

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CSCS/SB 58

SPONSOR: Children and Families Committee, Governmental Oversight & Productivity Committee and Senator Wise

SUBJECT: Authorization for Direct-Support Organizations for the Departments of Children & Family Services and Elderly Affairs

DATE: February 19, 2003 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Rhea	Wilson	GO	Favorable/CS
2.	Collins	Whiddon	CF	Favorable/CS
3.	_____	_____	AHS	_____
4.	_____	_____	AP	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This committee substitute authorizes the Department of Children and Family Services and the Department of Elder Affairs to establish not-for-profit corporations called “direct-support organizations” which are authorized to raise funds, receive grants, gifts and bequests and make expenditures for the benefit of the departments and their projects and programs.

A “direct-support organization” is a Florida not-for-profit corporation, incorporated under the provisions of ch. 617, F.S., and authorized by Florida law as a direct-support organization to benefit or to provide assistance to a governmental entity. Such entities have been provided for throughout Florida Statutes for different agencies and commissions, including universities and local school boards.

The committee substitute limits board membership and provides that the purposes and objectives of the organization must be consistent with the priority issues and objectives of each department and must be in the best interest of the state. Each department is authorized to permit the appropriate use of property and facilities for the purposes of the organization. The bill provides for annual post-audit of financial accounts by an independent certified public accountant.

This bill creates the following sections of the Florida Statutes: 20.193 and 430.065.

II. Present Situation:

A “direct-support organization” is a Florida not-for-profit corporation, incorporated under the provisions of ch. 617, F.S., and authorized by Florida law to benefit or to provide assistance to a

governmental entity. According to s. 617.0803, F.S., the board of directors of a direct-support organization must consist of three or more members with numbers specified or “fixed” in accordance with the articles of incorporation. The specific composition of the board relating to areas of expertise is not addressed.

Direct-support organizations are provided for in statute for many departments and programs. These include the Department of Education,¹ District School Boards,² Community Colleges,³ the Department of Corrections,⁴ and the Department of Juvenile Justice.⁵

Direct-support organizations are associated with various functions of the Office of Tourism, Trade and Economic Development in ch. 288, F.S., including sports promotion and economic development. Several commissions have statutory provisions for direct-support organizations, including the Florida Commission on Community Service, s. 14.29, F.S., the Florida Agriculture in the Classrooms Program, s. 570.903, F.S., and Assistance to Victims of Crime, s. 960.002, F.S.

Examples of the types of direct-support organizations that are affiliated with the State University System as of March 2, 2001, for Florida State University and the University of Florida are:

FLORIDA STATE UNIVERSITY

- The Florida State University Alumni Association, Inc.
- Florida State University International Programs Assoc., Inc.
- FSU Financial Assistance, Inc.
- The Florida State University Foundation, Inc.
- Seminole Boosters, Inc.
- The Florida State University Research Foundation, Inc.

UNIVERSITY OF FLORIDA

- Florida 4-H Club Foundation, Inc.
- University of Florida National Alumni Association, Inc.
- Florida Association of Basic Medical Scientists, Inc.
- Florida Foundation Seed Producers, Inc.
- University of Florida Foundation, Inc.
- Gator Boosters, Inc.
- University of Florida Law Center Association, Inc.
- University of Florida Research Foundation, Inc.
- University Athletic Association, Inc.
- Southwest Florida Research and Education Foundation, Inc.
- Treasure Coast Agricultural Research Foundation, Inc.
- University of Florida Leadership & Education Foundation, Inc.
- Citrus Research and Education Foundation, Inc.

¹ Section 229.8021, F.S.

² Section 237.40, F.S.

³ Section 240.363, F.S.

⁴ Section 944.802, F.S.

⁵ Section 985.4145, F.S.

Direct-support organizations authorized by law are subject to various legal, regulatory and contractual requirements. Pursuant to s. 215.981, F.S., each direct-support organization must provide for an annual financial audit of its accounts and records that is to be conducted by an independent certified public accountant in accordance with rules adopted by the Auditor General and the state agency that created, approved, or administered the direct-support or citizen-support organization.

The Office of the Auditor General has established rules for auditing direct-service organizations.⁶ This rule chapter is supplemental to audit requirements mandated by other governmental entities that have authority over direct-support organizations. The rule is based on the standards for Financial Statements of Not-For-Profit Organizations established by the Financial Accounting Standards Board. If the auditor determines that the organization is a governmental entity, it is required to include a report on financial statements presented in accordance with reporting standards established by the Governmental Accounting Standards Board.

Currently, the Department of Children and Family Services uses district welfare trust funds established under s. 402.18(2), F.S., to deposit funds in banks for the benefit, education, and general welfare of all clients of the department. The Internal Revenue Code requires that funds donated to or for the use of the state must be donated for “exclusively public purposes.” This requirement may discourage contributors who wish to deduct their contributions from their income tax.

III. Effect of Proposed Changes:

The committee substitute creates sections 20.193 and 430.065, F.S., to authorize the establishment of direct-support organizations for the benefit of the Department of Children and Family Services and the Department of Elder Affairs. These direct-support organizations must be incorporated as not-for-profit corporations that meet the requirements of ch. 617, F.S.

The committee substitute establishes the purposes for which these direct-support organizations may be created. A direct-support organization may be created to:

- conduct programs and activities;
- initiate developmental projects;
- raise funds;
- request and receive grants, gifts, and bequests of moneys’ acquire, receive, hold, invest, and administer, in its own name, securities, funds, objects of value, or other property, real or personal; and
- make expenditures to or for the direct or indirect benefit of the departments or individual programs or projects of the departments.

