assist victims of human trafficking statewide and public awareness campaigns must have broad support, involve diverse activities, and have an accurate and concise message, while also being culturally sensitive.
- Although Florida has made progress in its human trafficking laws, more training is needed to carry out enforcement of such laws and further reforms should be considered.
- There is a need for state government training and awareness of human trafficking so that government employees and contractors may learn how they might encounter human trafficking and how they should respond; Florida needs to provide effective and safe services

[10] *Id.*
[11] *Id.* at 48.
[12] *See* ch. 2009-95, Laws of Florida.
[13] Florida State University, Center for the Advancement of Human Rights, *Florida Strategic Plan on Human Trafficking*, available at http://www.dcf.state.fl.us/initiatives/humantrafficking/docs/FSUStrategicPlan2010.pdf (Last visited on January 31, 2011).
[14] *Id.*

for victims; and law enforcement needs more training for more effective responses and needs to develop and sustain partnerships within communities.[15]

The task force was required to propose a plan of implementation of the strategic plan by October 1, 2010.[16]

Human Trafficking in Florida

The exact number of persons trafficked in Florida is difficult to determine because little data is available due to the reluctance of victims to report trafficking, the ease with which traffickers can move and operate, and until recently, little historical experience by law enforcement and prosecutors in cases of human trafficking. However, Florida is ranked as one of the top states in the nation for human trafficking cases, with immigrants and non-English speaking persons especially vulnerable.[17]

The CAHR has found that Asian massage parlors are often used to disguise sex trafficking. Women are trafficked in from Korea, Vietnam, Thailand or China using tourist visas. The women are then forced to work off their debt of being smuggled in, which is typically $50,000 to $100,000.[18] Officials in Florida have discovered a very pronounced pattern of "moving targets" with some massage establishments operating a "taxi service," transporting women to other massage establishments throughout the country as often as every 7 to 14 days.[19] Massage establishments engaged in trafficking will also often close and re-open frequently to avoid having to hold trafficked women in a single location.[20]

Currently in Florida, all law enforcement recruits receive mandatory training in recognizing and investigating human trafficking cases. Also, the U.S. Justice Department currently operates human trafficking task forces in Miami, Homestead, Naples, Fort Myers, and Tampa-Clearwater.

Florida Laws on Human Trafficking, Sex Trafficking, and Prostitution

"Human trafficking" is defined under s. 787.06(2)(c), F.S., to mean transporting, soliciting, recruiting, harboring, providing, or obtaining another person for transport.

Section 787.06(3), F.S., provides that it is a second-degree felony, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, F.S., (maximum imprisonment of 15 years, maximum fine of $10,000, or penalties applicable for a habitual offender) for any person to knowingly:

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[15] *Id.*

[16] Senate Health Regulation Committee professional staff requested a copy of the implementation plan on January 31, 2011, from a task force member, and is awaiting a response.

[17] Terry S. Coonan, *Human Rights in the Sunshine State: A proposed Florida Law on Human Trafficking*, 31 FLA. ST. U. L. REV. 289 (Winter 2004).

[18] Email received from Terry Coonan, Executive Director of the FSU Center for the Advancement of Human Rights (CAHR), on February 1, 2011. A copy of the email is on file with the Senate Health Regulation Committee.

[19] Terry Coonan, CAHR, *Rationale for the Proposed Revisions.* Document on file with the Committee on Health Regulation staff.

[20] *Supra* fn. 13.

- Engage, or attempt to engage, in human trafficking with the intent or knowledge that the trafficked person will be subjected to forced labor or services; or
- Benefit financially by receiving anything of value from participation in a venture that has subjected a person to forced labor or services.

"Sex trafficking" is regulated under ch. 796, F.S., relating to prostitution. Section 796.045, F.S., provides that any person who knowingly recruits, entices, harbors, transports, provides, or obtains by any means a person, knowing that force, fraud, or coercion will be used to cause that person to engage in prostitution, commits the offense of sex trafficking, a second-degree felony. A person commits a first-degree felony, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, F.S., (maximum imprisonment of 30 years, maximum fine of $10,000, or penalties applicable for a habitual offender) if the offense of sex trafficking is committed against a person who is under the age of 14 or if such offense results in death.

Section 796.07, F.S., makes it unlawful to, among other things, own, establish, maintain, or operate any place, structure, building, or conveyance for the purpose of lewdness, assignation, or prostitution. A person who commits this offense is guilty of:
- A misdemeanor of the second-degree for the first violation, punishable as provided in s. 775.082, F.S., or s. 775.083, F.S., (maximum imprisonment of 60 days or maximum fine of $500);
- A misdemeanor of the first-degree for the second violation, punishable as provided in s. 775.082, F.S., or s. 775.083, F.S., (maximum imprisonment of 1 year or maximum fine of $1,000); or
- A felony of the third degree for the third or subsequent violation, punishable as provided in s. 775.082, F.S., s. 775.083, F.S., or s. 775.084, F.S., (maximum imprisonment of 5 years, maximum fine of $5,000, or penalties applicable for a habitual offender).

"Prostitution" is defined under s. 796.07, F.S., to mean the giving or receiving of the body for sexual activity for hire but excludes sexual activity between spouses. "Lewdness" means any indecent or obscene act and "assignation" means the making of any appointment or engagement for prostitution or lewdness, or any act in furtherance of such appointment or engagement.

Florida Regulation of Massage Therapists and Massage Establishments

Massage therapists and massage establishments in Florida are regulated by the Board of Massage Therapy (board) in the DOH under the Massage Practice Act, ch. 480, F.S., and Chapter 64B7, Florida Administrative Code. A person must be licensed as a massage therapist to practice massage for compensation, unless otherwise specifically exempted under the Massage Practice Act.[21] In order to be licensed as a massage therapist, an applicant must:
- Be at least 18 years old or have received a high school diploma or graduate equivalency diploma;
- Complete a course of study at a board-approved massage school or apprenticeship program; and
- Pass an examination,[22] which is currently offered in English and in Spanish.[23]

[21] Section 480.047(1)(a), F.S. *See also* s. 480.033(4), F.S.
[22] Section 480.042, F.S.

Licensed massage therapists may practice in a licensed massage establishment, at a client's residence or office, or at a sports event, convention or trade show.[24] Sexual misconduct, defined as a violation of the professional relationship through the use of such relationship to engage or attempt to engage in sexual activity outside the scope of the profession, is strictly prohibited.[25]

A person may be approved by the board to become an apprentice to study massage under the instruction of a licensed massage therapist, if the person meets the qualifications stated in Rule 64B7-29.002, Florida Administrative Code. To qualify for an apprenticeship, the applicant must have secured the sponsorship of a sponsoring massage therapist, complete a DOH application, pay a $100 fee, and must not be enrolled simultaneously as a student in a board-approved massage school.[26]

Section 480.43, F.S., provides that a massage establishment license is required at any facility where massage therapy services are offered by a licensed massage therapist and directs the board to adopt application criteria. It also provides that massage establishment licenses may not be transferred to a new owner, but may be transferred to a new location if the new location is inspected and approved by the board and an application and inspection fee has been paid. A license may be transferred from one business name to another if approved by the board and if an application fee has been paid.

The board's rules include insurance requirements, compliance with building codes, and safety and sanitary requirements, and require a licensed massage therapist to be onsite any time a client is receiving massage services.[27] Upon receiving an application, the DOH inspects the establishment to ensure it meets the licensure requirements.[28] Once licensed, the DOH inspects the establishment at least annually.[29]

An application for a massage establishment license may be denied for an applicant's conviction of crimes related to the practice of massage, and must be denied for convictions of enumerated crimes within 15 years of application[30] and for past sexual misconduct.[31]

It is a misdemeanor of the first degree to operate an unlicensed massage establishment.[32] Currently, upon receiving a complaint that unlicensed activity is occurring, the DOH's Medical Quality Assurance inspectors coordinate with local law enforcement. Unlicensed practice of massage therapy is punishable as a third-degree felony.[33] The DOH may issue cease and desist notices, enforceable by filing for an injunction or writ of mandamus and seek civil penalties against the unlicensed party in circuit court.[34] The DOH may also impose, by citation, an

[23] Rule 64B7-25.001(3), F.A.C.
[24] Section 480.046(1)(n), F.S.
[25] Section 480.0485, F.S. *See also* Rule 64B7-26.010, F.A.C.
[26] *See* rule 64B7-27.005, for the apprentice fee amount.
[27] Rule 64B7-26.003, F.A.C.
[28] Rule 64B7-26.004, F.A.C.
[29] Rule 64B7-26.005, F.A.C.
[30] Section 456.0635, F.S.
[31] Section 456.063, F.S.
[32] Section 480.047, F.S.
[33] Section 456.065, F.S.
[34] *Id.*

administrative penalty up to $5,000. While the DOH has investigative authority, it does not have arrest authority or sworn law enforcement personnel.

I-551 Permanent Residence Card, Employment Authorization Document

The U.S. Citizen and Immigration Service (USCIS) within the Department of Homeland Security (DHS) is the federal department responsible for granting lawful permanent residence.[35] A permanent resident is someone who has been granted authorization to live and work in the U.S. on a permanent basis. As proof of that status, a person is granted a Permanent Resident Card or Alien Registration Receipt Card. A Permanent Resident Card is officially called "Form I-551," and commonly called a "green card."[36]

Individuals who are temporarily in the U.S. and eligible[37] for employment authorization may file a Form I-765, Application for Employment Authorization, to request an Employment Authorization Document (EAD).[38] An EAD card, commonly called a "work permit," provides its holder the legal right to work in the U.S.

III. Effect of Proposed Changes:

Section 1 creates s. 480.0535, F.S., to require a person, who operates a massage establishment pursuant to s. 480.043, F.S., to maintain valid work authorization documents on the premises for *each* employee who is not a U.S. citizen and to present to a law enforcement officer, upon request, the work authorization documents for each employee who is not a U.S. citizen. Valid work authorization documents include:

- A valid I-551 permanent residence card; or
- A valid government-issued employment authorization document.

The CS prohibits a person operating a massage establishment from knowingly using a massage establishment licensed pursuant to s. 480.043, F.S., including any location, structure, trailer, conveyance or any other part thereof, for the purpose of lewdness, assignation, or prostitution.

The CS provides a cross-reference to s. 796.07, F.S., to define the terms lewdness, assignation, and prostitution.

A person who violates any provisions of the CS commits:

- A misdemeanor of the second degree for the first violation, punishable as provided in s. 775.082, F.S., or s. 775.083, F.S., (maximum imprisonment of 60 days or maximum fine of $500);

[35] U.S. Immigration Support, *USCIS*, available at http://www.usimmigrationsupport.org/uscis.html (Last visited on February 1, 2011).
[36] U.S. Immigration Support, *Form I-551 (Green Card)*, available at: http://www.usimmigrationsupport.org/form-i-551-greencard.html (Last visited on February 1, 2011).
[37] Employment authorization eligibility is codified in Federal Regulations at 8 C.F.R. §274a.12, available at http://law.justia.com/us/cfr/title08/8-1.0.1.2.54.2.1.1.html (Last visited on February 1, 2011).
[38] U.S. Citizen and Immigration Service, *I-765, Application for Employment Authorization*, available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=73ddd59cb7a5d010VgnVCM10000048f3d6a1RCRD&vgnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD (Last visited on February 1, 2011).

- A misdemeanor of the first-degree for the second violation, punishable as provided in s. 775.082, F.S., or s. 775.083, F.S., (maximum imprisonment of 1 year or maximum fine of $1,000); or
- A felony of the third-degree for the third or subsequent violation, punishable as provided in s. 775.082, F.S., s. 775.083, F.S., or s. 775.084, F.S., (maximum imprisonment of 5 years, maximum fine of $5,000, or penalties applicable for a habitual offender).

Section 2 amends s. 921.0022, F.S., to rank third and subsequent violations of s. 480.0535, F.S., as level 5 offenses under the Criminal Punishment Code for the purpose of sentencing.

Section 3 provides an effective date of October 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this CS have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of this CS have no impact on public records or open meetings issues under the requirements of Article I, Section 24(a) and (b) of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this CS have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Operators or owners of massage establishments may incur nominal administrative costs to comply with the requirements set forth in the CS. The provisions of the CS might prevent or deter human trafficking in massage establishments.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Health Regulation on February 8, 2011:
The CS differs from the bill in that it:

- Removes the requirement that individuals providing or offering to provide massage services for compensation or on behalf of a massage establishment or business possess, and show to law enforcement upon request, license cards issued by the Department of Health and other identifying documentation.
- Clarifies that the employment authorization documents to be maintained by the massage establishment operators are to be "government-issued" employment authorization documents.
- Provides a cross-reference for the definitions of the terms "lewdness," "assignation," and "prostitution."
- Makes a technical correction in the Criminal Punishment Code relating to a description of the offenses provided for in the bill.

B. Amendments:

None.

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LEGISLATIVE ACTION

Senate	.	House
Comm: RS	.	
02/08/2011	.	
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The Committee on Health Regulation (Jones) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause and insert:

Section 1. Section 480.0535, Florida Statutes, is created to read:

480.0535 Documents required while offering or providing massage services.—

(1) In order to provide law enforcement agencies the means to more effectively identify, investigate, and arrest persons engaging in human trafficking as defined in s. 787.06 or prostitution as proscribed by chapter 796 by the fraudulent or

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valid use of a license to practice massage therapy or operate a massage establishment:

(a) An individual may not offer or provide massage services for compensation or on behalf of a massage establishment or for any business without being in possession of a valid wallet-size identification license card or wall license card issued in his or her name by the Department of Health pursuant to s. 456.013, and one of the following documents issued in his or her name:

1. A current driver's license or identification card issued by a state.

2. A valid passport issued by the Department of State of the United States.

3. A valid I-551 permanent resident card.

4. A valid government-issued employment authorization document.

(b) Upon request by a law enforcement officer, each individual providing or offering to provide massage services for compensation or on behalf of a massage establishment or for any business must present the wallet-size identification license card or wall license card issued in his or her name by the Department of Health pursuant to s. 456.013, plus one of the additional documents specified in paragraph (a).

(2)(a) A person operating a massage establishment pursuant to s. 480.043 shall maintain, and it is unlawful to operate a massage establishment without, a valid work authorization document on the premises for each employee who is not a United States citizen. Valid work authorization documents for an employee who is not a United States citizen include:

1. A valid I-551 permanent resident card; or

2. A valid government-issued employment authorization document.

(b) Upon request by a law enforcement officer, any person operating a massage establishment must present one of the documents specified in paragraph (a) for each employee who is not a United States citizen.

(3) A person operating a massage establishment may not knowingly use a massage establishment license issued under s. 480.043 for the purpose of lewdness, assignation, or prostitution, as these terms are defined in s. 796.07, at any massage establishment location or structure, or any part thereof, including any trailer or other conveyance.

(4) An individual or person who violates any provision of this section commits:

(a) A misdemeanor of the second degree for a first violation, punishable as provided in s. 775.082 or s. 775.083.

(b) A misdemeanor of the first degree for a second violation, punishable as provided in s. 775.082 or s. 775.083.

(c) A felony of the third degree for a third or subsequent violation, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Section 2. Paragraph (e) of subsection (3) of section 921.0022, Florida Statutes, is amended to read:

921.0022 Criminal Punishment Code; offense severity ranking chart.—

(3) OFFENSE SEVERITY RANKING CHART

(e) LEVEL 5

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Florida Statute	Felony Degree	Description
316.027(1)(a)	3rd	Accidents involving personal injuries, failure to stop; leaving scene.
316.1935(4)(a)	2nd	Aggravated fleeing or eluding.
322.34(6)	3rd	Careless operation of motor vehicle with suspended license, resulting in death or serious bodily injury.
327.30(5)	3rd	Vessel accidents involving personal injury; leaving scene.
381.0041(11)(b)	3rd	Donate blood, plasma, or organs knowing HIV positive.
440.10(1)(g)	2nd	Failure to obtain workers' compensation coverage.
440.105(5)	2nd	Unlawful solicitation for the purpose of making workers' compensation claims.
440.381(2)	2nd	Submission of false, misleading, or incomplete information with the purpose of avoiding or reducing workers' compensation premiums.

480.0535(4)(c)	3rd	Lack of possession of identifying documents or work authorization documents to provide massage services or operate a massage establishment; third or subsequent offense. Unlawful use of a massage establishment license for the purpose of assignation, prostitution, or lewdness; third or subsequent offense.
624.401(4)(b)2.	2nd	Transacting insurance without a certificate or authority; premium collected $20,000 or more but less than $100,000.
626.902(1)(c)	2nd	Representing an unauthorized insurer; repeat offender.
790.01(2)	3rd	Carrying a concealed firearm.
790.162	2nd	Threat to throw or discharge destructive device.
790.163(1)	2nd	False report of deadly explosive or weapon of mass destruction.
790.221(1)	2nd	Possession of short-barreled shotgun or machine gun.

790.23	2nd	Felons in possession of firearms, ammunition, or electronic weapons or devices.
800.04(6)(c)	3rd	Lewd or lascivious conduct; offender less than 18 years.
800.04(7)(b)	2nd	Lewd or lascivious exhibition; offender 18 years or older.
806.111(1)	3rd	Possess, manufacture, or dispense fire bomb with intent to damage any structure or property.
812.0145(2)(b)	2nd	Theft from person 65 years of age or older; $10,000 or more but less than $50,000.
812.015(8)	3rd	Retail theft; property stolen is valued at $300 or more and one or more specified acts.
812.019(1)	2nd	Stolen property; dealing in or trafficking in.
812.131(2)(b)	3rd	Robbery by sudden snatching.
812.16(2)	3rd	Owning, operating, or conducting a chop

		shop.
817.034(4)(a)2.	2nd	Communications fraud, value $20,000 to $50,000.
817.234(11)(b)	2nd	Insurance fraud; property value $20,000 or more but less than $100,000.
817.2341(1), (2)(a) & (3)(a)	3rd	Filing false financial statements, making false entries of material fact or false statements regarding property values relating to the solvency of an insuring entity.
817.568(2)(b)	2nd	Fraudulent use of personal identification information; value of benefit, services received, payment avoided, or amount of injury or fraud, $5,000 or more or use of personal identification information of 10 or more individuals.
817.625(2)(b)	2nd	Second or subsequent fraudulent use of scanning device or reencoder.
825.1025(4)	3rd	Lewd or lascivious exhibition in the presence of an elderly person or disabled adult.

