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: CS/CS/CS/SB 1698

SPONSOR: Governmental Oversight and Productivity Committee, Children and Families Committee, Banking and Insurance Committee and Senator Lynn

SUBJECT: Community-Based Care

DATE: April 8, 2004 REVISED: ________ ________ ________ ________

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Deffenbaugh	Deffenbaugh	BI	Fav/CS
2.	Whiddon	Whiddon	CF	Fav/CS
3.	Wilson	Wilson	GO	Fav/CS
4.	Hardy	Belcher	AHS	Favorable
5.			AP	
6.				

I. Summary:

Committee Substitute for CS/CS/SB 1698 amends s. 409.1671, F.S., related to the privatization of foster care and related services, to provide new requirements for the proposal related to a statewide shared financial risk program intended to protect community-based care providers who deliver foster care and related services. The bill extends a deadline for the submission by the Department of Children and Family Services (DCF or department) to the Legislative Budget Commission of a proposal regarding the risk program from December 31, 2002, until October 1, 2004, removes conflicting language related to the use of risk program funds, clarifies requirements for performance bonds, and provides that an irrevocable letter of credit may substitute for the currently required performance bond.

The bill amends s. 20.19, F.S., related to the current requirement for the DCF to establish a community alliance for community participation and governance of community-based services. The bill provides that members of the community alliance, other than the statutorily mandated members of the alliance, may not receive funds for contractual services from either the department or a community-based care lead agency (i.e., providers who receive funds from the department or community-based care are not eligible to be a member of the alliance).

The bill further amends s. 20.19, F.S., related to community-based lead agency contracts, to require that preference be given to established local providers for the provision of services and to specify the actions that must occur if the established provider is not selected; related to qualifications for a lead agency, to require that at least 51 percent of the members of the agency's board must reside in the state and that 51 percent of those state residents must reside in the service area; and, related to the department's contracts with lead agencies, to require that each contract include all legislatively-established performance measures.

This bill exempts lead community-based providers and their subcontractors from adherence to the provisions of s. 112.061, F.S., that require prior state agency approval of their travel.

II. Present Situation:

In 1996, the Legislature required the Department of Children and Family Services (DCF or department) to create a pilot program to privatize certain child protective services, including family preservation, emergency shelter, foster care, and adoption.[1] In 1998, the Legislature expanded the community-based care initiative statewide by directing the department to contract with lead agencies to assume many of the management and operational responsibilities previously exercised by the department's service districts.[2] Lead agencies are private, community-based agencies responsible for planning, administering, and delivering client services, ensuring that services are delivered in accordance with state and federal laws, and coordinating with other local public or private agencies that offer services for clients.

In 2000, s. 409.1671, F.S., was amended to address the risk assumed by community-based care providers as they became responsible for service provision by authorizing the DCF to establish and administer a risk pool intended to reduce the financial risk to eligible lead community-based providers resulting from unanticipated caseload growth.[3] The risk pool did not have an established year-to-year funding source but was funded by specific appropriation each year from non-recurring funds. The sum of $4.5 million was appropriated in 2000 to establish the risk pool.

Legislation enacted in 2002, through further amendment to s. 409.1671, F.S., required the DCF to develop, in consultation with existing lead-agency providers, a statewide proposal related to the long-term use and structure of a shared-earnings program addressing the financial risk to eligible lead community-based care providers not only from unanticipated caseload increases as provided in 2000 legislation but also from significant changes in client mixes or services eligible for federal reimbursement. The proposal expanded upon the issue of risk management and replaced the existing risk pool. The proposal was required to be submitted to the Legislative Budget Commission (LBC) for adoption before December 31, 2002, and to be submitted to the Legislature in the form of recommended legislation if the LBC failed to concur with the proposal. The 2002 legislative changes provided that the DCF could request and the Governor could recommend that excess federal earnings be used to provide for continuity of care in the event of lead agency failure, discontinuance of service provision or financial misconduct. The General Appropriations Act (GAA) was required to include any funds appropriated for this purpose in a lump sum in the Administered Funds Program. The department was required to use such appropriation to offset the need for a performance bond, which bond cannot exceed 2.5 percent of the annual value of a contract.[4]

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[1] Chapter 96-402, L.O.F., as summarized in DCF's Lead Agency Readiness Assessment Process Meets Statutory Requirements, But Needs Strengthening, Office of Program Policy Analysis and Government Accountability, February 2004 (Report No. 04-14).
[2] Chapter 98-180, L.O.F.
[3] Chapter 2000-139, L.O.F.
[4] Chapter 2002-219, L.O.F.