The committee substitute establishes that the purposes and objectives of the organization must be consistent with the priority issues and objectives of each department and must be in the best interest of the state. Each department is authorized to permit the appropriate use of property and

⁶ Chapter 10-700, F.A.C.

facilities for the purposes of the organization. The bill provides for an annual post-audit of financial accounts by an independent certified public accountant.

The committee substitute identifies that the departmental secretary has authority to create the direct-support organization, thereby ensuring that another competing and unauthorized direct-support organization is not created. Further, the committee substitute states who appoints members of the board. By specifying that the secretary of the department has this authority, it ensures greater control and oversight of the direct-support organization by the agency head.

The committee substitute limits board membership to no more than five members and specifies that at least two of the members are from the business community with financial management experience and have no direct association with the department.

The committee substitute provides that, upon dissolution of each corporation, all assets of the direct-support organization revert to the State of Florida.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Typically, a direct-support organization is created or authorized to be created in statute. Additionally, it is created as a means to assist a governmental entity in the performance of a government program. Further, a direct-support organization is closely aligned with and controlled by the entity that benefits from it or utilizes its services. As a result, a direct-support organization falls within the definition of “agency” found in s. 119.011(2), F.S., which states:

(2) “Agency” means 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 [emphasis added]*.

Since a direct-support organization created under this bill would fall within the definition of “agency,” it would be subject to open government requirements, even if the bill did not expressly state this.⁷ The committee substitute explicitly notes the applicability of open government requirements to the direct-support organizations.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

A state agency, such as a department, is a creature of statute and, as such, it has only those rights and privileges given to it by the Legislature in statute.⁸ A department is created in the executive branch and, therefore, is subject to the administrative control of an executive officer who is appointed by, and serves at the pleasure of, the Governor or a Cabinet officer. Nevertheless, the powers and duties which the department is authorized to execute are delegated by the Legislature:

An agency has only such power as expressly or by necessary implication is granted by legislative enactment. An agency may not increase its own jurisdiction and, as a creature of statute, has no common law jurisdiction or inherent power such as might reside in, for example, a court of general jurisdiction. When acting outside the scope of its delegated authority, an agency acts illegally and is subject to the jurisdiction of the courts when necessary to prevent encroachment on the rights individuals.⁹

Given that agency powers must be delegated by the Legislature and are limited, an agency may not create a direct-support organization without express legislative authority.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Creation of an entity that is authorized to raise funds to pursue the objectives and purposes of these departments could benefit the private sector as those funds will be spent in local economies either by vendors or benefit recipients.

⁷ The definition of “agency,” which includes the phrase “acting on behalf of” does not establish criteria for defining what the phrase means. The Florida Supreme Court has established a “totality of factors” method for determining if an entity is “acting on behalf of” an agency. *See, News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So.2d 1029 (Fla. 1992). Some relevant factors include, whether the private entity is performing a governmental function or a function that the agency otherwise would perform; the extent of the agency’s involvement with, regulation of, or control over the private entity, whether the private entity was created by the public agency; whether the public agency has a substantial financial interest in the private entity; for whose benefit the private entity is functioning.

⁸ *Seaside Properties, Inc., v. State Road Department*, 190 So.2d 391 (3rd DCA 1966).

⁹ *Lee v. Division of Florida Land Sales and Condominiums*, 474 So.2d 282 (5th DCA 1985).

C. Government Sector Impact:

According to the Department of Children and Family Services, the legislation creates another vehicle for receiving money to benefit the department and its programs and projects. The provision allowing the corporation to raise funds to accomplish its purpose should be to the benefit of the department, which does not presently have such authority.

According to the department, to the extent there is an expectation the department will become administratively or otherwise involved with the administration and costs of the corporation, there will be resource and accounting issues involved requiring keeping of donation and inventory records, processing of cash receipts and expenditures, personnel records for any employees of the corporation, IRS and other reporting obligations, allocation of administrative expenditures, audit and other costs.

The Department of Children and Family Services estimates an annual cost of \$75,000 (2 FTEs) to maintain accounting functions for each corporation established, if the department is required to fund such function.

The Department of Elder Affairs estimates no fiscal impact from the bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

This bill is the subject of a bill that passed the Legislature during the 2002 session but was vetoed by the Governor. The Governor's Veto Message for Committee Substitute for Senate Bill 1862 states:

“ . . . to reduce and streamline government in order to maximize services. To achieve that goal I have emphasized the importance of partnering with communities and the private sector, and transforming our health and human service delivery system from one that is government-based to one that is community-based. Encouraging state agencies to reinforce themselves through the establishment of direct-service organizations expands and promotes government and is therefore counter to this goal.”

The Senate Veto Analysis notes:

The use of direct-support organizations by governmental entities to enhance legislatively-created programs is a longstanding method of increasing community involvement in a program and a means for providing additional funding to financially-strapped programs. Authorizing a direct-support organization does not create or expand governmental programs, as those are legislative prerogatives, but merely permits a government entity the flexibility to seek additional support, monetary and otherwise, for programs that the Legislature has mandated that it perform. For example, the following DSOs are legislatively-authorized to support programs with the Executive Office of the Governor:

- Florida Commission on Community Service Direct-Support Organization is authorized by s. 14.29(9), F.S.
- Victims of Adult and Juvenile Crime Direct-Support Organization is authorized by s. 960.002, F.S.
- Sports Industry Direct-Support Organization under OTTED is authorized by s. 288.1229, F.S.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