827.071(4)	2nd	Possess with intent to promote any photographic material, motion picture, etc., which includes sexual conduct by a child.
827.071(5)	3rd	Possess any photographic material, motion picture, etc., which includes sexual conduct by a child.
839.13(2)(b)	2nd	Falsifying records of an individual in the care and custody of a state agency involving great bodily harm or death.
843.01	3rd	Resist officer with violence to person; resist arrest with violence.
847.0135(5)(b)	2nd	Lewd or lascivious exhibition using computer; offender 18 years or older.
847.0137 (2) & (3)	3rd	Transmission of pornography by electronic device or equipment.
847.0138 (2) & (3)	3rd	Transmission of material harmful to minors to a minor by electronic device or equipment.
874.05(2)	2nd	Encouraging or recruiting another to join a criminal gang; second or subsequent offense.

893.13(1)(a)1.	2nd	Sell, manufacture, or deliver cocaine (or other s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)4. drugs).
893.13(1)(c)2.	2nd	Sell, manufacture, or deliver cannabis (or other s. 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)5., (2)(c)6., (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4) drugs) within 1,000 feet of a child care facility, school, or state, county, or municipal park or publicly owned recreational facility or community center.
893.13(1)(d)1.	1st	Sell, manufacture, or deliver cocaine (or other s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)4. drugs) within 1,000 feet of university.
893.13(1)(e)2.	2nd	Sell, manufacture, or deliver cannabis or other drug prohibited under s. 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)5., (2)(c)6., (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4) within 1,000 feet of property used for religious services or a specified business site.

893.13(1)(f)1.	1st	Sell, manufacture, or deliver cocaine (or other s. 893.03(1)(a), (1)(b), (1)(d), or (2)(a), (2)(b), or (2)(c)4. drugs) within 1,000 feet of public housing facility.
893.13(4)(b)	2nd	Deliver to minor cannabis (or other s. 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)5., (2)(c)6., (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4) drugs).
893.1351(1)	3rd	Ownership, lease, or rental for trafficking in or manufacturing of controlled substance.

Section 3. This act shall take effect October 1, 2011.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete everything before the enacting clause and insert:

A bill to be entitled

An act relating to human trafficking; creating s. 480.0535, F.S.; specifying documents that must be possessed by each individual providing or offering to provide massage services in certain circumstances; requiring presentation of such documents upon request of a law enforcement officer; requiring operators of

478958

massage establishments to maintain valid work authorization documents on the premises for each employee who is not a United States citizen; requiring presentation of such documents upon request of a law enforcement officer; prohibiting the use of a massage establishment license for the purpose of lewdness, assignation, or prostitution; providing criminal penalties; amending s. 921.0022, F.S.; including within the severity ranking chart of the Criminal Punishment Code certain offenses prohibited by the act; providing an effective date.

947710

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
02/08/2011	.	
	.	
	.	
	.	

The Committee on Health Regulation (Jones) recommended the following:

Senate ~~Substitute for~~ **Amendment** ~~(478958)~~ **(with title amendment)**

Delete everything after the enacting clause and insert:

Section 1. Section 480.0535, Florida Statutes, is created to read:

480.0535 Documents required while offering or providing massage services.—

(1) In order to provide law enforcement agencies the means to more effectively identify, investigate, and arrest persons engaging in human trafficking as defined in s. 787.06:

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(a) A person operating a massage establishment pursuant to s. 480.043 shall maintain, and it is unlawful to operate a massage establishment without, a valid work authorization document on the premises for each employee who is not a United States citizen. Valid work authorization documents for an employee who is not a United States citizen include:

1. A valid I-551 permanent resident card; or

2. A valid government-issued employment authorization document.

(b) Upon request by a law enforcement officer, any person operating a massage establishment must present one of the documents specified in paragraph (a) for each employee who is not a United States citizen.

(2) A person operating a massage establishment may not knowingly use a massage establishment license issued under s. 480.043 for the purpose of lewdness, assignation, or prostitution, as these terms are defined in s. 796.07, at any massage establishment location or structure, or any part thereof, including any trailer or other conveyance.

(3) A person who violates any provision of this section commits:

(a) A misdemeanor of the second degree for a first violation, punishable as provided in s. 775.082 or s. 775.083.

(b) A misdemeanor of the first degree for a second violation, punishable as provided in s. 775.082 or s. 775.083.

(c) A felony of the third degree for a third or subsequent violation, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Section 2. Paragraph (e) of subsection (3) of section

947710

921.0022, Florida Statutes, is amended to read:

921.0022 Criminal Punishment Code; offense severity ranking chart.—

(3) OFFENSE SEVERITY RANKING CHART

(e) LEVEL 5

Florida Statute	Felony Degree	Description
316.027(1)(a)	3rd	Accidents involving personal injuries, failure to stop; leaving scene.
316.1935(4)(a)	2nd	Aggravated fleeing or eluding.
322.34(6)	3rd	Careless operation of motor vehicle with suspended license, resulting in death or serious bodily injury.
327.30(5)	3rd	Vessel accidents involving personal injury; leaving scene.
381.0041(11)(b)	3rd	Donate blood, plasma, or organs knowing HIV positive.
440.10(1)(g)	2nd	Failure to obtain workers' compensation coverage.
440.105(5)	2nd	Unlawful solicitation for the purpose of making workers' compensation claims.

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440.381(2)	2nd	Submission of false, misleading, or incomplete information with the purpose of avoiding or reducing workers' compensation premiums.
480.0535(4)(c)	3rd	Lack of possession of work authorization documents to operate a massage establishment; third or subsequent offense. Unlawful use of a massage establishment license for the purpose of assignation, prostitution, or lewdness; third or subsequent offense.
624.401(4)(b)2.	2nd	Transacting insurance without a certificate or authority; premium collected $20,000 or more but less than $100,000.
626.902(1)(c)	2nd	Representing an unauthorized insurer; repeat offender.
790.01(2)	3rd	Carrying a concealed firearm.
790.162	2nd	Threat to throw or discharge destructive device.

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790.163(1)	2nd	False report of deadly explosive or weapon of mass destruction.
790.221(1)	2nd	Possession of short-barreled shotgun or machine gun.
790.23	2nd	Felons in possession of firearms, ammunition, or electronic weapons or devices.
800.04(6)(c)	3rd	Lewd or lascivious conduct; offender less than 18 years.
800.04(7)(b)	2nd	Lewd or lascivious exhibition; offender 18 years or older.
806.111(1)	3rd	Possess, manufacture, or dispense fire bomb with intent to damage any structure or property.
812.0145(2)(b)	2nd	Theft from person 65 years of age or older; $10,000 or more but less than $50,000.
812.015(8)	3rd	Retail theft; property stolen is valued at $300 or more and one or more specified acts.
812.019(1)	2nd	Stolen property; dealing in or

		trafficking in.
812.131(2)(b)	3rd	Robbery by sudden snatching.
812.16(2)	3rd	Owning, operating, or conducting a chop shop.
817.034(4)(a)2.	2nd	Communications fraud, value $20,000 to $50,000.
817.234(11)(b)	2nd	Insurance fraud; property value $20,000 or more but less than $100,000.
817.2341(1), (2)(a) & (3)(a)	3rd	Filing false financial statements, making false entries of material fact or false statements regarding property values relating to the solvency of an insuring entity.
817.568(2)(b)	2nd	Fraudulent use of personal identification information; value of benefit, services received, payment avoided, or amount of injury or fraud, $5,000 or more or use of personal identification information of 10 or more individuals.
817.625(2)(b)	2nd	Second or subsequent fraudulent use of scanning device or reencoder.

825.1025(4)	3rd	Lewd or lascivious exhibition in the presence of an elderly person or disabled adult.
827.071(4)	2nd	Possess with intent to promote any photographic material, motion picture, etc., which includes sexual conduct by a child.
827.071(5)	3rd	Possess any photographic material, motion picture, etc., which includes sexual conduct by a child.
839.13(2)(b)	2nd	Falsifying records of an individual in the care and custody of a state agency involving great bodily harm or death.
843.01	3rd	Resist officer with violence to person; resist arrest with violence.
847.0135(5)(b)	2nd	Lewd or lascivious exhibition using computer; offender 18 years or older.
847.0137 (2) & (3)	3rd	Transmission of pornography by electronic device or equipment.
847.0138 (2) & (3)	3rd	Transmission of material harmful to minors to a minor by electronic device

			or equipment.
86			
	874.05(2)	2nd	Encouraging or recruiting another to join a criminal gang; second or subsequent offense.
87			
	893.13(1)(a)1.	2nd	Sell, manufacture, or deliver cocaine (or other s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)4. drugs).
88			
	893.13(1)(c)2.	2nd	Sell, manufacture, or deliver cannabis (or other s. 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)5., (2)(c)6., (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4) drugs) within 1,000 feet of a child care facility, school, or state, county, or municipal park or publicly owned recreational facility or community center.
89			
	893.13(1)(d)1.	1st	Sell, manufacture, or deliver cocaine (or other s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)4. drugs) within 1,000 feet of university.
90			
	893.13(1)(e)2.	2nd	Sell, manufacture, or deliver cannabis or other drug prohibited under s. 893.03(1)(c), (2)(c)1., (2)(c)2.,

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			(2)(c)3., (2)(c)5., (2)(c)6., (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4) within 1,000 feet of property used for religious services or a specified business site.
893.13(1)(f)1.		1st	Sell, manufacture, or deliver cocaine (or other s. 893.03(1)(a), (1)(b), (1)(d), or (2)(a), (2)(b), or (2)(c)4. drugs) within 1,000 feet of public housing facility.
893.13(4)(b)		2nd	Deliver to minor cannabis (or other s. 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)5., (2)(c)6., (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4) drugs).
893.1351(1)		3rd	Ownership, lease, or rental for trafficking in or manufacturing of controlled substance.

Section 3. This act shall take effect October 1, 2011.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete everything before the enacting clause and insert:

A bill to be entitled

947710

An act relating to human trafficking; creating s. 480.0535, F.S.; requiring operators of massage establishments to maintain valid work authorization documents on the premises for each employee who is not a United States citizen; requiring presentation of such documents upon request of a law enforcement officer; prohibiting the use of a massage establishment license for the purpose of lewdness, assignation, or prostitution; providing criminal penalties; amending s. 921.0022, F.S.; including within the severity ranking chart of the Criminal Punishment Code certain offenses prohibited by the act; providing an effective date.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Health Regulation Committee

BILL:	CS/SB 406
INTRODUCER:	Health Regulation Committee; and Senators Sobel and Gaetz
SUBJECT:	The Florida Kidcare Program
DATE:	February 9, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	Stovall	HR	**Fav/CS**
2.			ED	
3.			BC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	x	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

The bill creates requirements for school districts to follow regarding the application process for school lunch and breakfast programs and the Florida Kidcare Program. Each school district is required to collaborate with the Kidcare program to:

- At a minimum, provide application information about Kidcare or an application for Kidcare to students at the beginning of each school year, and modify the school district's application form for school breakfast and lunch programs to incorporate a provision that permits the school district to share data from the application form with the state agencies and the Florida Healthy Kids Corporation (FHKC) and its agents that administer Kidcare, unless the child's parent or guardian opts out of the provision.
- At the option of the school district, share income and other demographic data through an electronic interchange with the FHKC and other state agencies in order to determine Kidcare eligibility on a regular and periodic basis.
- Establish interagency agreements ensuring that data exchanged by virtue of the bill's requirements may be used only to enroll eligible children in the Kidcare program and must be protected from unauthorized disclosure, pursuant to federal regulations.

The bill further requires the FHKC, in the development and implementation of a plan for publicizing the Florida Kidcare program, to include the use of application forms for school lunch and breakfast programs.

This bill substantially amends the following sections of the Florida Statutes: 1006.06 and 624.91.

II. Present Situation:

Florida Kidcare

The Florida Kidcare Program was created by the Florida Legislature in 1998 in response to the federal enactment of the state Children's Health Insurance Program (CHIP) in 1997. Initially authorized for 10 years and then recently re-authorized again through 2019 with federal funding through 2015, CHIP provides subsidized health insurance coverage to uninsured children who do not qualify for Medicaid but meet other eligibility requirements.

The umbrella name of Florida Kidcare encompasses four subsidized programs: Medicaid for children, MediKids, Children's Medical Services (CMS) Network, and Healthy Kids. Florida's Healthy Kids program predates enactment of the CHIP program. Subsidized Kidcare coverage is funded through state and federal funds through Title XIX (Medicaid) and Title XXI (CHIP) of the federal Social Security Act. Families also contribute to the cost of the coverage under the Title XXI components of the program based on their household size, income, and other eligibility factors. For families above the income limits for subsidy or who do not otherwise qualify for subsidy, Kidcare also offers a buy-in option under Healthy Kids and MediKids.

Eligibility for the four subsidized Kidcare components funded by Title XXI is determined in part by age and household income, as follows:[1]

- Medicaid for Children: Title XXI funding is available from birth until age 1 for income between 185 percent and 200 percent of the Federal Poverty Level (FPL).
- MediKids: Title XXI funding is available from age 1 until age 5 for income between 133 percent and 200 percent of FPL.
- Healthy Kids: Title XXI funding is available from age 5 until age 6 for income between 133 percent and 200 percent of FPL. For age 6 until age 19, Title XXI funding is available for income between 100 percent and 200 percent of FPL.
- CMS Network: Title XXI and Title XIX funds are available from birth until age 19 for income up to 200 percent of FPL for children with special health care needs. The Department of Health assesses whether children meet the program's clinical requirements.

Florida Kidcare is administered jointly by the Agency for Health Care Administration (AHCA), the Department of Children and Families (DCF), the Department of Health, and the FHKC. Each entity has specific duties and responsibilities under Kidcare as detailed in the Florida Kidcare Act. The DCF determines eligibility for Medicaid, and the FHKC processes all Kidcare applications and determines eligibility for CHIP, which includes a Medicaid screening and referral process to DCF, as appropriate.

To enroll in Kidcare, families utilize a joint form that is both a Medicaid and CHIP application. Families may apply using the paper application or an online application. Both formats are

[1] Florida Kidcare Eligibility, Florida Kidcare website, http://www.floridakidcare.org/images/data/FKC-eligibilityflag-accessible.pdf

available in English, Spanish, and Creole. Income eligibility is determined through electronic data matches with available databases or, in cases where income cannot be verified electronically, through submission of current pay stubs, tax returns, or W-2 forms.

In the 2010-11 General Appropriations Act, $501 million is appropriated for Kidcare, including $66 million from the General Revenue Fund.[2] The Social Services Estimating Conference has projected a total Kidcare surplus of $13.3 million for 2010-11, including a $5 million surplus of general revenue.

School Food Service Programs

Florida's school food service programs are authorized under the K-20 Education Code in recognition of the demonstrated relationship between good nutrition and the capacity of students to develop and learn. The State Board of Education is required to adopt rules covering the administration and operation of the school food service programs. Each district school board is required to consider recommendations of the district school superintendent and adopt policies for an appropriate food and nutrition program for students consistent with federal law and rules of the State Board of Education.[3]

Free and reduced-price school meal programs are funded jointly by states and the federal government. In Florida's 2010-11 General Appropriations Act, $823.8 million is appropriated for school lunch and breakfast programs, including $16.9 million from the General Revenue Fund.[4]

Currently in Florida, 82 charter schools, 50 private schools, and all 67 public school districts participate in the national free and reduced-price school meal programs. In the 2010-11 school year, 56 percent of the 2.6 million public school students, including charter schools, are eligible for free or reduced-price meals. The number of private school students eligible in 2010-11 is 13,191.

Children may be deemed eligible for free or reduced-price school meals based largely on household income and by filling out an application. Eligibility is capped at 185 percent of the federal poverty level. There is no uniform, statewide application form for families to use when applying for free or reduced-price meals. School districts may design their own forms based on the requirements of federal and state regulations. The Food and Nutrition Service within the United States Department of Agriculture provides a model application form that school districts may modify and use as needed for local circumstances and nomenclature.[5] A few school districts offer only an electronic form.

Kidcare Information Delivered by School Districts

Information about Kidcare is currently offered to all 67 Florida school districts in the summer for distribution at the beginning of the school year. For the past several years, this information has been a postcard that includes information on how to apply with English on one side, Spanish on the reverse, and instructions for how to receive information in Creole along the bottom. These postcards are provided free of charge to the districts and shipped to the location of their choice

[2] See ch. 2010-152, L.O.F., line items 158-161.
[3] *See* s. 1006.06(1)-(3), F.S.
[4] *See* ch. 2010-152, L.O.F., line items 101-102.
[5] The model application can be found at the USDA web site at http://www.fns.usda.gov/cnd/frp/frp.process.htm.

by the FHKC. Most, but not all, school districts accept this offer every year. In the 2009-10 school year, 54 of the 67 school districts participated in this back-to-school Kidcare outreach.[6]

Additionally, some school districts have also modified their application forms for school food service programs to include a check-off for families to indicate they would like more information about Kidcare. For those families indicating they would like more Kidcare information or which agree to release their information, the school districts vary in how those requests are handled, based on available resources. In some cases, the districts send the requests directly to Florida Kidcare for applications to be mailed to the requesting families. In other areas, the school districts utilize local community partners or designated staff to contact families to provide application assistance on a one-on-one basis.