The 2003 General Appropriations Act provided $10 million from the federal grants trust fund for the shared risk fund for community-based providers of child welfare to be used for unanticipated costs associated with the privatization of foster care and related services as authorized in s. 409.1671(7)(i), F.S. This appropriation is funded from unrestricted trust fund cash in the department. Funds in this lump sum shall not be released until department submits the plan required in s. 409.1671(7), F.S., and final approval is received by the Legislative Budget Commission.[5]

The implementing bill for the 2003 General Appropriations Act provided that for fiscal year 2003-2004, excess federal earnings used to provide for continuity of care in the event of lead agency failure, discontinuance of service provision, or financial misconduct shall be included by the GAA in a lump sum in the department rather than in the Administered Funds Program. This provision expires on July 1, 2004.[6]

The decision to privatize the provision of foster care and related services has transferred the associated financial risk from the state to those entities that have contracted to become community-based care lead agencies. A report issued by the Child Welfare League of America stated:

> *In 1997, Florida began its entry into privatization with relatively small pilots in four geographic regions of the state. The state now has a legislative mandate to privatize foster care and all related services statewide over the course of the next few years, using lead agency contracts that will shift significant financial risk to contractors.*[7]

As of January 2004, the department has contracts in place with 11 lead agencies, serving 28 counties and 42 percent of all children receiving child protection services, with a total contract value of just over $342 million dollars.[8]

Unlike the Department of Children and Family Services, private providers do not have the ability to manage financial risk through the use of statewide realignments in the agency budget nor do they have sovereign immunity.

Management of financial risk is a serious issue that can affect privatization efforts both on the front end when trying to recruit lead agencies and on the back end when lead agencies fail. In February 2001, a report issued by the Office of Program Policy Analysis and Government Accountability (OPPAGA) stated that the DCF must address several potential obstacles before achieving statewide implementation of privatized foster care and related services, including the reluctance of many providers to assume the increased financial risk that comes with lead agency status.[9] As more lead agencies assume service provision at the accelerated pace currently in place, there appears to be a justifiable concern that lead agencies will fail. Department contract monitoring reports for November 2002 and January 2003 identified two lead agencies that were

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[5] Chapter 2003-397, L.O.F.
[6] Chapter 2003.399, L.O.F.
[7] CWLS Managed Care and Privatization Child Welfare Tracking Project, Child Welfare League of America, (1998) p. 15.
[8] OPPAGA Report No. 04-15, cited above.
[9] Justification Review of the Child Protection Program in the Department of Children and Family Services, Office of Program Policy Analysis and Government Accountability, March 2001. (Report No. 01-14)

experiencing problems, some of which were related to financial stability, which jeopardized their existence. One of those agencies which began providing services in June 2000, reportedly failed recently having exhausted an almost $4 million credit line.

According to the Child Welfare League of America,

> *There are many ways public purchasers can limit contractor risks… Another method used to limit risk is to require a risk pool to cover unexpected high costs for certain individuals or groups of children. Both the public agency and the contractor might contribute to the risk pool and the terms for its use would be described in the contract.*[10]

The risk pool, which was established and appropriated $4.5 million in 2000 and $10 million in 2003 has been criticized as being inadequate to manage the risk associated with a statewide privatization effort of this magnitude. To date, the risk pool has not been accessed by any provider, reportedly due to statutory interpretation conflicts. One statutory conflict is the reference in s. 409.1671(7), F.S., to the department's legislative budget request for "funding necessary to carry out paragraph (i)," which refers to only one of the nine paragraphs that specify the purposes of the risk pool. In an ongoing evaluation of Florida's community-based care initiative, it was stated:

> *In most privatization arrangements across the country, lead agencies have been financed through capitation or case rate payments that reflect the actual number of people the agency is serving or likely to serve. Florida is the only state using a global budget transfer, that is, giving a fixed amount of money to the lead agency and making it responsible for providing all services needed to serve children who enter the child welfare system. Since a lead agency cannot unilaterally control, but can impact the number of children entering the system, it is at financial risk.… DCF has recognized this and worked with the lead agencies around issues such as sudden increases in enrollment and has taken steps to mitigate potential financial risks under the purview of Senate Bill 632* [ch. 2002-219, L.O.F.].[11]

The provisions of ch. 2002-219, L.O.F. (SB 632), related to the development of a statewide proposal for the long-term use and structure of a shared-earnings program addressing the financial risk to eligible lead community-based care providers were never accomplished. The proposal was required to be submitted to the Legislative Budget Commission for adoption before December 31, 2002, and to be submitted to the Legislature in the form of recommended legislation if the LBC failed to concur with the proposal. Neither of these statutory requirements was carried out by the Department. This would appear to leave the issue of financial risk unresolved even as more lead agencies assume the responsibility for service provision and spend contract dollars.

