

THIS BILL WAS HEARD BY HOUSE COMMITTEE ON ELDER AFFAIRS & LONG TERM CARE
ON 4/15/98, 1:30 pm, 413C. VOTES: YEAS 5 NAYS 0, UNANIMOUS--SEE SECTION VIII.
AMENDMENTS FOR EXPLANATION OF AMENDMENT.

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Date: March 16, 1998 Revised: _____

Subject: Rulemaking Authority for the Department of Elderly Affairs (RAB)

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Crosby</u>	<u>Whiddon</u>	<u>CF</u>	<u>Favorable/CS</u>
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

The Committee Substitute for Senate Bill 1706 is the result of the Department of Elderly Affairs review of rule and enabling law. The department found that some rules contained in Chapter 58A, Florida Administrative Code, are not sufficiently authorized by statute. When the department communicated this information to the Joint Administrative Procedures Committee (JAPC), a number of rule references were inadvertently dropped. As a result, in March 1998, the department drafted a letter to the President of the Senate and the Speaker of the House of Representatives requesting permission to expand the scope of the rules project. The Committee Substitute for SB 1706 is the result of this process and addresses all issues relevant to the department's rule authority, providing such authority where necessary.

This bill substantially amends sections 400.424 and 400.427 of the Florida Statutes

II. Present Situation:

During the 1996 legislative session, a comprehensive rewrite of the Florida Administrative Procedures Act (APA) was adopted (see CS/SBs 2290 and 2288). Among many other changes, the revised APA modifies the standards which authorize rule making and includes a provision for periodic review of rules by agencies with rule-making authority.

In the past, a number of court decisions held that a rule did not exceed the legislative grant of rule-making authority if it was reasonably related to the stated purpose of the enabling legislation. Additionally, it was accepted that a rule was valid when it implemented general legislative intent

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or policy. Agencies had wide discretion to adopt rules regardless of whether the statutory basis for a rule was clearly conferred or merely implied from the enabling statute.

Section 120.536, F.S., effectively overturns this line of cases by imposing a much stricter standard for rule making authority. Under the new APA, existing rules and proposed rules must **implement, interpret, or make specific** the particular powers and duties granted by the enabling statute. It is important to note that the revised APA is not intended to eliminate administrative rules or even to discourage rule-making, but to ensure that administrative rules are no broader than the enabling statute allows. A grant of rule-making authority by the Legislature is necessary, but not enough by itself, for an agency to adopt a rule. Likewise, agencies need more than a statement of general legislative intent for implementing a rule. Rules must be based on a specific grant of power and not address those subjects on which the Legislature was silent.

In order to temporarily shield a rule or portion of a rule from challenge under the new provisions, by October 1, 1997 agencies were to report rules that they believed did not meet the new criteria. The Joint Administrative Procedures Committee (JAPC) reports that some 5,850 rules or portions thereof were reported as exceeding the agency's rule making authority under s. 120.536(1), F.S. Of these, 3,610 rules were identified by various local school boards (whose rules are not contained in the Florida Administrative Code); 2,240 rules contained in the Florida Administrative Code were reported by various agencies as exceeding statutory authority for rule making under s. 120.536, F.S.

Section 120.536(2), F.S., also lays out the second step in the process. This step is that of legislative review. The relevant subsection reads as follows:

The Legislature shall, at the 1998 Regular Session, consider whether specific legislation authorizing the identified rules, or portions thereof, should be enacted. By January 1, 1999, each agency shall initiate proceedings pursuant to s. 120.54 to repeal each rule, or portion thereof, identified as exceeding the rule making authority permitted by this section for which authorizing legislation does not exist.

Thus, during the 1998 Legislative Session each agency has the responsibility to bring forward legislative proposals, as appropriate, to provide statutory authorization for existing rules -- rules which the agency deems necessary but which currently exceed the agency's rule-making authority. The Legislature is directed to consider whether the legislation authorizing the identified rules should be enacted.

The Committee Substitute for SB 1706 is the completed product resulting from the Department of Elderly Affairs review of rule and enabling law. This bill addresses all issues relevant to the department's rule authority, providing such authority where necessary.