III. Effect of Proposed Changes:

Section 1006.06, F.S., is amended to require each school district to collaborate with the Kidcare program to:

- At a minimum, provide application information about Kidcare or an application for Kidcare to students at the beginning of each school year, and modify the school district's application form for school breakfast and lunch programs to incorporate a provision that permits the school district to share data from the application form with the state agencies and the FHKC and its agents that administer Kidcare, unless the child's parent or guardian opts out of the provision.
- At the option of the school district, share income and other demographic data through an electronic interchange with the FHKC and other state agencies in order to determine Kidcare eligibility on a regular and periodic basis.
- Establish interagency agreements ensuring that data exchanged by virtue of the bill's requirements may be used only to enroll eligible children in the Kidcare program and must be protected from unauthorized disclosure, pursuant to federal regulations.

The Florida Department of Education indicates that these new requirements in s. 1006.06, F.S., would trigger the need for the State Board of Education to develop a rule.

Section 624.91, F.S., is amended to require the FHKC, in the development and implementation of a plan for publicizing the Florida Kidcare program, to include the use of application forms for school lunch and breakfast programs.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18, of the Florida Constitution.

[6] Office of Program Policy Analysis and Government Accountability, *Research Memorandum: Several Options Exist to Improve Florida Kidcare Outreach and Enrollment Efforts through Schools,* March 1, 2010, p. 4.

B. Public Records/Open Meetings Issues:

The provisions of the bill have no impact on public records or open meetings issues under the requirements of Article I, Section 24(a) and (b), of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f), of the Florida Constitution.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Medicaid Impact
AHCA has been asked to provide an estimate of fiscal impact based on the language in the committee substitute.

Kidcare Impact
The FHKC indicates that the data-sharing requirement could require up to $750,000 in non-recurring funds for information technology upgrades, $233,850 of which would be general revenue.

K-12 School System / Department of Education Impact
Public school districts, charter schools, and private schools participating in free and reduced-price meal programs would incur indeterminate costs associated with the revision of hard-copy and online application forms to comply with the bill's requirements.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Health Regulation on February 8, 2011:
Instead of requiring application forms for school lunch and breakfast programs to also allow students to apply for the Kidcare program or provide information about Kidcare, the CS requires school districts to collaborate with the Kidcare program to:

- Provide an application form or application information about the Kidcare program at the beginning of each school year;
- Modify the school lunch and breakfast programs application form to authorize the school district to share data with the Kidcare program unless the child's parent opts out; and
- Enter into interagency agreements to protect the data.

School districts are also authorized to transmit the data electronically.

B. Amendments:

None.

401082

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
02/08/2011	.	
	.	
	.	
	.	

The Committee on Health Regulation (Sobel) recommended the following:

Senate Amendment (with title amendment)

Delete lines 18 - 24
and insert:
(7) Each school district shall collaborate with the Florida Kidcare Program created pursuant to ss. 409.810-409.821 to:
(a) At a minimum:
1. Provide application information about the Kidcare program or an application for Kidcare to students at the beginning of each school year.
2. Modify the school district's application form for the lunch program under subsection (4) and the breakfast program

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under subsection (5) to incorporate a provision that permits the school district to share data from the application form with the state agencies and the Florida Healthy Kids Corporation and its agents that administer the Kidcare program unless the child's parent or guardian opts out of the provision.

(b) At the option of the school district, share income and other demographic data through an electronic interchange with the Florida Healthy Kids Corporation and other state agencies in order to determine Kidcare eligibility on a regular and periodic basis.

(c) Establish interagency agreements ensuring that data exchanged under this subsection may be used only to enroll eligible children in the Florida Kidcare program and must be protected from unauthorized disclosure, pursuant to 42 U.S.C. s. 1758(b)(6).

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete lines 3 - 6

and insert:

amending s. 1006.06, F.S.; requiring school districts to collaborate with the Florida Kidcare program to use the application form for the school breakfast and lunch programs to provide information about the Florida Kidcare Program and to authorize data on the application form to be shared with state agencies and the Florida Healthy Kids Corporation and its agents; authorizing each school district the option to share the data electronically; requiring interagency

401082

agreements to ensure that the data exchanged is protected from unauthorized disclosure and is used only for enrollment in the Florida Kidcare

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Health Regulation Committee

BILL:	CS/SB 414
INTRODUCER:	Health Regulation Committee and Senator Oelrich
SUBJECT:	Prostate Cancer Awareness Program
DATE:	February 8, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Callaghan	Stovall	HR	**Fav/CS**
2.			BC	
3.			RC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

The committee substitute (CS) for SB 414 modifies the purpose of the Prostate Cancer Awareness Program (Program), housed within the Department of Health (DOH), to include: promoting prostate cancer awareness; communicating the advantages of early detection; reporting of recent progress in prostate cancer research and availability of clinical trials; minimizing health disparities; communicating best-practice principles to physicians treating prostate cancer patients; and establishing a communication platform for patients and their advocates.

The CS authorizes the University of Florida Prostate Disease Center (UFPDC) to work with other agencies, organizations, and institutions to implement the Program. The CS directs the UFPDC to establish and lead a UFPDC Prostate Cancer Advisory Council (Advisory Council), which replaces the prostate cancer advisory committee. The CS provides for the appointment of members to the Advisory Council, the term-limits of the members, meeting requirements, and the duties of the Advisory Council.

This CS substantially amends s. 381.911, F.S.

II. Present Situation:

Prostate Cancer

The prostate is a gland in the male reproductive system. Cancer of the prostate is a disease in which cancer cells are found in the prostate. The prostate produces and stores a fluid that is a component of semen and is located in the pelvis, under the bladder and in front of the rectum. The prostate surrounds part of the urethra, the tube that empties urine from the bladder. Because of the prostate's location, the flow of urine can be slowed or stopped if the prostate grows too large. Symptoms of prostate cancer may include: weak or interrupted flow of urine, frequent urination, trouble urinating, pain or burning during urination, blood in the urine or semen, or a pain in the back, hip, or pelvis that does not go away.[1]

Four tests are used to detect prostate cancer in the absence of symptoms. One is the digital rectal exam, in which a doctor feels the prostate through the rectum to find hard or lumpy areas. Another is a blood test used to detect a substance made by the prostate called prostate-specific antigen (PSA). However, an elevated PSA is not always a sign of prostate cancer. Also, a transrectal ultrasound may be performed by a doctor using a finger-size probe to examine the prostate through the rectum. Finally, a doctor may perform a biopsy by removing cells or tissues so they can be viewed under a microscope by a pathologist. The pathologist will examine the biopsy sample to check for cancer cells and determine the Gleason score. The Gleason score ranges from 2-10 and describes how likely it is that a tumor will spread. The lower the number, the less likely the tumor is to spread.[2] All diagnoses of prostate cancer must be confirmed by a biopsy. Together, these tests can detect many silent prostate cancers. Due to the widespread implementation of PSA testing in the United States, approximately 90 percent of all prostate cancers are diagnosed at an early stage.[3]

Treatment of prostate cancer corresponds with the stage of the disease and how far the cancer has progressed. Early prostate cancer, stage I and II, is localized. Stage III and IV prostate cancer extends outside the prostate gland.[4]

Localized prostate cancer is generally treated by:

- Radical prostatectomy, a surgical procedure to remove the entire prostate gland and nearby tissues;
- Radiation therapy involving the delivery of radiation energy to the prostate; and
- Active surveillance (watchful waiting).[5]

Except for skin cancer, cancer of the prostate is the most common malignancy in American men and is the second leading cause of cancer deaths among men in the United States after lung

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[1] National Cancer Institute, *Prostate Cancer Treatment*, November 5, 2010, available at http://www.cancer.gov/cancertopics/pdq/treatment/prostate/patient/allpages (Last visited on February 2, 2011).
[2] *Id.*
[3] National Cancer Institute, *Early Prostate Cancer: Questions and Answers*, available at http://www.doh.state.fl.us/Family/menshealth/prostatecancerqa.pdf (Last visited on February 2, 2011).
[4] *Supra* fn. 1.
[5] *Supra* fn. 3.

cancer.[6] More than 70 percent of all clinically diagnosed prostate cancers occur in men over age 65.[7] Risk factors associated with prostate cancer include older age, a family history of the disease, black race, and dietary factors.[8] In 2007, there were 223,307 men in the United States who developed prostate cancer, and 29,093 men in the United States died from prostate cancer.[9] In Florida in 2006, there were 14,043 new prostate cancer cases diagnosed among males in Florida, and 2,079 males died of prostate cancer.[10] The incidence rate of prostate cancer in Florida in 2006 was 48 percent higher among black men than white men.[11]

Prostate Cancer Screening Recommendations

In its most recent prostate cancer screening recommendations, the United States Preventive Services Task Force (USPSTF) concluded that it is indeterminate whether it is beneficial for men under the age of 75 to be screened for prostate cancer and that for men over the age of 75 there is moderate to high certainty that the harms of screening for prostate cancer outweigh the benefits.[12] The USPSTF found convincing evidence that treatment for prostate cancer detected by screening causes moderate to substantial harms, such as erectile dysfunction, urinary incontinence, bowel dysfunction, and death. These harms are especially important because some men with prostate cancer who are treated would never have developed symptoms related to cancer during their lifetime. The USPSTF suggests that a clinician should not order a PSA test without first discussing with the patient the potential but uncertain benefits and known harms of prostate cancer screening and treatment.[13]

The American Cancer Society (ACS) recommends that men have a chance to make an informed decision with their health care provider about whether to be screened for prostate cancer. The prostate cancer screening decision should be made after getting information about the uncertainties, risks, and potential benefits of prostate cancer screening.[14] The ACS recommends that men thinking about prostate cancer screening should make informed decisions based on available information, discussion with their doctors, and their own views on the benefits and side effects of screening and treatment.

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[6] U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, *United States Cancer Statistics (USCS)*, 2007, available at http://apps.nccd.cdc.gov/uscs/toptencancers.aspx (Last visited on February 2, 2011). *See also* fn. 3.
[7] *Supra* fn. 3.
[8] Florida Department of Health, Bureau of Epidemiology, *Prostate Cancer in Florida 2006*, available at http://www.doh.state.fl.us/disease_ctrl/epi/cancer/Prostate_06.pdf (Last visited on February 2, 2011).
[9] Centers for Disease Control and Prevention, *Prostate Cancer, Fast Facts*, available at http://www.cdc.gov/cancer/prostate/basic_info/fast_facts.htm (Last visited on February 2, 2011).
[10] *Supra* fn. 8.
[11] *Id.*
[12] U.S. Department of Health and Human Services, Agency for Healthcare Research and Quality, U.S. Preventive Services Task Force, *Screening for Prostate Cancer, Clinical Summary of U.S. Preventive Services Task Force Recommendation*, August 2008, available at http://www.uspreventiveservicestaskforce.org/uspstf08/prostate/prostatesum.htm (Last visited February 2, 2011).
[13] *Id.*
[14] American Cancer Society, *Prostate Cancer: Early Detection*, available at http://www.cancer.org/cancer/prostatecancer/moreinformation/prostatecancerearlydetection/prostate-cancer-early-detection-acs-recommendations (Last visited on February 2, 2011).

The Department of Health

Section 20.43, F.S., creates the DOH. The DOH is responsible for the state's public health system, which is designed to promote, protect, and improve the health of all people in the state. The mission of the state's public health system is to foster the conditions in which people can be healthy, by assessing state and community health needs and priorities through data collection, epidemiologic studies, and community participation; by developing comprehensive public health policies and objectives aimed at improving the health status of people in the state; and by ensuring essential health care and an environment which enhances the health of the individual and the community.[15] The State Surgeon General is the State Health Officer and the head of the DOH.

The primary focus of the DOH's Men's Health Initiative, located within the Adult and Community Health Unit of the Division of Family Health Services, is to increase awareness about men's health issues and educate men and their families about the importance of screening and early detection in preventing and treating disease among men and boys.[16] The Men's Health Initiative provides prostate cancer awareness, screening, and risk factor information.

Prostate Cancer Awareness Program

In 2004, the Legislature created the Program within the DOH.[17] To the extent that funds are made available, the Program is charged with implementing the recommendations of the January 2000 Florida Prostate Cancer Task Force and to provide for statewide outreach and health education activities to ensure men are aware of and appropriately seek medical counseling for prostate cancer as an early detection health care measure.[18] The DOH is required to coordinate its Program with the efforts of the Florida Public Health Institute, Inc. (Institute).[19]

The Prostate Cancer Advisory Committee (Committee) is created under s. 381.911, F.S., to assist the DOH and the Institute in implementing the Program. The State Surgeon General is responsible for appointing the following advisory committee members:

- Three persons from prostate cancer survivor groups or cancer-related advocacy groups;
- Three persons who are scientists or clinicians from public universities or research organizations; and
- Three persons who are engaged in the practice of a cancer-related medical specialty from health organizations committed to cancer research and control.

[15] Section 381.001, F.S.
[16] The Department of Health, *Men's Health Initiative*, available at http://www.doh.state.fl.us/family/menshealth/index.html (Last visited on February 2, 2011).
[17] Section 14, ch. 2004-2, L.O.F.
[18] Section 381.911, F.S.
[19] The Florida Public Health Institute, acting as a neutral convener, works with various local, state and national leaders to develop public-private partnerships that provide recommendations and solutions to health-related matters for the citizens of the state of Florida and the national community. Its mission is to "…advance the knowledge and practice of public health to promote, protect and improve the health of all." The Institute advances improvements in health through community education; health advocacy; health workforce training; and assessment, research and evaluation. *See* Florida Public Health Institute, *FPHI History*, available at http://www.flphi.org/ABOUTUS/FPHIHistory/tabid/164/Default.aspx (Last visited on February 4, 2011).

In 2004, the Legislature provided funding for the DOH for prostate cancer education and the DOH convened a meeting of the Committee.[20] No additional funds have been appropriated for the Program and the Committee has not met since 2004.

The Comprehensive Cancer Control Program

The Comprehensive Cancer Control Program, housed under the Bureau of Chronic Disease Prevention and Health Promotion in the DOH, is funded through a cooperative agreement with the Centers for Disease Control and Prevention. The program focuses on colorectal, lung, ovarian, prostate, and skin cancers. The main objective of the cooperative agreement is to reduce the cancer burden through a collaborative effort with public and private partners throughout Florida. This is accomplished by working with the existing governor-appointed Cancer Control Research Advisory Board (C-CRAB) and a myriad of statewide cancer stakeholders including the National Cancer Institute's Cancer Information Services, the American Cancer Society, and Florida Comprehensive Cancer Control Initiative, among others.[21]

University of Florida Prostate Disease Center

The UFPDC was established in 2009 within the University of Florida's Urology Department. The UFPDC is an inter-disciplinary, statewide research and education center that facilitates the development of state-of-the-art diagnostic tools and advanced treatment methods for prostate disease. It investigates prostate disease on a preclinical and clinical level, pushing forth new medical knowledge, setting new benchmarks for standards of care and advancing new principles for future biomedical training. The UFPDC uses the expertise of scientists and clinicians in urology, cellular and molecular biology, physics, immunology, pharmacology, socio-behavioral sciences, functional genomics, nursing, radiation oncology, medical oncology, cancer endocrinology, and epidemiology to improve the lives of those diagnosed with prostate cancer.[22]

Cancer Control and Research Act

The Cancer Control and Research Act (the Act) is created in s. 1004.435, F.S. The Florida Cancer Control and Research Advisory Council (C-CRAB) is established within the Act to advise the Board of Governors, the State Surgeon General, and the Legislature on cancer control and research in this state.[23] The C-CRAB is housed at, and administratively supported by the H. Lee Moffitt Cancer Center and Research Institute, but operates as an independent group.[24] The C-CRAB consists of 34 members, who meet at least twice a year.[25] The C-CRAB annually approves the Florida Cancer Plan, which is a program for cancer control and research. Additional responsibilities of the C-CRAB include:

[20] Ch. 2004-268, Laws of Florida.
[21] Florida Department of Health, *Florida Cancer Plan*, available at http://www.doh.state.fl.us/family/cancer/plan/ (Last visited on February 3, 2011).
[22] University of Florida, Department of Urology, *News and Events*, available at http://urology.ufl.edu/news_events.php (Last visited on February 3, 2011).
[23] Section 1004.435(4)(h), F.S.
[24] Cancer Control Research Advisory Council, *2010 Annual Report*. A copy of the report is on file with the Senate Health Regulation Committee.
[25] *Id.*

- Recommending to the State Surgeon General a plan for the care and treatment of persons suffering from cancer and standard requirements for cancer units in hospitals and clinics in Florida;
- Recommending grant and contract awards for the planning, establishment, or implementation of programs in cancer control or prevention, cancer education and training, and cancer research;
- If funded by the Legislature, providing written summaries that are easily understood by the average adult patient, informing actual and high-risk breast cancer patients, prostate cancer patients, and men who are considering prostate cancer screening of the medically viable treatment alternatives available to them and explaining the relative advantages, disadvantages, and risks associated therewith;
- Implementing an educational program for the prevention of cancer and its early detection and treatment;
- Advising the Board of Governors and the State Surgeon General on methods of enforcing and implementing laws concerning cancer control, research, and education; and
- Recommending to the Board of Governors or the State Surgeon General rulemaking needed to enable the C-CRAB to perform its duties.

Statewide Cancer Registry

Section 385.202, F.S., requires each hospital or other licensed facility to report to the DOH information that indicates diagnosis, stage of disease, medical history, laboratory data, tissue diagnosis, and radiation, surgical, or other methods of diagnosis or treatment for each cancer diagnosed or treated by that facility. The DOH, or a medical organization pursuant to a contract with the DOH, is required to maintain and make available for research such information in a statewide cancer registry.

Information in the statewide cancer registry that discloses or could lead to the disclosure of the identity of any person whose condition or treatment has been reported and studied is confidential and exempt from Florida's public records laws. However, such information may be disclosed with the consent of the affected person; if such information is to be used for epidemiologic investigation and monitoring; or if the information is used by any other governmental agency or contractual designee for medical or scientific research.

Advisory Councils

Section 20.03(7), F.S., defines "advisory council" to mean "an advisory body created by specific statutory enactment and appointed to a function on a continuing basis for the study of the problems arising in a specified functional or program area of state government and to provide recommendations and policy alternatives." Section 20.052, F.S., establishes requirements for advisory bodies created by a specific statutory enactment. An advisory body may not be created unless:

- It meets a statutorily defined purpose;
- Its powers and responsibilities conform with the definitions for governmental units in s. 20.03, F.S.;
- Its members, unless expressly provided otherwise in the State Constitution, are appointed for 4-year staggered terms; and

- Its members, unless expressly provided otherwise by specific statutory enactment, serve without additional compensation or honorarium, and are authorized to receive only per diem and reimbursement for travel expenses as provided in s. 112.061, F.S.

III. Effect of Proposed Changes:

The CS amends s. 381.911, F.S., to modify the purpose of the Prostate Cancer Awareness Program (Program). The Program's purpose under the CS is to promote prostate cancer awareness; communicate the advantages of early detection; report of recent progress in prostate cancer research and the availability of clinical trials; minimize health disparities; communicate best-practice principles to physicians treating prostate cancer patients; and establish a communication platform for patients and their advocates.

The CS authorizes the University of Florida Prostate Disease Center (UFPDC) to implement the Program by working with other agencies, organizations, and institutions to create a systematic approach to increase community education and public awareness about prostate cancer.

The CS repeals responsibilities of the Florida Public Health Institute to participate in implementation of the Program.

The CS repeals the Prostate Cancer Advisory Committee, whose members were appointed by the State Surgeon General and establishes a UFPDC Prostate Cancer Advisory Council (Advisory Council). The Advisory Council is created to develop and implement strategies to improve outreach and education about prostate cancer.

The CS specifies that the Executive Director of the UFPDC shall appoint, in consultation with the DOH's Comprehensive Cancer Control Program and the State Surgeon General, a geographically and institutionally diverse advisory council. The Advisory Council is to consist of two persons from prostate cancer survivor groups or other cancer-related advocacy groups; four persons, including two physicians, a scientist, and the Executive Director of the University of Florida Prostate Disease Center or a designee; and three persons who are engaged in cancer-related medical specialty practice. Advisory Council members are to serve 4-year terms, but the initial members will have staggered terms. The Advisory Council is to meet annually and at the call of the Executive Director or by a majority vote of the members.

The duties of the Advisory Council include:

- Presenting prostate-cancer-related policy recommendations to the DOH and other governmental entities;
- Verifying the accuracy of prostate cancer information disseminated to the public;
- Developing effective communication channels among all private and public entities in the state involved in prostate cancer education, research, treatment, and patient advocacy;
- Planning, developing, and implementing activities designed to heighten awareness and educate residents of the state, especially those in underserved areas, regarding the importance of prostate cancer awareness;
- Disseminating information about recent progress in prostate cancer research and the availability of clinical trials;
- Minimizing health disparities through outreach and education;

- Communicating best-practices principles to physicians involved in the care of patients with prostate cancer;
- Establishing a communication platform for patients and their advocates;
- Soliciting grants and funding to conduct an annual prostate cancer symposium; and
- Submitting and presenting an annual report to the Governor, Legislature, and State Surgeon General by January 15, 2012, and each year thereafter, to recommend legislative changes to decrease the incidence of prostate cancer, decrease disparities among persons diagnosed with prostate cancer, and promote increased community education and awareness of prostate cancer.

The effective date of the CS is July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this CS have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of this CS have no impact on public records or open meetings issues under the requirements of Article I, Section 24(a) and (b) of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this CS have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Physicians may adopt best-practices recommended by the Advisory Council, which may include additional prostate cancer screenings of patients.

C. Government Sector Impact:

The costs that might be incurred by the UFPDC through implementation of the Program are indeterminate.[26]

[26] Professional committee staff of the Health Regulation Committee has requested an analysis of SB 414, including a fiscal analysis, from the Board of Governors.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The CS, on lines 120 through 121, requires the Advisory Council to "verify the accuracy of prostate cancer information disseminated to the public." It is important to note that there may be vast amounts of information related to prostate cancer disseminated to the public over the Internet. If the intent is to require the Advisory Council to verify the accuracy of specific types of documents, such as research studies or medical journals, this language may need clarification.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Health Regulation on February 8, 2011:

The CS differs from the bill in that it:

- Replaces the task force with an advisory council.
- Deletes a redundant reference to the Florida Cancer Control Program.
- Deletes the requirements for the task force to develop and maintain a prostate cancer registry and tissue bank.
- Makes a technical correction in the "whereas" clause.

B. Amendments:

None.

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LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
02/08/2011	.	
	.	
	.	
	.	

The Committee on Health Regulation (Gaetz) recommended the following:

Senate Amendment (with title amendment)

Delete lines 71 - 152
and insert:
(UFPDC) shall establish the UFPDC Prostate Cancer Advisory Council and lead the advisory council in developing and implementing strategies to improve outreach and education and thereby reduce the number of patients who develop prostate cancer. ~~A prostate cancer advisory committee is created to advise and assist the Department of Health and the Florida Public Health Institute, Inc., in implementing the program.~~
(a) The Executive Director of the University of Florida

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Prostate Disease Center shall appoint, in consultation with the Department of Health's Comprehensive Cancer Control Program and the State Surgeon General, a geographically and institutionally diverse advisory council, which ~~shall appoint the advisory committee members, who~~ shall consist of:

1. Two ~~Three~~ persons from prostate cancer survivor groups or cancer-related advocacy groups.

2. Four ~~Three~~ persons, one of whom is a physician licensed under chapter 458, one of whom is a physician licensed under chapter 459, one of whom is a scientist, and one of whom is the Executive Director of the University of Florida Prostate Disease Center or a designee ~~who are scientists or clinicians from public universities or research organizations~~.

3. Three persons who are engaged in the practice of a cancer-related medical specialty from health organizations committed to cancer research and control.

(b) Members shall serve as volunteers without compensation ~~but are entitled to reimbursement, pursuant to s. 112.061, for per diem and travel expenses incurred in the performance of their official duties~~.

(c) Each member of the advisory council shall be appointed to a 4-year term; however, for the purpose of providing staggered terms, of the initial appointments, four members shall be appointed to 2-year terms and four members shall be appointed to 4-year terms. The remaining seat shall be filled by the Executive Director of the University of Florida Prostate Disease Center or a designee.

(d) The advisory council shall meet annually and at other times at the call of the Executive Director of the University of

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Florida Prostate Disease Center or by a majority vote of the members of the advisory council.

(e) Five of the members of the advisory council constitute a quorum, and an affirmative vote of a majority of the members present is required for final action.

(f) The advisory council shall:

1. Present prostate-cancer-related policy recommendations to the Department of Health and other appropriate governmental entities.

2. Verify the accuracy of prostate cancer information disseminated to the public.

3. Develop effective communication channels among all private and public entities in the state involved in prostate cancer education, research, treatment, and patient advocacy.

4. Plan, develop, and implement activities designed to heighten awareness and educate residents of the state, especially those in underserved areas, regarding the importance of prostate cancer awareness.

5. Disseminate information about recent progress in prostate cancer research and the availability of clinical trials.

6. Minimize health disparities through outreach and education.

7. Communicate best practices principles to physicians involved in the care of patients with prostate cancer.

8. Establish a communication platform for patients and their advocates.

9. Solicit grants or philanthropic funding to conduct an annual prostate cancer symposium that brings physicians,

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researchers, community leaders, prostate cancer survivors, and prostate cancer advocates together to highlight recent advances in prostate cancer research, clinical trials, and best practices used for the prevention of the prostate cancer and to promote strategies for successful rural and urban outreach, community education, and increased awareness.

10. Submit and present an annual report to the Governor,

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete lines 7 - 32

and insert:

other organizations and institutions, to increase community education and public awareness of prostate cancer; requiring the University of Florida Prostate Disease Center to establish an advisory council to replace the existing advisory committee; providing for membership and duties of the advisory council; requiring an annual report to the Governor, Legislature, and State Surgeon General; providing an effective date.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Health Regulation Committee

BILL: SB 420

INTRODUCER: Health Regulation Committee

SUBJECT: OGSR - Donor Personal Identifying Information

DATE: February 8, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Callaghan	Stovall	HR	**Favorable**
2.			GO	
3.			RC	
4.				
5.				
6.				

I. Summary:

This bill is the result of an Open Government Sunset Review of the public records exemptions for the Florida Center for Brain Tumor Research (FCBTR). The bill saves from repeal and re-enacts the exemption related to information received from an individual from another state or nation or the Federal Government that is otherwise confidential or exempt pursuant to the laws of that jurisdiction. Instead of re-enacting the exemption for an individual's medical record, the bill revises the law to exempt information which identifies a donor of specimens or information to the brain tumor registry and repository. In addition, the bill authorizes disclosure of exempted information maintained by the FCBTR for bona fide research under specified conditions.

This bill substantially amends s. 381.8531, F.S.

II. Present Situation:

Florida's Public Records Laws

Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1892.[1] In 1992, Florida voters approved an amendment to the State Constitution which raised the statutory right of access to public records to a constitutional level.

[1] Section 1390, 1391 F.S. (Rev. 1892).

Section 24(a), Art. I, of the Florida Constitution, provides that:

> Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

The Public Records Act is contained in ch. 119, F.S., and specifies conditions under which the public must be given access to governmental records. Section 119.07(1)(a), F.S., provides that every person who has custody of a public record[2] must permit the record to be inspected and examined by any person, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record. Unless specifically exempted, all agency[3] records are to be available for public inspection.

The Florida Supreme Court has interpreted the definition of "public record" to encompass all materials made or received by an agency in connection with official business which are "intended to perpetuate, communicate, or formalize knowledge."[4] All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.[5]

Only the Legislature is authorized to create exemptions from open government requirements.[6] Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.[7] A bill enacting an exemption may not contain other substantive provisions, although it may contain multiple exemptions relating to one subject.[8]

There is a difference between records that the Legislature exempts from public inspection and those that the Legislature makes confidential and exempt from public inspection. If a record is made confidential with no provision for its release so that its confidential status will be

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[2] Section 119.011(12), F.S., defines "public records" to include "all documents, papers, letters, maps, books, tapes, photographs, film, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency."

[3] Section 119.011(2), F.S., defines "agency" as "any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency."

[4] *Shevin v. Byron, Harless, Schaffer, Reid, and Assocs., Inc.,* 379 So. 2d 633, 640 (Fla. 1980).

[5] *Wait v. Florida Power & Light Co.,* 372 So. 2d 420 (Fla. 1979).

[6] FLA. CONST. art. I, s. 24(c) (1992).

[7] *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation,* 729 So. 2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation,* 724 So. 2d 567 (Fla. 1999).

[8] *Supra* fn. 6.

maintained, such record may not be released by an agency to anyone other than the person or entities designated in the statute.[9] If a record is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[10]

Access to public records is a substantive right and therefore, a statute affecting that right is presumptively prospective in its application.[11] There must be a clear legislative intent for a statute affecting substantive rights to apply retroactively.[12]

Open Government Sunset Review Act

The Open Government Sunset Review Act[13] provides for the systematic review of an exemption from the Public Records Act in the fifth year after its enactment.[14] The act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.[15] An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.[16] An exemption meets the statutory criteria if it:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals; or
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.[17]

The act also requires the Legislature to consider the following six questions that go to the scope, public purpose, and necessity of the exemption:[18]

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

[9] Attorney General Opinion 85-62, August 1, 1985.
[10] *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA), *review denied*, 589 So. 2d 289 (Fla. 1991).
[11] *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 784 So. 2d 438 (Fla. 2001).
[12] *Id.*
[13] Section 119.15, F.S.
[14] Section 119.15(4)(b), F.S., provides that an existing exemption may be considered a substantially amended exemption if the exemption is expanded to cover additional records. As with a new exemption, a substantially amended exemption is also subject to the 5-year review.
[15] Section 119.15(6)(b), F.S.
[16] *Id.*
[17] *Id.*
[18] Section 119.15(6)(a), F.S.

- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required.[19] If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created,[20] then a public necessity statement and a two-thirds vote for passage are not required.[21]

Brain Tumors

Malignant brain tumors are one of the most virulent forms of cancer. Brain tumors can be either primary – those that start in the brain and generally stay there, or metastatic – those that begin as a cancer elsewhere in the body and spread to the brain.[22] Some tumors are not cancer but can cause disability and death because of their location in the brain.[23] They can press on sensitive areas and cause serious health problems and surgery to remove them has risks.

Brain tumors are the:
- Second leading cause of cancer-related deaths in children under age 20 (leukemia is the first),
- Second leading cause of cancer-related deaths in males up to age 39,
- Second leading cause of cancer-related deaths in females under age 20, and
- Fifth leading cause of cancer-related deaths in females ages 20–39.6[24]

An estimated 62,930 new cases of primary brain tumors are expected to be diagnosed in 2010 and includes both malignant (23,720) and non-malignant (39,210) brain tumors.[25]

Patients with moderately severe malignant tumors typically survive for two to 5 years, whereas those with severe forms live only 12 to 15 months on average, even with optimal treatment.[26] The normal course of treatment for malignant tumors is surgery followed by a combination of chemotherapy and radiation.

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[19] *Supra* fn. 6.
[20] An example of an exception to a public records exemption would be allowing another agency access to confidential or exempt records.
[21] *Cf., State v. Knight*, 661 So. 2d 344 (Fla. 4th DCA 1995).
[22] National Brain Tumor Society, *Brain Tumor FAQ*, available at: http://www.braintumor.org/patients-family-friends/about-brain-tumors/brain-tumor-faq.html (Last visited on January 4, 2011).
[23] *Id.*
[24] American Brain Tumor Association: *Facts and Statistics, 2010*, available at: http://www.abta.org/sitefiles/pdflibrary/ABTA-FactsandStatistics2010v3.pdf (Last visited on January 4, 2011) (citing Ahmedin Jemal et al.; *Cancer Statistics, 2009*; CA: A Cancer Journal for Clinicians; American Cancer Society; May 2009).
[25] *Id.*
[26] The Florida Center for Brain Tumor Research, Annual Report January 2009 – December 2009, citing Patrick Y. Wen and Santosh Kesari, "Malignant Gliomas in Adults," *The New England Journal of Medicine* 2008; 359: 492-507. (A copy of the report is on file with the Florida Senate Committee on Health Regulation).

The Florida Center for Brain Tumor Research

The Florida Legislature established the FCBTR within the Evelyn F. and William L. McKnight Brain Institute of the University of Florida on July 1, 2006.[27] The Legislature initially appropriated $500,000 for the FCBTR.[28] In 2009 and 2010, the Legislature appropriated $500,000 to the FCBTR.[29]

The purpose of the FCBTR is to find cures for brain tumors by:

- Establishing a coordinated effort among the state's public and private universities and hospitals and the biomedical industry to discover brain tumor cures and develop brain tumor treatment modalities;
- Expanding the state's economy by attracting biomedical researchers and research companies to the state;
- Developing and maintaining a brain tumor registry that is an automated, electronic, and centralized database of individuals with brain tumors; and
- Fostering collaboration with brain cancer research organizations and other institutions, providing a central repository for brain tumor biopsies from individuals throughout the state, improving and monitoring brain tumor biomedical research programs within the state, facilitating funding opportunities, and fostering improved technology transfer of brain tumor research findings into clinical trials and widespread public use.[30]

A Scientific Advisory Council (The Council) is established within the FCBTR.[31] The Council is required to meet at least annually, however it generally meets twice per year.[32] The Council consists of members from the University of Florida, the Scripps Research Institute Florida, Cleveland Clinic in Florida, M.D. Anderson Cancer Center Orlando, Mayo Clinic in Jacksonville, H. Lee Moffitt Cancer Center and Research Institute, the University of Miami, and a neurosurgeon in private practice.[33]

The Registry

The FCBTR maintains a collaborative, statewide registry of banked cancerous and non-cancerous brain tumor specimens, matched samples of DNA, plasma, serum and cerebrospinal fluid, clinical and demographic information, and quality-of-life assessments obtained from patients.[34]

As of January 5, 2010, 742 patients have contributed tissue to the bank. There are 2,550 brain tumor tissue samples and 2,469 plasma, serum, DNA, and cerebrospinal fluid samples stored in

[27] Section 381.853, F.S., was enacted in ch. 2006-258, Laws of Florida.
[28] The FCBTR is to be funded through private, state, and federal sources. See s. 381.853(4)(g), F.S.
[29] *See* ch. 2009-81 and ch. 2010-152, Laws of Florida.
[30] The Florida Center for Brain Tumor Research, Annual Report January 2009 – December 2009. A copy of this report is on file with the Florida Senate Health Regulation Committee.
[31] Section 381.853(5), F.S.
[32] Response to the Florida House of Representative's questionnaire by the Florida Center for Brain Tumor Research dated September 8, 2010. A copy of this response is on file with the Florida Senate Health Regulation Committee.
[33] *Id. See also* s. 381.853(5)(a), F.S.
[34] *Supra* fn. 26.

the FCBTR bio-repository. One hundred forty-two samples have been distributed from the bio-repository for research purposes.[35]

Patients, located in and outside of Florida, are asked to participate in the FCBTR's bio-repository and registry, which has been approved by an Institutional Review Board,[36] to provide valuable specimens and data for future research.[37] The patient signs an informed consent form to authorize the collection and banking of his or her specimens.[38] The banked materials are made available to researchers in Florida and beyond who are investigating improved treatments and cures for brain tumors.[39]

A web-based database stores demographic, clinical and quality-of-life data, creates a registry of participants, and bar-codes and tracks the samples. This clinical database contains information available (in unidentifiable format) to researchers who study brain tumors.[40] Although the registry receives information that identifies an individual donor, neither the registry nor the FCBTR obtain a copy of the donor's medical record.[41] According to a representative from the FCBTR, no researcher has requested information that identifies an individual donor.[42] However, it is conceivable that certain researchers may need such information to further their research objectives. Currently, the law does not authorize release of this information for research purposes.