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III. Effect of Proposed Changes:

Section 1 amends s. 400.404, F.S., relating to exemption from licensure as an assisted living facility. In compliance with a well-established departmental rule, this section is amended to exempt those residential units providing outpatient clinic-type services from licensure.

Section 2 amends s. 400.424, F.S., relating to contracts in assisted living facilities. Amendments to this section to clarify that advance payment of funds by residents in a facility shall be kept separate from the funds and property of the facility. Sufficiently specific rule authority for the department is stated.

Section 3 amends s. 400.427, F.S., relating to the property and personal affairs of residents of assisted living facilities. Sufficiently specific rule authority for the department in this area is stated.

Section 4 creates s. 400.4275, F.S., regarding business practices, personnel records, penalties, and liability insurance for assisted living facilities. This section of law relocates many portions of rule to statute. Sufficiently specific rule authority is provided.

Section 5 amends s. 400.442, F.S., relating to rules establishing standards for a reasonable and consistent quality of residential care. With regard to fire protection safety standards, it is clarified that the State Fire Marshall, in cooperation with the agency, the department, and the Department of Health (not the Department of Health and Rehabilitative Services) will establish and enforce uniform fire safety standards. Rule authority in this area resides with the State Fire Marshall. Obsolete language, regarding a work study group, is deleted. The department is given the authority to utilize existing rules regarding the number, training and qualifications of those personnel who have responsibility for the care of residents. The rules must clearly delineate the responsibility of the agency's licensure and survey staff, as well as the local authority having jurisdiction over fire safety. Other sufficiently specific rule authority is provided in the area of licensing, inspections, and the care and maintenance of residents.

Section 6 amends s. 400.442, F.S., relating to pharmacy and dietary services, providing sufficiently specific rule authority for the department.

Section 7 amends s. 400.444, F.S., relating to construction and renovation, providing sufficiently specific rule authority for the department.

Section 8 amends s. 400.619, F.S., relating to licensure of adult family care homes to clarify several segments of existing rule authority and to provide sufficiently specific rule authority for the department.

Section 9 amends s. 400.6196, F.S., relating to penalties in adult family care homes. In this segment, the department did not report the relevant rule as problematic in the rules project last

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year. The department reports that JAPC will accept an additional rule provision if the department can provide a reason for this need which is also relevant to chapter 120, F.S. Section 120.54(1)(e), F.S., provides that no agency “has any agency authority to establish penalties for violation of a rule unless the Legislature, when establishing a penalty, specifically provides that the penalty applies to rules.” Consistent with chapter 120, F.S., in this section the department has relocated specific penalty provisions, currently existing in rule, to the relevant statutory section of law. Additionally, procedures for unclassified violations and rule authority for the department are stated.

Section 10 amends s. 400.621, F.S., relevant to rules and standards for adult family care homes. Again, the department clarifies rule authority and then moves many segments of existing rule into the law including those which address physical sites, services, standards for license application, training and standards for providers and staff, procedures for determining the appropriateness of resident placement, and other procedures necessary to ensure the efficient function of adult family care homes.

Section 11 amends s. 400.6211, F.S., relevant to training and education programs for adult family care homes and provides the department necessary rule authority.

Section 12 amends s. 409.212, F.S., relating to optional supplementation to clarify that those providers at assisted living facilities, adult family care homes, or other such specialized living facilities who house residents receiving optional supplementation will comply with federal requirements in this area.

Section 13 provides that this act shall take effect July 1, 1998.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

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V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

The House Committee on Elder Affairs & Long Term Care Committee adopted 1 amendment which corrected the following:

- * Page 3, Lines 21-26--Grammatical changes to clarify this exemption from licensure.
- * Page 10, lines 8-22--Subsection (2) of Section 4 of the bill is deleted. This whole section creates in statute language currently in rule. This deleted subsection should not have been included.
- * Page 21, Line 7--Corrects a scrivener's error, i.e., (h) appears twice in the list.
- * Page 24, line 29--Corrects the spelling of "offense".
- * Page 28, line 14--Grammatical change, deleting the word "Mandate".