Protecting Health Information in Research

The federal Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule establishes national standards, and requires appropriate safeguards, to protect individuals' medical records and other personal health information. [43] The Privacy Rule applies only to "covered entities," which are health plans, health care clearinghouses, and those health care providers that conduct certain health care transactions electronically.[44] The Privacy Rule also gives patients rights over their health information, including rights to examine and obtain a copy of their health records and to request corrections; it also sets limits and conditions on the uses

[35] *Id.*
[36] An Institutional Review Board is any board, committee, or other group formally designated by an institution to review, to approve the initiation of, and to conduct periodic review of, biomedical research involving human subjects to assure the protection of the rights and welfare of the human subjects. *See* 21 C.F.R. Part 56.
[37] *Supra* fn. 26.
[38] Section 381.853(3), F.S., provides for a patient to sign a form to opt-out of participation in the registry; however the FCBTR requires an informed consent to participate in the registry.
[39] *Supra* fn. 26.
[40] *Id.*
[41] Email received by professional staff of the Florida Senate Health Regulation Committee from a representative of the FCBTR on July 27, 2010. A copy of the email is on file with the committee.
[42] *Id.*
[43] U.S. Department of Health and Human Services, *Health Information Privacy: The Privacy Rule*, available at http://www.hhs.gov/ocr/privacy/hipaa/administrative/privacyrule/index.html (Last visited on January 5, 2011).
[44] *Id. See also* U.S. Department of Health and Human Services, *HIPAA Privacy Rule: To Whom Does the Privacy Rule Apply and Whom Will It Affect?*, available at http://privacyruleandresearch.nih.gov/pr_06.asp (Last visited January 5, 2011).

and disclosures that may be made of such information without patient authorization.[45] The Privacy Rule supplements other federal protections for research involving human subjects.[46]

Many organizations, institutions, and researchers that use, collect, access, and disclose individually identifiable health information are not covered entities.[47] To gain access for research purposes to protected health information created or maintained by covered entities, the researcher or other organization may have to provide supporting documentation on which the covered entity may rely in meeting the requirements, conditions, and limitations of the Privacy Rule.[48]

In 2009, the Institute of Medicine's Committee on Health Research and the Privacy of Health Information issued a report concluding that the HIPAA Privacy Rule does not adequately protect the privacy of people's personal health information and hinders important health research discoveries.[49]

The FCBTR also has a Certificate of Confidentiality from the National Institutes of Health.[50] Certificates of Confidentiality offer an important protection for the privacy of research study participants by protecting identifiable research information from forced disclosure (e.g., through a subpoena or court order).[51] The HIPPA Privacy Rule does not protect against all forced disclosure since it permits disclosures required by law, for example. Various Federal agencies may grant a Certificate of Confidentiality for studies that collect information that, if disclosed, could damage subjects' financial standing, employability, insurability, or reputation, or have other adverse consequences. By protecting research and institutions from forced disclosure of such information, Certificates of Confidentiality help achieve research objectives and promote participation in research studies.[52]

Institutional Review Boards (IRB)

Under federal Food and Drug Administration regulations, an IRB is an appropriately constituted group that has been formally designated to review and monitor biomedical research involving human subjects.[53] An IRB has the authority to approve, require modifications in (to secure

[45] *Supra* fn. 43.
[46] *See e.g.*, The Common Rule, 45 C.F.R. Part 46, Subpart A and the Food and Drug Administration's human subject protections regulations 21 C.F.R. Parts 50 and 56, which primarily address subjects involved in clinical investigations.
[47] U.S. Department of Health and Human Services, *HIPAA Privacy Rule: To Whom Does the Privacy Rule Apply and Whom Will It Affect?*, available at http://privacyruleandresearch.nih.gov/pr_06.asp (Last visited January 5, 2011).
[48] NIH Publication Number 03-5388 Protecting Personal Health Information in Research: Understanding the HIPAA Privacy Rule, April 2003, available at: http://privacyruleandresearch.nih.gov/pdf/HIPAA_Privacy_Rule_Booklet.pdf, (Last visited on January 5, 2011).
[49] The Institute of Medicine, *Beyond the HIPAA Privacy Rule: Enhancing Privacy, Improving Health Through Research*. The National Academies' press release announcing the report is available at: http://www.iom.edu/Reports/2009/Beyond-the-HIPAA-Privacy-Rule-Enhancing-Privacy-Improving-Health-Through-Research.aspx, (Last visited on January 5, 2011).
[50] *Supra* fn. 26.
[51] U.S. Department of Health and Human Services, *Certificates of Confidentiality: Background Information*, available at http://grants.nih.gov/grants/policy/coc/background.htm (Last visited on January 5, 2011).
[52] *Id.*
[53] *See supra* fn. 36.

approval), or disapprove research. This group review serves an important role in the protection of the rights and welfare of human research subjects.[54]

The purpose of IRB review is to assure, both in advance and by periodic review, that appropriate steps are taken to protect the rights and welfare of humans participating as subjects in the research.[55] To accomplish this purpose, IRBs use a group process to review research protocols and related materials (e.g., informed consent documents and investigator brochures) to ensure protection of the rights and welfare of human subjects of research.[56]

IRB approval means the determination of the IRB that the research has been reviewed and may be conducted at an institution within the constraints set forth by the IRB and by other institutional and federal requirements.

Public Records Exemption for the FCBTR

Chapter 2006-259, L.O.F., enacted concurrently with the establishment of the FCBTR, made certain information held by the FCBTR confidential and exempt from s. 119.07(1), F.S., and s. 24, Art. I, of the Florida Constitution.[57]

The exempted information includes an individual's medical records and any information received from an individual from another state or nation or the Federal Government that is otherwise confidential or exempt pursuant to the laws of that state or nation or pursuant to federal law. This law was codified in s. 381.8531, F.S., which is subject to the Open Government Sunset Review Act.[58] Accordingly, it will be repealed automatically on October 2, 2011, unless reviewed and saved from repeal through reenactment by the Legislature.

Exemptions from the public records law must be created by a general law which must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.[59] The Legislature expressed the reasons supporting the public necessity for making an individual's medical records held by the brain tumor registry confidential and exempt from the public records requirements as follows:

> Matters of personal health are traditionally private and confidential concerns between the patient and the health care provider. The private and confidential nature of personal health matters pervades both the public and private health care sectors. For these reasons, the individual's expectation of and right to privacy in all matters regarding his or her personal health necessitates this exemption. [In

[54] U.S. Food and Drug Administration, *Institutional Review Boards Frequently Asked Questions-Information Sheet*, available at http://www.fda.gov/RegulatoryInformation/Guidances/ucm126420.htm (Last visited on January 5, 2011).
[55] *Id.*
[56] *Id.*
[57] The FCBTR also operates under the public records exemptions in s. 760.40, F.S., related to genetic testing and DNA analysis. DNA analysis is defined in s. 760.40, F.S., to mean the medical and biological examination and analysis of a person to identify the presence and composition of genes in that person's body. The term includes DNA typing and genetic testing. Results of a DNA analysis are confidential and exempt from the public records law.
[58] Section 119.15, F.S.
[59] *Supra* fn. 7.

> addition], …the release of such record could be defamatory to the patient or could cause unwarranted damage to the name or reputation of that patient.

Research from the review disclosed that the FCBTR does not receive a donor's medical records. However, the FCBTR does receive tissue samples, certain medical information about the donor that is extracted from the donor's medical record, and information which identifies the donor. The FCBTR has requested that the exemption be revised to reflect the practice of the FCBTR.[60] This will help ensure that a potential donor is not discouraged from donating to the repository.

The Legislature expressed the reasons supporting the public necessity for making information received by the brain tumor registry from an individual from another state or nation or the Federal Government that is otherwise exempt or confidential pursuant to the laws of that state or nation or pursuant to federal law confidential and exempt from the Florida public records requirement because without this protection, another state or nation or the Federal Government might be less likely to provide information to the registry in the furtherance of its duties and responsibilities.

Representatives from the FCBTR indicated that they have received information from a person from another state or nation or the Federal Government that is confidential or exempt pursuant to the laws of that state or nation or pursuant to federal law.[61] The representative cited protections under HIPAA and its implementing regulations and state law, as well as the federal Common Rule as the basis for protection from public disclosure in those jurisdictions.[62]

As a part of participating in the Open Government Sunset Review process, the FCBTR requested the authority under Florida's law to release identifying information consistent with federal and another state's laws if applicable when necessary to further the purposes of the research and when additional safeguards are in place to protect that information.[63]

Based on research conducted as part of the Open Government Sunset Review Act as required by s. 381.8531(2), F.S., professional staff in the Senate Committee on Health Regulation recommends that the Legislature:

- Re-enact and modify the public records exemption in s. 381.8531, F.S., to delete the exemption for an individual's medical record and instead exempt any personal identifying information pertaining to a donor to the registry and repository. This exemption reflects the practice of the FCBTR, furthers the purpose of the FCBTR to foster research objectives, and complies with the statutory requirements for an exemption because it protects information of a personal nature;
- Authorize the release of identifying information when it is specifically needed to further a particular medical or scientific research project related to brain tumors and when additional privacy safeguards are in place; and

[60] *Supra* fn. 41.
[61] *Supra* fn. 32.
[62] *Id. See supra* fn. 46 for information regarding the Common Rule.
[63] *Supra* fn. 41.

- Re-enact the exemption related to information received by the brain tumor registry from an individual from another state or nation. Continuing the exemption promotes donations from persons in other jurisdictions which, in turn, will further the purposes of the FCBTR.

III. Effect of Proposed Changes:

The bill exempts information held by the FCBTR before, on, or after July 1, 2011,[64] which identifies an individual who has donated specimens or information to the brain tumor registry and repository from public disclosure. This information is made confidential and exempt from s. 119.07(1), F.S., and s. 24, Art. I, of the Florida Constitution. The bill eliminates the exemption from public disclosure for an individual's medical record because the FCBTR does not receive or maintain an individual's medical record.

The bill provides for disclosure of a donor's personal identifying information or any information that is received from an individual from another state or nation or the Federal Government that is confidential or exempt pursuant to the laws of that state or nation or pursuant to federal law when the research cannot otherwise be conducted without that information. Specific conditions for such release are included in the bill. The confidential and exempt information may only be disclosed to a person engaged in bona fide research if the researcher agrees to:

- Submit to the FCBTR a research plan that has been approved by an institutional review board and that specifies the exact nature of the information requested, the intended use of the information, and the reason that the research could not practicably be conducted without the information;
- Sign a confidentiality agreement with the FCBTR;
- Maintain the confidentiality of the personal identifying information or otherwise confidential or exempt information; and
- To the extent permitted by law and after the research is concluded, destroy any confidential records or information obtained.

Notwithstanding the authorization in state law for such release of identifying information, the disclosure must comply with applicable federal law.

Because the exemption from the public records law is modified and broadens the scope of the exemption, a statement pertaining to the public necessity for the exemption is provided and a two-thirds vote of each house is required to enact the bill. Additionally, the law must be scheduled for review again under the Open Government Sunset Review Act. Accordingly, the proposed committee bill provides for repeal of this law on October 2, 2016, if not reviewed and saved from repeal through reenactment by the Legislature.

The act will take effect on July 1, 2011.

[64] The phrase "before, on, or after July 1, 2011" provides a clear legislative intent that the law should apply retroactively. As mentioned previously in the analysis, there must be a clear legislative intent for a statute affecting substantive rights to apply retroactively. *See supra* fn. 11, 12.

Other Potential Implications:

If the Legislature chooses not to retain or modify the public records exemption for the FCBTR repository and registry, the exemption will expire on October 2, 2011. Without the exemption, certain information in the repository and registry of the FCBTR might become public, deter donations, and impede the timely discovery of treatments or cures for brain tumors.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of s. 18, Art. VII, of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The bill reenacts and amends an existing public records exemption in s. 381.8531, F.S. Because the bill expands the exemption, it contains a constitutionally required statement of public necessity for the expansion. Additionally, this bill is subject to a two-thirds vote of each house of the Legislature for enactment as required by s. 24(c), Art. I, of the Florida Constitution, because it expands the public records exemption.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of subsection 19(f), Art. III, of the Florida Constitution.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Health Regulation Committee

BILL:	SPB 7048
INTRODUCER:	For Consideration by the Health Regulation Committee
SUBJECT:	Certificates of Need
DATE:	February 7, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Callaghan	Stovall		**Pre-meeting**
2.				
3.				
4.				
5.				
6.				

I. Summary:

The proposed committee bill is the result of a review of the moratorium on nursing home certificates of need, which is discussed in Florida Senate Interim Report 2011-125.[1]

The proposed committee bill extends, until July 1, 2016, the moratorium on nursing home certificates of need and the requirement for the Agency for Health Care Administration (Agency) to reduce upon request, the mandatory percentage of Medicaid patient days in certain nursing homes.

This bill substantially amends the following sections of the Florida Statutes: 408.040 and 408.0435.

II. Present Situation:

Certificates of Need

A certificate of need (CON) is a written statement issued by the Agency evidencing community need for a new, converted, expanded, or otherwise significantly modified health care facility, health service, or hospice.[2] Under this regulatory program, the Agency must provide approval through the CON review and approval process prior to a provider establishing a new nursing home or adding nursing home beds.

[1] The Florida Senate Interim Report 2011-125 is available at http://www.flsenate.gov/data/Publications/2011/Senate/reports/interim_reports/pdf/2011-125hr.pdf (Last visited on January 25, 2011).

[2] Section 408.032(3), F.S.

The Florida CON program has three levels of review: full, expedited, and the granting of an exemption.[3] The nursing home projects addressed in s. 408.036, F.S., related to CONs are as follows:

Projects Subject to Full Comparative Review

- Adding beds in community nursing homes; and
- Constructing or establishing new health care facilities, which include skilled nursing facilities (SNFs).[4]

Projects Subject to Expedited Review

- Replacing a nursing home within the same district; and
- Relocating a portion of a nursing home's licensed beds to a facility within the same district.

Exemptions from CON Review

- Converting licensed acute care hospital beds to Medicare and Medicaid certified skilled nursing beds in a rural hospital;
- Adding nursing home beds at a SNF that is part of a retirement community which had been in operation on or before July 1, 1949 for the exclusive use of the community residents;
- Combining licensed beds from two or more licensed nursing homes within a district into a single nursing home within that district if 50 percent of the beds are transferred from the only nursing home in a county and that nursing home had less than a 75 percent occupancy rate;[5]
- State veteran's nursing homes operated by or on behalf of the Florida Department of Veterans' Affairs;
- Combining into one nursing home, the beds or services authorized by two or more CONs issued in the same planning subdistrict;
- Separating into two or more nursing homes in the subdistrict, the beds or services that are authorized by one CON;
- Adding no more than 10 total beds or 10 percent of the licensed nursing home beds of that facility, whichever is greater; or if the nursing home is designated as a Gold Seal nursing home, no more than 20 total beds or 10 percent of the licensed nursing home beds of that facility for a facility with a prior 12-month occupancy rate of 96 percent or greater; and
- Replacing a licensed nursing home on the same site, or within 3 miles, if the number of licensed beds does not increase.

The CON program applies to all nursing home beds, regardless of the source of payment for the beds (private funds, insurance, Medicare, Medicaid, or other funding sources).

[3] Section 408.036, F.S.
[4] Section 408.032(16), F.S., defines a SNF as an institution, or a distinct part of an institution, which is primarily engaged in providing, to inpatients, skilled nursing care and related services for patients who require medical or nursing care, or rehabilitation services for the rehabilitation of injured, disabled, or sick persons.
[5] This exemption is repealed upon the expiration of the moratorium by operation of s. 408.036(3)(f), F.S.

Determination of Need

A CON is predicated on a determination of need. The future need for community nursing home beds is determined twice a year and published by the agency as a fixed bed need pool for the applicable planning horizon. The planning horizon for CON applications is 3 years. Need determinations are calculated for subdistricts within the Agency's 11 service districts[6] based on estimates of current and projected population as published by the Executive Office of the Governor.

The need formula[7] links the projected subdistrict need to a projected increase in the district need for nursing home beds. The district increase is based on the expected increase in the district population age 65 to 74 and age 75 and over, with the age group 75 and over given 6 times more weight in projecting the population increase. The projected district bed need total is then allocated to its subdistricts. The result for a given subdistrict is adjusted to reflect the current subdistrict occupancy of beds, and a desired standard of 94 percent occupancy. The subdistrict net need is the excess of the allocated beds over the licensed or approved beds in the subdistrict. If current occupancy of licensed beds is less than 85 percent, the net need in the subdistrict is zero regardless of whether the formula otherwise shows a net need.

The Agency is required to issue a CON to the holder of a provisional certificate of authority to construct nursing home beds for the exclusive use of the prospective residents of the proposed continuing care facility under a different bed-need assessment scheme.[8] The Agency is required to approve at least one sheltered nursing home bed[9] for every four proposed residential units. Additional sheltered nursing home beds must be approved based on actual utilization and demand by current residents. Sheltered nursing home beds are not included in the need formula for community nursing home beds.

Application Process

Nursing home bed projects subject to competitive review are included in the batching cycle for "other beds and programs." The review process takes approximately 120 days.[10] The fixed bed need determination is published in the Florida Administrative Weekly. A letter of intent describing the applicant, the project type including the number of beds, and its location must be submitted to the Agency at least 30 days prior to the applicable batching cycle application due date.[11] A grace period after the initial letter of intent deadline provides an opportunity for other applicants to compete with an initial letter of intent. The grace period extends this initial phase by an additional 16 days for the submission of a competitor's letter of intent.

[6] The nursing home subdistricts are set forth in Rule 59C-2.200, F.A.C.
[7] Rule 59C-1.036, F.A.C.
[8] Section 651.118, F.S.
[9] A sheltered nursing home bed is a nursing home bed located within a continuing care facility for which a CON is issued pursuant to s. 651.118(2), F.S. Generally these beds must be used for residents of the continuing care facility. However, the beds may be used for persons who are not residents of the continuing care facility for a period of up to 5 years after the date of issuance of the initial nursing home license. A continuing care community may request an extension of this timeframe for up to 30 percent of the sheltered nursing home beds based on demonstrated financial need.
[10] Presentation by the Agency on Florida CONs to the House Health Innovation Committee on January 8, 2008. A copy of the presentation slides is available from the Senate Committee on Health Regulation.
[11] Rule 59C-1.008, F.A.C.

The CON application must be submitted to the Agency by the date published for that batching cycle. The Agency must perform a completeness review of the application within 15 calendar days of the application submission deadline.[12] The applicant has 21 calendar days after receipt of the Agency's request for additional information to provide the requested information, otherwise the application is withdrawn from further consideration. The Agency must determine whether the application is complete or withdrawn within 7 calendar days after receipt of the requested information.

The Agency will conduct public hearings on the applications, if requested and the Agency determines that a proposed project involves issues of great local public interest.[13]

The Agency reviews CON applications for additional nursing home beds in context with the following criteria:[14]

- The need for the health care facilities and health services being proposed. An application for nursing facility beds will not be approved in the absence or insufficiency of a numeric need unless the absence or insufficiency of numeric need is outweighed by other information presented in a CON application showing special circumstances consistent with the additional criteria that follows;[15]
- The availability, quality of care, accessibility, and extent of utilization of existing health care facilities and health services in the service district of the applicant;
- The ability of the applicant to provide quality of care and the applicant's record of providing quality of care;
- The availability of resources, including health personnel, management personnel, and funds for capital and operating expenditures, for project accomplishment and operation;
- The extent to which the proposed services will enhance access to health care for residents of the service district;
- The immediate and long-term financial feasibility of the proposal;
- The extent to which the proposal will foster competition that promotes quality and cost-effectiveness;
- The costs and methods of the proposed construction, including the costs and methods of energy provision and the availability of alternative, less costly, or more effective methods of construction;
- The applicant's past and proposed provision of health care services to Medicaid patients and the medically indigent; and
- The applicant's designation as a Gold Seal Program nursing facility pursuant to s. 400.235, F.S., when the applicant is requesting additional nursing home beds at that facility.

The Agency issues a State Agency Action Report which states the Agency's intent to grant or deny a CON for projects in their entirety or for identifiable portions thereof and states the conditions required, if any, of the CON holder. If there is no challenge to all or any part of the

[12] Rule 59C-1.010, F.A.C.
[13] Section 408.039, F.S.
[14] Section 408.035, F.S.
[15] Rule 59C-1.036, F.A.C.

agency decision embodied in the State Agency Action Report within 21 days after publication in the Florida Administrative Weekly, the decision becomes final and the CON is issued.[16]

Applicants in the same batching cycle and exiting health care facilities in the same district that will be substantially affected by the issuance of any CON may challenge the issuance or denial of a CON. The Division of Administrative Hearings conducts the hearing, which must commence within 60 days after the administrative law judge has been assigned except upon unanimous consent of the parties or pursuant to a motion of continuance granted by the administrative law judge.[17] A party to an administrative hearing for an application for a CON may seek judicial review of the final order issued by the administrative law judge to the District Court of Appeal.

Moratorium on Nursing Home CONs

In 2001, the Legislature enacted the first moratorium on the issuance of CONs for additional community nursing home beds until July 1, 2006.[18] In 2006, the Legislature extended the moratorium until July 1, 2011.[19] In addition, the Legislature provided for additional exceptions to the moratorium to address occupancy needs that might arise.

The Legislature has provided for certain exceptions to the moratorium on CONs as follows:

- Adding sheltered nursing home beds;
- Beds may be added in a county that has no community nursing home beds and the lack of beds is the result of the closure of nursing homes that were licensed on July 1, 2001;[20]
- Adding the greater of no more than 10 total beds or 10 percent of the licensed nursing home beds of a nursing home located in a county having up to 50,000 residents,[21] if:
  - The nursing home has not had any class I or class II deficiencies[22] within the 30 months preceding the request for addition;
  - The prior 12-month average occupancy rate for the nursing home beds at the facility meets or exceeds 94 percent and the facility has not had any class I or class II deficiencies since its initial licensure; or

[16] *Supra* fn. 12.
[17] *Supra* fn. 13.
[18] Chapter 2001-45, L.O.F. s. 52.
[19] Chapter 2006-161, L.O.F.
[20] The request to add beds under this exception to the moratorium is subject to the full competitive review process for CONs.
[21] Twenty-five counties have fewer than 50,000 residents. These counties include: Baker, Bradford, Calhoun, DeSoto, Dixie, Franklin, Gadsden, Gilchrist, Glades, Gulf, Hamilton, Hardee, Hendry, Holmes, Jefferson, Lafayette, Levy, Liberty, Madison, Okeechobee, Suwannee, Taylor, Union, Washington and Wakulla. Source: The Florida Legislature Office of Demographic and Economic Research as of April 1, 2010, *The Florida Legislature Econographic News*, 2010 Volume Ia, available at: http://edr.state.fl.us/Content/population-demographics/reports/econographicnews-2010v1a.pdf, (Last visited on January 28, 2011).
[22] Deficiencies in nursing homes are classified according to the nature and scope of the deficiency. A class I deficiency is a deficiency that the Agency determines presents a situation in which immediate corrective action is necessary because the facility's noncompliance has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident receiving care in a facility. A class II deficiency is a deficiency that the Agency determines has compromised a resident's ability to maintain or reach his or her highest practicable physical, mental, and psychosocial well-being, as defined by an accurate and comprehensive resident assessment, plan of care, and provision of services. *See* s. 400.23(8), F.S.

  - For a facility that has been licensed for less than 24 months, the prior 6-month average occupancy rate for the nursing home beds at the facility meets or exceed 94 percent and the facility has not had any class I or class II deficiencies since its initial licensure; and
- Adding the greater of no more than 10 total beds or 10 percent of the number of licensed nursing home beds if:
  - The facility has not had any class I or class II deficiencies within the 30 months preceding the request for addition;
  - The prior 12-month average occupancy rate for the nursing home beds at the facility meets or exceeds 96 percent;
  - The prior 12-month occupancy rate for the nursing home beds in the subdistrict is 94 percent or greater; and
  - Any beds authorized for the facility under this exception in a prior request have been licensed and operational for at least 12 months.[23]

Nursing Home Occupancy Levels

As of January 1, 2011, there are 674 licensed nursing homes and 82,562 licensed nursing home beds in Florida.[24]

Over the last 10 years, the average nursing home occupancy level in Florida has remained below 90 percent and has been declining steadily. However, since the moratorium was reenacted in 2006, the Leon and Okeechobee subdistricts have exceeded slightly the 94 percent occupancy level. The number of resident days for persons aged 65 and older has been declining steadily. The annual statewide nursing home occupancy levels are presented below:[25]

Year	Occupancy Level	Number of resident days per 1000 population aged 65+
2000	85.29 %	8849
2001	85.07 %	8679
2002	86.75 %	8639
2003	87.67 %	8655
2004	88.12 %	8445
2005	87.17 %	8346
2006	88.22 %	8094
2007	88.05 %	7942
2008	87.35 %	7756
2009	86.92 %	7618

[23] The request to add beds under the exception to the moratorium is subject to the procedures related to an exemption to the CON requirements.

[24] Source: Agency for Health Care Administration, as of January 1, 2011. Data available at: http://www.fdhc.state.fl.us/MCHQ/Long_Term_Care/FDAU/docs/SummaryAllActive.pdf, (Last visited on January 27, 2011).

[25] Agency for Health Care Administration report provided to professional staff of the Florida Senate Health Regulation Committee on July 28, 2010, a copy of which is available upon request from the Senate Health Regulation Committee.

The Agency projected the nursing home occupancy levels and need projections for January 2016 and the statewide occupancy level is projected at 86.55 percent. However, three subdistricts will exceed the desired standard of 94 percent occupancy based on the Agency's projection. This calculation projects additional nursing home beds will be needed in three rural subdistricts.[26] Exceptions to the moratorium currently authorized in law will enable nursing homes which have not been poor performers that are located in these areas to incrementally expand to meet increased demand if it materializes as projected.

CON Conditions

Section 408.040, F.S., authorizes the Agency to impose conditions on the issuance of a CON or an exemption. Each nursing home participating in the Medicaid program provided a statement of intent in its application for a CON that includes a specified percentage of the annual patient days at the facility that will be utilized by patients eligible for care under the Medicaid program. The Medicaid-patient-days condition is included on the CON or exemption for these nursing homes.

The holder of a CON or an exemption with conditions may be granted a modification of the conditions by the Agency based on a demonstration of good cause. Additionally, if a nursing home is located in a county in which a long-term care community diversion pilot project has been implemented or in a county with a managed care program for Medicaid recipients who are 60 years of age or older, the Agency must grant a nursing home's request to reduce its annual Medicaid-patient-days condition by not more than 15 percent. A nursing home may submit only one request every 2 years for the automatic reduction. The authority for the automatic reduction expires June 30, 2011.[27]

Since 2006, when this provision authorizing the automatic reduction went into effect,[28] the Agency has granted the automatic 15 percent reduction 230 times.[29] Some licensed nursing homes have been granted reductions on three separate occasions.

Senate Interim Report 2011-125

During the 2010-2011 interim, professional staff of the Senate Committee on Health Regulation examined factors impacting an extension of the moratorium on nursing home certificates of need.

Senate professional staff recommended in Interim Report 2011-125 that the Legislature reenact and continue the moratorium on the CON for community nursing home beds through the year 2016 based on the following findings:

- The public prefers home and community-based residency options;
- Projected nursing home occupancy levels through 2016 are to decrease;
- The economic climate continues to affect existing nursing homes; and

[26] Okeechobee will need 16 additional nursing home beds (currently it has 180 licensed beds), Columbia/ Hamilton/ Suwannee will need 86 additional nursing home beds (currently it has 766 licensed beds), and Putnam will need 39 additional nursing home beds (currently it has 337 licensed beds). *See supra* fn. 25.
[27] Section 408.040(1)(d), F.S.
[28] Chapter 2006-161, L.O.F.
[29] Source: Agency for Health Care Administration email to Senate Health Regulation professional staff dated August 19, 2010, a copy of which is available from the Senate Health Regulation Committee.

- The Legislature continues to place an emphasis on, and facilitates, the ability of Floridians to reside in less restrictive settings than nursing homes.

In addition, Senate professional staff recommended that the exceptions and exemptions that the Legislature has enacted to implement the moratorium and address potential surges in occupancy levels be retained. Staff also suggested that language regarding the exception to the moratorium in a county having up to 50,000 residents should be clarified to reflect that a facility requesting additional beds must certify that it has not had any class I or class II deficiencies within 30 months or since it was initially licensed if licensed within 25 – 29 months preceding the request for additional beds.

Furthermore, Senate professional staff recommended that the Legislature reenact the automatic 15 percent reduction of the annual Medicaid-patient-days condition for nursing homes located in a county in which a long-term care community diversion pilot project has been implemented or in a county with a managed care program for Medicaid recipients who are age 60 years or older. The recommendation for continuing the automatic reduction is based on the ongoing emphasis to reduce nursing home care in favor of community-based care. Staff recommended that the automatic reduction expire on a date that coincides with the date for continuation of the moratorium in order to allow a reassessment of the long-term care environment and help ensure that reduction requests do not eliminate the availability of Medicaid nursing home beds below future needs.

This proposed committee bill implements the committee's instruction to draft a proposed committee bill in accordance with the professional staff's recommendations.

III. Effect of Proposed Changes:

Section 1 amends s. 408.040, F.S., to extend until July 1, 2016, the requirement that the Agency automatically grant to certain nursing homes[30] their request to reduce the condition on their CON requiring a percentage of annual patient days to be utilized by patients eligible for care under the Medicaid program.

Section 2 amends s. 408.0435, F.S., to extend until July 1, 2016, the moratorium on certificates of need for additional community nursing home beds.

This section clarifies that a nursing home requesting, under one of the statutory exceptions, a CON during the moratorium must certify that it has not had any class I or class II deficiencies within 30 months preceding the request for additional beds or since initial licensure if licensed less than 30 months. In addition, the facility must certify that it has had an average occupancy rate for nursing home beds that meets or exceeds 94 percent for the designated timeframe. A facility that has been licensed 24 months or longer must certify that the prior 12-month average occupancy rate met or exceeded 94 percent, while a facility that has been licensed for less than 24 months must certify that the prior 6-month average occupancy rate met or exceeded 94 percent.

[30] Section 408.040, F.S., provides that only nursing homes located in a county in which a long-term care community diversion pilot project has been implemented or in a county with a managed care program for Medicaid recipients who are 60 years of age or older or dually eligible for Medicare and Medicaid are eligible for the automatic reduction.

Section 3 provides that the bill will take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this CS have no impact on municipalities and the counties under the requirements of article VII, section 18, of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of the bill have no impact on public records or open meetings issues under the requirements of article I, section 24(a) and (b), of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of article III, subsection 19(f), of the Florida Constitution.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill continues the current moratorium on certificates of need for additional community nursing home beds. Therefore, unless an exception or exemption applies, new nursing home facilities may not be built and existing facilities may not be expanded to provide additional community nursing home beds.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

The Florida Senate

Interim Report 2011-125 *October 2010*

Committee on Health Regulation

REVIEW THE MORATORIUM ON NURSING HOME CERTIFICATES OF NEED

Issue Description

Florida regulates the entry of nursing homes into the market and the expansion of nursing home beds through the certificate of need (CON) process. Currently a moratorium is imposed on the issuance of a CON for additional nursing home beds, with certain exceptions, until July 1, 2011. The moratorium has been in place since 2001, after reenactment with modifications by the Legislature in 2006. The purpose of the moratorium is to contain nursing home placements and encourage other forms of assistance in a manner that is both more cost-effective and more in keeping with the wishes of elderly residents in this state. This report examines factors impacting an extension of the moratorium and recommends a legislative extension of the moratorium on the issuance of CONs for additional nursing home beds.

Background

Certificates of Need

A CON is a written statement issued by the Agency for Health Care Administration (Agency) evidencing community need for a new, converted, expanded, or otherwise significantly modified health care facility, health service, or hospice.[1] Under this regulatory program, the Agency must provide approval through the CON review and approval process prior to a provider establishing a new nursing home or adding nursing home beds.

The Florida CON program has three levels of review: full, expedited, and the granting of an exemption.[2] The nursing home projects addressed in s. 408.036, F.S., related to CONs are as follows:

Projects Subject to Full Comparative Review

- Adding beds in community nursing homes and
- Constructing or establishing new health care facilities, which include skilled nursing facilities (SNFs).[3]

Projects Subject to Expedited Review

- Replacing a nursing home within the same district and
- Relocating a portion of a nursing home's licensed beds to a facility within the same district.

Exemptions from CON Review

- Converting licensed acute care hospital beds to Medicare and Medicaid certified skilled nursing beds in a rural hospital;
- Adding nursing home beds at a SNF that is part of a retirement community which had been in operation on or before July 1, 1949 for the exclusive use of the community residents;

[1] s. 408.032(3), F.S.
[2] s. 408.036, F.S.
[3] Section 408.032(16), F.S., defines a SNF as an institution, or a distinct part of an institution, which is primarily engaged in providing, to inpatients, skilled nursing care and related services for patients who require medical or nursing care, or rehabilitation services for the rehabilitation of injured, disabled, or sick persons.

- Combining licensed beds from two or more licensed nursing homes within a district into a single nursing home within that district if 50 percent of the beds are transferred from the only nursing home in a county and that nursing home had less than a 75 percent occupancy rate;[4]
- State veteran's nursing homes operated by or on behalf of the Florida Department of Veterans' Affairs;
- Combining into one nursing home, the beds or services authorized by two or more CONs issued in the same planning subdistrict;
- Separating into two or more nursing homes in the subdistrict, the beds or services that are authorized by one CON;
- Adding no more than 10 total beds or 10 percent of the licensed nursing home beds of that facility, whichever is greater; or if the nursing home is designated as a Gold Seal nursing home, no more than 20 total beds or 10 percent of the licensed nursing home beds of that facility for a facility with a prior 12-month occupancy rate of 96 percent or greater; and
- Replacing a licensed nursing home on the same site, or within 3 miles, if the number of licensed beds does not increase.

The CON program applies to all nursing home beds, regardless of the source of payment for the beds (private funds, insurance, Medicare, Medicaid, or other funding sources).

Determination of Need

A CON is predicated on a determination of need. The future need for community nursing home beds is determined twice a year and published by the agency as a fixed bed need pool for the applicable planning horizon. The planning horizon for CON applications is 3 years. Need determinations are calculated for subdistricts within the Agency's 11 service districts[5] based on estimates of current and projected population as published by the Executive Office of the Governor.

The need formula[6] links the projected subdistrict need to a projected increase in the district need for nursing home beds. The district increase is based on the expected increase in the district population age 65 to 74 and age 75 and over, with the age group 75 and over given 6 times more weight in projecting the population increase. The projected district bed need total is then allocated to its subdistricts. The result for a given subdistrict is adjusted to reflect the current subdistrict occupancy of beds, and a desired standard of 94 percent occupancy. The subdistrict net need is the excess of the allocated beds over the licensed or approved beds in the subdistrict. If current occupancy of licensed beds is less than 85 percent, the net need in the subdistrict is zero regardless of whether the formula otherwise shows a net need.

The Agency is required to issue a CON to the holder of a provisional certificate of authority to construct nursing home beds for the exclusive use of the prospective residents of the proposed continuing care facility under a different bed-need assessment scheme.[7] The Agency is required to approve at least one sheltered nursing home bed[8] for every four proposed residential units. Additional sheltered nursing home beds must be approved based on actual utilization and demand by current residents. Sheltered nursing home beds are not included in the need formula for community nursing home beds.

[4] This exemption is repealed upon the expiration of the moratorium by operation of s. 408.036(3)(f), F.S.
[5] The nursing home subdistricts are set forth in Rule 59C-2.220, F.A.C.
[6] Rule 59C-1.036, F.A.C.
[7] s. 651.118, F.S.
[8] A sheltered nursing home bed is a nursing home bed located within a continuing care facility for which a CON is issued pursuant to s. 651.118(2), F.S. Generally these beds must be used for residents of the continuing care facility. However, the beds may be used for persons who are not residents of the continuing care facility for a period of up to 5 years after the date of issuance of the initial nursing home license. A continuing care community may request an extension of this timeframe for up to 30 percent of the sheltered nursing home beds based on demonstrated financial need.

Application Process

Nursing home bed projects subject to competitive review are included in the batching cycle for "other beds and programs." The review process takes approximately 120 days.[9] The fixed bed need determination is published in the Florida Administrative Weekly. A letter of intent describing the applicant, the project type including the number of beds, and its location must be submitted to the Agency at least 30 days prior to the applicable batching cycle application due date.[10] A grace period after the initial letter of intent deadline provides an opportunity for other applicants to compete with an initial letter of intent. The grace period extends this initial phase by an additional 16 days for the submission of a competitor's letter of intent.

The CON application must be submitted to the Agency by the date published for that batching cycle. The Agency must perform a completeness review of the application within 15 calendar days of the application submission deadline.[11] The applicant has 21 calendar days after receipt of the Agency's request for additional information to provide the requested information, otherwise the application is withdrawn from further consideration. The Agency must determine whether the application is complete or withdrawn within 7 calendar days after receipt of the requested information.

The Agency will conduct public hearings on the applications, if requested and the Agency determines that a proposed project involves issues of great local public interest.[12]

The Agency reviews CON applications for additional nursing home beds in context with the following criteria:[13]

- The need for the health care facilities and health services being proposed. An application for nursing facility beds will not be approved in the absence or insufficiency of a numeric need unless the absence or insufficiency of numeric need is outweighed by other information presented in a CON application showing special circumstances consistent with the additional criteria that follows;[14]
- The availability, quality of care, accessibility, and extent of utilization of existing health care facilities and health services in the service district of the applicant;
- The ability of the applicant to provide quality of care and the applicant's record of providing quality of care;
- The availability of resources, including health personnel, management personnel, and funds for capital and operating expenditures, for project accomplishment and operation;
- The extent to which the proposed services will enhance access to health care for residents of the service district;
- The immediate and long-term financial feasibility of the proposal;
- The extent to which the proposal will foster competition that promotes quality and cost-effectiveness;
- The costs and methods of the proposed construction, including the costs and methods of energy provision and the availability of alternative, less costly, or more effective methods of construction;
- The applicant's past and proposed provision of health care services to Medicaid patients and the medically indigent; and
- The applicant's designation as a Gold Seal Program nursing facility pursuant to s. 400.235, F.S., when the applicant is requesting additional nursing home beds at that facility.

The Agency issues a State Agency Action Report which states the Agency's intent to grant or deny a CON for projects in their entirety or for identifiable portions thereof and states the conditions required, if any, of the CON holder. If there is no challenge to all or any part of the agency decision embodied in the State Agency Action

[9] Presentation by the Agency on Florida CONs to the House Health Innovation Committee on January 8, 2008. A copy of the presentation slides is available from the Senate Committee on Health Regulation.
[10] Rule 59C-1.008, F.A.C.
[11] Rule 59C-1.010, F.A.C.
[12] s. 408.039, F.S.
[13] s. 408.035, F.S.
[14] Rule 59C-1.036, F.A.C.

Report within 21 days after publication in the Florida Administrative Weekly, the decision becomes final and the CON(s) are issued.[15]

Applicants in the same batching cycle and exiting health care facilities in the same district that will be substantially affected by the issuance of any CON may challenge the issuance or denial of a CON. The Division of Administrative Hearings conducts the hearing, which must commence within 60 days after the administrative law judge has been assigned except upon unanimous consent of the parties or pursuant to a motion of continuance granted by the administrative law judge.[16] A party to an administrative hearing for an application for a CON may seek judicial review of the final order issued by the administrative law judge to the District Court of Appeal.

Moratorium on Nursing Home CONs

In 2001, the Legislature enacted the first moratorium on the issuance of CONs for additional community nursing home beds until July 1, 2006.[17] In 2006, the Legislature extended the moratorium until July 1, 2011.[18] In addition, the Legislature provided for additional exceptions to the moratorium to address occupancy needs that might arise.

The Legislature has provided for certain exceptions to the moratorium on CONs as follows:

- Adding sheltered nursing home beds;
- Beds may be added in a county that has no community nursing home beds and the lack of beds is the result of the closure of nursing homes that were licensed on July 1, 2001;[19]
- Adding the greater of no more than 10 total beds or 10 percent of the licensed nursing home beds of a nursing home located in a county having up to 50,000 residents,[20] if:
    - The nursing home has not had any class I or class II deficiencies[21] within the 30 months preceding the request for addition;
    - The prior 12-month average occupancy rate for the nursing home beds at the facility meets or exceeds 94 percent and the facility has not had any class I or class II deficiencies since its initial licensure; or
    - For a facility that has been licensed for less than 24 months, the prior 6-month average occupancy rate for the nursing home beds at the facility meets or exceed 94 percent and the facility has not had any class I or class II deficiencies since its initial licensure; [22] and
- Adding the greater of no more than 10 total beds or 10 percent of the number of licensed nursing home beds if:
    - The facility has not had any class I or class II deficiencies within the 30 months preceding the request for addition;
    - The prior 12-month average occupancy rate for the nursing home beds at the facility meets or exceeds 96 percent;
    - The prior 12-month occupancy rate for the nursing home beds in the subdistrict is 94 percent or greater; and

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[15] *Supra* note 11.
[16] *Supra* note 11.
[17] Ch. 2001-45, L.O.F. s. 52.
[18] Ch. 2006-161, L.O.F.
[19] The request to add beds under this exception to the moratorium is subject to the full competitive review process for CONs.
[20] Twenty-two counties have under 50,000 residents. These counties include: Baker, Bradford, Calhoun, DeSoto, Dixie, Franklin, Gilchrist, Glades, Gulf, Hamilton, Hardee, Hendry, Holmes, Jefferson, Lafayette, Levy, Liberty, Madison, Okeechobee, Taylor, Union, and Wakulla. Source: The Florida Legislature Office of Demographic and Economic Research as of August 9, 2010, available at: <http://edr.state.fl.us/>, (Last visited on September 21, 2010).
[21] Deficiencies in nursing homes are classified according to the nature and scope of the deficiency. A class I deficiency is a deficiency that the Agency determines presents a situation in which immediate corrective action is necessary because the facility's noncompliance has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident receiving care in a facility. A class II deficiency is a deficiency that the Agency determines has compromised a resident's ability to maintain or reach his or her highest practicable physical, mental, and psychosocial well-being, as defined by an accurate and comprehensive resident assessment, plan of care, and provision of services. (See s. 400.23(8), F.S.)
[22] The requirement that the facility not have had any class I or class II deficiencies within the three timeframes is unclear, especially within the first two provisions. This language could be clarified.

- Any beds authorized for the facility under this exception in a prior request have been licensed and operational for at least 12 months.[23]

Findings and/or Conclusions

Nursing Home Occupancy Levels

There are 671 licensed nursing homes in Florida.[24] As of March 1, 2010, there were 82,598 licensed nursing home beds, with an additional 1,024 CON-approved beds that are not licensed currently. Of the licensed beds, 79,437 were community beds, 2,496 were sheltered nursing home beds, 600 were beds in Veteran's nursing homes and 65 beds were dedicated to pediatric residents.[25]

Over the last 10 years, the average nursing home occupancy level in Florida has remained below 90 percent and has been declining steadily. As might be expected, there are some subdistricts that exceed the 94 percent standard occupancy level. Specifically, since the moratorium was reenacted in 2006, the Leon and Okeechobee subdistricts have exceeded slightly the 94 percent occupancy level. The number of resident days for persons aged 65 and older has been declining steadily. The annual statewide nursing home occupancy levels are presented below:[26]

Year	Occupancy Level	Number of resident days per 1000 population aged 65+
2000	85.29 %	8849
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2006	88.22 %	8094
2007	88.05 %	7942
2008	87.35 %	7756
2009	86.92 %	7618

The Agency projected the nursing home occupancy levels and need projections for January 2016 for purposes of the July 2012 planning horizon. Based on this calculation, the statewide occupancy level is projected at 86.55 percent. However, three subdistricts will exceed the desired standard of 94 percent occupancy based on the Agency's projection. This calculation projects additional nursing home beds will be needed in the following rural subdistricts: Okeechobee will need 16 additional nursing home beds (currently it has 180 licensed beds), Columbia/ Hamilton/ Suwannee will need 86 additional nursing home beds (currently it has 766 licensed beds), and Putnam will need 39 additional nursing home beds (currently it has 337 licensed beds).[27] Exceptions to the moratorium currently authorized in law will enable nursing homes which have not been poor performers that are located in these areas to incrementally expand to meet increased demand if it materializes as projected.

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[23] The request to add beds under the exception to the moratorium is subject to the procedures related to an exemption to the CON requirements.

[24] Source: Agency for Health Care Administration, as of On September 2, 2010. Data available at: <http://www.fdhc.state.fl.us/MCHQ/Long_Term_Care/FDAU/docs/SummaryAllActive.pdf>, (Last visited on September 21, 2010).

[25] Source: Agency for Health Care Administration report provided to professional staff of the Florida Senate Health Regulation Committee on July 28, 2010, a copy of which is available upon request from the Senate Health Regulation Committee.

[26] *Id.*

[27] *Id.*

Demographic Trends

The older population will burgeon between the years 2010 and 2030 when the "baby boom" generation[28] reaches age 65. On a national level, the population 65 and over will increase from 40 million in 2010 to 55 million in 2020. By 2030, there will be about 72.1 million older persons, almost twice their number in 2008. People 65 and over represented 12.8 percent of the population in the year 2008 but are expected to grow to be 19.3 percent of the population by 2030.[29] Most of the growth, especially over the next 10 to 15 years, will be among the young old (age 65-74) because of the aging of the baby boomers.[30] Within Florida, the population 65 and over will increase from 3.3 million in 2010 to 4.5 million in 2020, and to 6.2 million in 2030.[31] Nearly one in five U.S. residents will be aged 65 and older in 2030.

A better barometer for the potential demand for long-term care services is the growth in the 85 and over population (referred to as the "oldest-old"), not only because they have much higher rates of disability, but they also are much more likely to be widowed and without someone to provide assistance with daily activities.[32] Nationally, the population of the oldest old is projected to increase from 5.8 million in 2010, to 6.6 million in 2020, and to 8.7 million in 2030.[33] In Florida, the population of the oldest-old is projected to increase from 537,926 in 2010, to 739,069 in 2020, and to just over 1 million in 2030.[34] The baby boomers will begin to turn age 85 in 2031.[35]

Trends and Conditions In Long-Term Care

The term long-term care refers to a variety of services which includes medical and non-medical care for people who have a chronic illness or disability. Long-term care helps meet health or personal needs. Most long-term care is to assist people with support services such as activities of daily living like dressing, bathing, and using the bathroom. Long-term care can be provided at home, in the community, in assisted living facilities (ALFs) or in nursing homes.[36]

The majority of Americans age 50 and over (89 percent) want to stay in their homes for as long as they can.[37] The average age of residents in nursing homes in Florida in 2007 was 80.21 years of age.[38] Nursing facility residents, beds, and occupancy rates have remained nearly constant over the last 5 years, despite an increase in the older population.[39] The stabilization of the nursing home population in Florida can at least partially be attributed to expanding home and community-based services,[40] including services available in ALFs.[41]

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[28] The baby boomer generation consists of people born between 1946 and 1964.
[29] A Profile of Older Americans: 2009, U.S. Department of Health and Human Services, Administration on Aging, available at: <http://www.aoa.gov/AoARoot/Aging_Statistics/Profile/2009/docs/2009profile_508.pdf>, (Last visited on September 21, 2010). (page 5)
[30] AARP Across the States, Profiles of Long-Term Care and Independent Living, Eighth Edition, 2009 available at: <http://www.aarp.org/home-garden/livable-communities/info-03-2009/across_the_states_2009__profiles_of_long-term_care_and_independent_living.html>, (Last visited on September 21, 2010).
[31] The Office of Economic and Demographic Research, The Florida Legislature, available at: <http://edr.state.fl.us/population/Pop_Census_Day.pdf>, (Last visited on September 21, 2010).
[32] *Supra* note 30.
[33] *Supra* note 29, and THE NEXT FOUR DECADES The Older Population in the United States: 2010 to 2050, US Census Bureau, Issued May 2010, available at: <http://www.census.gov/prod/2010pubs/p25-1138.pdf>, (Last visited on September 21, 2010).
[34] *Supra* note 31.
[35] *Supra* note 30.
[36] Definition from Medicare.gov, found at:< http://www.medicare.gov/longtermcare/static/home.asp>, (Last visited on September 21, 2010).
[37] Providing More Long-term Support and Services at Home: Why It's Critical for Health Reform. AARP Public Policy Institute, June 2009, available at: http://www.aarp.org/health/health-care-reform/info-06-2009/fs_hcbs_hcr.html
[38] "Shaping Long Term Care in America Project at Brown University funded in part by the National Institute on Aging (1P01AG027296)." available at: < http://ltcfocus.org/StateTable.aspx>, (Last visited on September 21, 2010).
[39] *Supra* note 30.
[40] Home and community-based service programs for the elderly, funded in whole or part by public funds, include the Alzheimer's Disease Initiative, Alzheimer's Disease Waiver, Community Care for the Elderly, Contracted Services, Home Care for the Elderly, Local Services Program, Channeling, Consumer Directed Care Plus, Frail/Elderly Program, Medicaid

Florida, like most states, is now spending considerably more on home and community based long-term care services than 10 years ago. The Legislature has determined that the continued growth in the Medicaid budget for nursing home care constrained the ability of the state to meet the needs of its elderly residents through the use of less restrictive and less institutional methods of long-term care. Accordingly, the Legislature has limited the increase in Medicaid nursing home expenditures in order to provide funds to invest in long-term care that is community-based and provides supportive services in a manner that is both more cost-effective and more in keeping with the wishes of the elderly residents of this state.[42]

The Nursing Home Diversion Waiver Program is one of the primary alternate nursing home programs in Florida.[43] This program, as well as others, have helped increase the percentage of individuals who are eligible for Medicaid services to be diverted from nursing home placement. On average, Medicaid dollars can support nearly three older people and adults with physical disabilities in home and community-based settings for every person in a nursing facility.[44] All of Florida's home and community based waiver programs are relatively cost-effective alternatives to nursing home care for several thousand poor and frail elderly persons, especially those without caregivers. Even the most expensive program, the Nursing Home Diversion Waiver Program, is about $2,500 less expensive per person per month than Medicaid-funded nursing home care.[45]

The percentage of nursing home bed days in Florida paid for by Medicaid has also been declining on an annual basis. The following chart reflects total state spending and caseload for nursing home care paid for by Medicaid and the caseload and spending in the Nursing Home Diversion Waiver Program for 10 years:

State Fiscal Year	Medicaid Occupancy (Calendar Year)	Medicaid Nursing Home Caseload	Total Medicaid Expenditures	Nursing Home Diversion Caseload	Total Nursing Home Diversion Expenditures
2001-2002	64.43%	46,892	$1,837,866,321	857	$ 24,089,345
2002-2003	64.28%	47,704	$2,091,999,715	899	$ 25,228,532
2003-2004	63.48%	48,203	$2,238,956,267	1,871	$ 49,863,602
2004-2005	62.36%	47,465	$2,216,008,576	5,333	$131,404,123
2005-2006	61.14%	46,558	$2,296,156,032	6,252	$135,380,277
2006-2007	60.62%	45,856	$2,342,856,744	8,831	$188,774,446
2007-2008	60.69%	43,009	$2,350,109,632	11,083	$237,625,279
2008-2009	61.26%	42,535	$2,488,017,780	13,650	$266,191,975
2009-2010 based on February Social Services Estimating Conference	information not available	43,268	$2,760,065,260	18,114	$338,177,729
2010-2011 based on General Appropriations Act	information not available	44,077	$2,785,799,739	18,617	$347,885,072

Aged and Disabled Adult Waiver, Medicaid Assisted Living for the Elderly, Nursing Home Diversion Waiver Program, Program of All Inclusive Care for the Elderly, and Assistive Care Services. A description of each of these programs is available in the Florida Master Plan on Aging 2007-2009, prepared by The Florida Department of Elder Affairs, beginning on page 21, available at: <http://elderaffairs.state.fl.us/english/pubs/pubs/MasterPlan/FullCopy.pdf>, (Last visited on September 21, 2010). See also Profile of Florida's Medicaid Home and Community-Based Services Waivers, Report No. 10-10, issued January 2010 by the Office of Program Policy Analysis and Government Accountability for a description of the scope and availability of services under each of the Medicaid waiver programs, available at: <http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/1010rpt.pdf>, (Last visited on September 21, 2010).

[41] Florida Master Plan on Aging 2007-2009, prepared by The Florida Department of Elder Affairs, available at: <http://elderaffairs.state.fl.us/english/pubs/pubs/MasterPlan/FullCopy.pdf>, (Last visited on September 21, 2010) (page 4).

[42] s. 408.0435(2), F.S.

[43] The Nursing Home Diversion program is a managed care option under a 1915(c) waiver that is designed to provide community-based services to people who would qualify for Medicaid nursing home placement. The objective of the program is to provide elders community-based care to avoid nursing home placement at a cost less than Medicaid nursing home care.

[44] *Supra* note 30.

[45] Florida's State Profile Tool, July 2009, published by the Florida Department of Elder Affairs, available at: <http://elderaffairs.state.fl.us/english/pubs/pubs/Florida'sStateProfile.pdf>, (Last visited on September 21, 2010). (page 31)

The Department of Elder Affairs' (DOEA) Comprehensive Assessment and Review for Long-Term Care Services (CARES) Program is Florida's federally mandated pre-admission screening program for nursing home applicants. The purpose of the applicant assessment is to identify long-term care needs, establish level of care (medical and functional eligibility for nursing facility care and Medicaid waivers), and recommend the least restrictive, most appropriate placement. Emphasis is placed on enabling people to remain safely in their homes or return to the community after a nursing home stay, through provision of home based services or with alternative community placements such as ALFs.[46]

Nursing home transition is another program intended to reduce nursing home days by selecting nursing home residents from institutions who can be returned home with support. The nursing home transition effort formally began in Florida in March, 2009. As of July 10, 2010, 2,350 individuals have been considered for transition, 1,119 individuals have been transitioned from a nursing home, and 794 of them went into a Medicaid Waiver Program.[47]

The DOEA is also focusing efforts on four important issues facing Florida's seniors and retirees who are not enrolled in Medicaid programs: (1) transportation, (2) housing, (3) employment, and (4) volunteerism. This increased focus has resulted in part from many requests for assistance from elders who wish to maintain an independent lifestyle for as long as possible. These efforts also provide opportunities for elders who require long-term care to find appropriate home- and community-based care options that are less restrictive and less costly than skilled nursing care.[48] However, tens of thousands of individuals who do not qualify for Medicaid are on waiting lists or are assisted by programs exclusively funded by the state. As the population ages and service demand increases, Florida will be challenged to adequately meet this demand.[49]

Similarly, at the federal level, The Affordable Care Act[50] (the Act) addresses, among other things, long-term care. The Act expresses the sense of the Senate that Congress should address long-term services and supports in a comprehensive way that guarantees elderly and disabled individuals the care they need; and long term services and supports should be made available in the community in addition to institutions. The Act provides incentives for home-based care rather than the individual residing in a nursing home, including but not limited to: a new Community First Choice Option[51] for individuals who are otherwise eligible for Medicaid-institutional coverage; expansion of the spousal impoverishment provisions;[52] and the expansion and modification of home and community-based services. The Florida Medicaid program has submitted a letter of intent to the Centers for Medicare and Medicaid Services to apply for a Money Follows the Person grant offered under Section 2403 of the Act.[53]

In addition, the Act requires the Secretary of HHS to adopt regulations to, among other things, ensure that all states develop service systems that are designed to:

- Allocate resources for services in a manner that is responsive to the changing needs and choices of beneficiaries receiving non-institutionally-based long-term services and supports (including services and supports that are provided under programs other than Medicaid), and that provides strategies for

[46] *Id,* at 27.
[47] Source: DOEA email communication to Senate Health Regulation professional staff, dated August 5, 2010, a copy of which is available upon request from the Senate Health Regulation Committee.
[48] DOEA 2010 Summary of Programs and Services, published March 2010. Available at: <http://elderaffairs.state.fl.us/english/pubs/pubs/sops2010/First_page_2010SOPS.html>, (Last visited on September 21, 2010) (page 11).
[49] *Supra* note 45, at 5.
[50] The Patient Protection and Affordable Care Act (H.R. 3590, Public Law 111-148) as amended by the Health Care Education Reconciliation Act of 2010 (H.R. 4872, Public Law 111-152).
[51] Sec. 2401 of Subtitle E of The Affordable Care Act.
[52] Under the spousal impoverishment provisions, the spouse of a nursing facility resident may keep a minimum share of the couple's combined income and assets. The Act extends the current spousal impoverishment provisions to spouses of Medicaid beneficiaries receiving home and community based services.[52] This avoids the institutional bias for a spouse to reside in a nursing home. This provision begins on January 1, 2014, and ends December 31, 2019.
[53] Florida Administrative Weekly, Volume 36, Number 36, September 10, 2010, page 4409.

beneficiaries receiving such services to maximize their independence, including through the use of client-employed providers; and

- Provide the support and coordination needed for a beneficiary in need of such services (and their family caregivers or representative, if applicable) to design an individualized, self-directed, community-supported life.

Trends in supply and demand for elder services and care can be explained on the basis of population growth patterns and disability rates. Disability rates[54] are dependent on demographic factors, particularly age, health conditions and available medical and assistive technologies. Survey data indicates that the impairment rate of Florida's elder population is seven percent less than the national rate, contributing to a relatively low nursing home occupancy rate in comparison with other states. Additional evidence comes from the 2000 Census, which reports that, even though Floridians have overall slightly higher physical disability rates, their disabilities are less likely to be of the type concomitant with the need for supportive care. The Census also reports that the prevalence of severe disability (two or more disabilities, including a self-care disability) among elder Floridians is 17 percent lower than the national average.[55] More recently, the State of Aging and Health in America Report for 2007 published by the Centers for Disease Control and Prevention ranked Florida as the second best state in the country, tied with Connecticut, in terms of the lowest population of elders with a disability.[56] Lower disability rates reduce the number of people requiring nursing home care on two accounts. It reduces the number of disabled persons potentially requiring nursing home care and, at the same time, increases the supply of able caregivers who can provide care longer and at a higher intensity. Family caregivers are the main providers of long-term care services in all states.[57]

Migratory patterns also influence Florida's demand for nursing home care. The large majority of elders who relocate to Florida after retirement are "amenity seeking" retirees. They are characterized by good health and economic self-sufficiency, and most are married. These retirees are usually young elders in their sixties and generally do not place a high demand on nursing home beds. Florida has a net outflow of elders relocating due to increasing frailty, severely disabled migrants, who relocate seeking nearness to adult children, and readily available nursing home facilities. According to Census 2000 figures, Florida had a net migratory loss of persons age 85 and older.[58] Although more current data is not available for the oldest old age group in particular, similar migratory trends have been reported for retirees in the 2007 Florida Aging Population Report published by the Pepper Institute.[59] The Brookings Institute reported net migratory losses for Florida's general population when comparing migratory trends between 2006 – 2007 and 2007 – 2008, with almost a 50 percent reduction in Florida's net migration for the age 65 and older between 2004 – 2005 and 2007-2008.[60]

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[54] *Supra* note 41, at 141.
[55] *Supra* note 41, at 123.
[56] The State of Aging and Health in America report assesses the health status and health behaviors of U.S. adults aged 65 years and older and makes recommendations to improve the mental and physical health of all Americans in their later years. The report includes national- and state-based report cards that examine 15 key indicators of older adult health. The disability indicator measures the percentage of older adults who report having a disability based on an affirmative response to either of the following two questions: "Are you limited in any way in any activities because of physical, mental, or emotional problems?" or "Do you now have any health problem that requires you to use special equipment, such as a cane, a wheelchair, a special bed, or a special telephone?" The report is available at: <http://apps.nccd.cdc.gov/SAHA/Default/IndicatorDetails.aspx?IndId=DIS~N>, (Last visited on September 21, 2010).
[57] *Supra* note 30.
[58] The State of Aging in Florida – A Monograph and Needs Assessment, DOEA, available at: <http://elderaffairs.state.fl.us/english/pubs/stats/StateOfAging.pdf>, (Last visited on September 21, 2010).
[59] Florida's Aging Population, Critical Issues for Florida's Future 3rd Edition, 2007, published by the Florida State University Pepper Institute on Aging and Public Policy, available at: <www.pepperinstitute.org/Population/2007FloridaAgingPopulationReport.pdf>, (Last visited on October 4, 2010) (page 33).
[60] The Great American Migration Slowdown: Regional and Metropolitan Dimensions, published by the Metropolitan Policy Program at the Brookings Institute, December 2009, available at: <http://www.brookings.edu/~/media/files/rc/reports/2009/1209_migration_frey/1209_migration_frey.pdf>, (Last visited on October 4, 2010) (pages 7 and 8, and Appendix F).

Provider Survey Responses

In early-August 2010, an online survey was made available to nursing home administrators statewide to generate opinions on the continuation of the moratorium on the CON. The ten-question survey included three sections: Facility identification, Future Construction Plans, and General Questions on the Moratorium and CON. The survey closed on September 14, 2010. During this time, over 100 responses were received from facilities statewide.[61]

Survey respondents were asked to indicate the age of the facility they represent. Based on responses, the majority of facilities, approximately 30 percent, were between 21-30 years old, and have not undergone any major renovations. A respondent stated that "many facilities need to make changes, renovate or expand, but may not have the capital at this time; however, they may be able to acquire the capital within that time frame." Additionally, approximately 70 percent of the respondents indicated that building a new facility or an expansion to their current facility within the next 10 years is "not likely." Survey results indicated that if a facility were to expand or new facilities were to be built, the number of licensed beds would remain unchanged. According to survey results, if any changes were to occur to a facility, changes would more than likely occur as a culture change concept.[62] Another respondent stated, "It is critical that Florida not be building additional nursing homes unless it is capable of adequately funding its existing providers."[63]

Based on survey results, approximately 71 percent of respondents were in favor of extending the moratorium on issuing certificates of need for nursing homes for an additional five years. Many of the respondents expressed that allowing the moratorium to expire would cause occupancy issues for established nursing homes. Some facilities felt that there are an adequate number of beds to suit community needs, with many beds often remaining unfilled. A respondent stated, "Current census levels indicat[e] that the supply of beds available exceeds demand." Unfilled beds have become commonplace since "people are seeking more at-home care. Currently, [nursing homes] are never full and most residents are coming for rehab back to home." A respondent expressed, "With the shift on ALF placements and the NH transfer and Medicaid Diversion program SNF occupancy and competition has increased. Each year the ability to maintain 95 percent occupancy has declined." Some responses cited the economic downturn as a reason to extend the moratorium. One response explained, "With the economic situation in Florida, we are not seeing the snow birds like we used to as well as the decline in population coming into our State. In fact there still exists a dramatic decline due to hurricanes and cost of living." Consequently, "existing nursing homes already have a difficult time keeping census at level[s] that allow for meeting budgeted expectations."

In addition to occupancy, funding was also a major concern to those respondents in favor of extending the moratorium as reflected in the following comments:

- "Census figures show that adding additional beds along with reduced reimbursement would be a devastating combination to existing providers;"
- "Funding at the hospital level encourages discharges to home, reducing SNF admissions, and there is an increased number of ALFs which also reduces SNF admissions;" and
- "The expiration of the moratorium will not only cause problems for providers in figuring out how to continue to care for Medicaid residents in an increasingly competitive market, but will also sky rocket costs for the state as additional supply will encourage the use of this setting for aged Medicaid residents versus the exploration of less costly settings for care."

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[61] Survey conducted by professional Senate staff of the Health Regulation Committee. Responses are available from the Senate Health Regulation Committee.

[62] "Culture change" is the common name given to the national movement for the transformation of older adult services, based on person-directed values and practices where the voices of elders and those working with them are considered and respected. Core person-directed values are choice, dignity, respect, self-determination and purposeful living. Culture change transformation may require changes in organization practices, physical environments, relationships at all levels and workforce models – leading to better outcomes for consumers and direct care workers without inflicting detrimental costs on providers. See Pioneer Network, available at: <http://www.pioneernetwork.net/CultureChange/Whatis/>, (Last visited on September 21, 2010).

[63] *Supra* note 61.

CON Conditions

Section 408.040, F.S., authorizes the Agency to impose conditions on the issuance of a CON or an exemption. These conditions may be predicated upon statements of intent expressed by an applicant in the application for a CON or an exemption. Any conditions imposed on the CON or exemption that are based on the statements of intent must be stated on the face of the CON or exemption. Each nursing home participating in the Medicaid program provided a statement of intent that includes a specified percentage of the annual patient days at the facility that will be utilized by patients eligible for care under the Medicaid program. The Medicaid-patient-days condition is included on the CON or exemption for these nursing homes.

The holder of a CON or an exemption with conditions may be granted a modification of the conditions by the Agency based on a demonstration of good cause. Additionally, if a nursing home is located in a county in which a long-term care community diversion pilot project has been implemented or in a county with a managed care program for Medicaid recipients who are 60 years of age or older, the Agency must grant a nursing home's request to reduce its annual Medicaid-patient-days condition by not more than 15 percent. A nursing home may submit only one request every 2 years for the automatic reduction. The authority for the automatic reduction expires June 30, 2011.[64]

Since 2006 when this provision authorizing the automatic reduction went into effect,[65] the Agency has granted the automatic 15 percent reduction 230 times.[66] Some licensed nursing homes have been granted reductions on three separate occasions.

Conclusions

Demographic changes projected for Florida within the next 5 to 10 years are not expected to create a surge in the need for additional nursing home beds statewide. Contrary to common notions, nursing home residents do not necessarily follow a downhill, or even static, trajectory in their overall condition. Many stabilize, improve, or adapt. Even if their condition declines, their circumstances and desires may change; for example, family members may come forward as caregivers for them, or they may choose to spend their last days at home, or in hospice care. The state is expanding programs and devoting resources to enable the frail elderly to realize their preference to remain in community settings for as long as possible. This effort is critical to avoiding increased demand for nursing home beds. The challenge for policy makers is to maintain funding and flexibility so that nursing homes are not the default option for older adults and people with disabilities.[67]

Options and/or Recommendations

Options

The 2011 Legislature is confronted with the decision whether to extend the moratorium on the CON for community nursing home beds or allow the moratorium to expire on June 30, 2011.

If the moratorium expires on June 30, 2011, the CON application process for the addition of community nursing home beds would be reactivated. This will increase the regulatory responsibility of the Agency as well as potentially increase the caseload at the Division of Administration Hearings and the court system if challenges to the Agency's decisions regarding CON applications ensue. The Agency has indicated that typically applications for CONs work by precedent. If the moratorium expires and approvals for new community nursing home beds begin to occur, it is likely that more and more new beds might be approved. The industry has expressed concern that his would undermine the solvency of nursing homes in Florida.

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[64] s. 408.040(1)(d), F.S.
[65] Ch. 2006-161, L.O.F.
[66] Source: Agency for Health Care Administration email to Senate Health Regulation professional staff dated August 19, 2010, a copy of which is available from the Senate Health Regulation Committee.
[67] Diversion, Transition Programs Target Nursing Homes' Status Quo, by Susan C. Reihnard, Health Affairs 29, no. 1 (2010): 44-48, doi: 10.1377/hlthaff.2009.0877.

Data suggests that there is currently, and projected to be, an adequate supply of community nursing home beds in the state for the next several years. Authorization exists for the addition of beds if the need arises while the moratorium is in place. In addition, future Legislatures may readdress the moratorium if conditions significantly change that would warrant an earlier expiration of the moratorium should the 2011 Legislature choose to extend the moratorium.

Recommendations

Based on the public's preference for home and community-based residency options, current and projected nursing home occupancy levels through 2016, the economic climate, and the ongoing emphasis that the Legislature has placed on facilitating the ability of Floridians to reside in less restrictive settings than nursing homes, Senate professional staff recommend that the Legislature reenact and continue the moratorium on the CON for community nursing homes beds through the year 2016.

Senate professional staff also recommend that the exceptions and exemptions that the Legislature has enacted to implement the moratorium and address potential surges in occupancy levels be retained. Language regarding the exception to the moratorium in a county having up to 50,000 residents should be clarified to reflect that a facility requesting additional beds must certify that it has not had any class I or class II deficiencies within 30 months or since it was initially licensed if licensed within 25 – 29 months preceding the request for additional beds.

Furthermore, Senate professional staff recommend that the Legislature reenact the automatic 15 percent reduction of the annual Medicaid-patient-days condition for nursing homes located in a county in which a long-term care community diversion pilot project has been implemented or in a county with a managed care program for Medicaid recipients who are age 60 years or older. The recommendation for continuing the automatic reduction is based on the ongoing emphasis to reduce nursing home care in favor or community-based care through diversion and transition programs. Although not directly related to the moratorium on CONs for nursing homes, we recommend that the automatic reduction expire on a date that coincides with the date for continuation of the moratorium. The expiration date will allow a reassessment of the long-term care environment and help ensure that reduction requests do not eliminate the availability of Medicaid nursing home beds below future needs.