Section 409.1671, F.S., contains provisions related to performance bonds and community-based care lead agencies. A performance bond is a surety bond which guarantees that a contractor will

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[10] CWLS Managed Care and Privatization Child Welfare Tracking Project, Child Welfare League of America, (1998) p. 32.
[11] Evaluation of the Florida Department of Children and Family Services Community-Based Care Initiative, Louis de la Parte Florida Mental Health Institute, University of South Florida, September 2003.

fully perform a contract and guarantees against the breach of such contract. Proceeds of the bond are used to complete the contract or compensate for loss in the event of nonperformance. There is no statutory authority allowing letters of credit to be substituted for those performance bonds, yet many lead agencies reportedly do make the substitution. Lead agencies appear to be acquiring letters of credit because they are easier to obtain, they require substantially less collateral, and the cost to obtain them related to fees is less.

Section 409.1671 (1) (e), F. S., lists the qualifications that must be met in order for an agency to compete for designation as a community-based lead agency including having the ability to provide directly or through contract all necessary child protective services. As the transition to community-based care has evolved, some local agencies with long-standing contractual relationships with the department have felt unfairly excluded from the new service delivery system. Further, in a few instances, lead agency boards of directors have been dominated by out-of-state and out-of-service-area members who do not represent the community being served.

III. Effect of Proposed Changes:

The bill amends. s. 409.1671, F.S., to redirect the Department of Children and Family Services (DCF or department), in consultation with the existing community-based care lead agencies, to develop a proposal related to the use and structure of a statewide shared financial risk program intended to protect eligible lead agencies who contract with the department for the provision of foster care and related services. The bill extends the deadline for the submission by the Department of Children and Family Services to the Legislative Budget Commission of a proposal regarding the risk program from December 31, 2002, until October 1, 2004.

The bill removes a provision which currently appears to restrict the use of funds from the risk pool only to provide for continuity of care in the event of the failure of a lead agency, discontinuance of service provision by a lead agency, or financial misconduct. Specifically, the bill provides that for the 2004-2005 fiscal year and annually thereafter, the Department may make a legislative budget request, and the Governor may recommend, an appropriation for funding necessary to “carry out paragraph (a)” to correctly refer to all of the purposes for which the risk pool may be utilized. The bill adds a purpose for such funds to be for the payment for time-limited technical assistance and consultation to lead agencies in the event of serious performance or management problems.

The bill deletes the provision that allows only those entities that were under privatization contracts as of July 1, 2002, from being eligible to receive any additional state funds appropriated for community-based agencies or made available pursuant to the budget amendment process.

The bill provides that an irrevocable letter of credit may be substituted for the currently required performance bond for each lead agency.

The bill provides that lead community-based providers and their subcontractors are exempt from the requirements of s. 112.061(3)(a), F.S., which requires that all travel must be authorized and approved by the head of the agency, or his or her designated representative, and requires a signed

statement by the traveler's supervisor stating that such travel is on the official business of the state and also stating the purpose of such travel.

The bill requires the DCF to consult with the community-based agencies that are undertaking the privatized projects, in establishing a quality assurance program for such services, and requires that the program be based on standards established by the federal Adoption and Safe Families Act.

The bill amends s. 20.19, F.S., related to the current requirement for the DCF to establish a community alliance of the stakeholders, community leaders, client representatives and funders of human services in each county to provide a focal point for community participation and governance of community-based services. The bill provides that certain members of the community alliance may not receive funds for contractual services from either the department or a community-based care lead agency. In other words, providers who receive funds from the department or the lead agency are not eligible to be a member of the alliance. This restriction would not apply to the statutorily mandated members of the alliance (i.e., the district administrator, or the representatives from county government, the school district, the county United Way, the county sheriff's office, the circuit court, or the county children's board).

The bill deletes provisions that specify legislative intent that the department be permitted to have limited flexibility to use funds for improving quality assurance and which limit the percentage and dollar amount of total funds that may be transferred from categories used to pay for these contractually provided services. Funds from these categories were reportedly never needed or utilized because the department was appropriated funds from other sources for establishing a quality assurance system.

The bill amends s. 409.1671, F. S., to specify that lead agencies must give preference to established providers for the delivery of subcontracted services and, if an established provider is not selected, to direct the lead agency to document the reasons which must be based on performance or capacity criteria and to provide the documentation to the department prior to executing a contract or making the decision to provide the service directly. That section is further amended to specify that at least 51 percent of a lead agency's board of directors must reside in this state and that at least 51 percent of the state residents must be from the service area served by the lead agency. Finally, s. 409.1671, F.S., is amended to direct the department to include in its lead agency contracts all legislatively-established performance measures which must be updated annually to reflect the most current standards.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Section 10, Article VII of the State Constitution, provides:

> SECTION 10. Pledging Credit.--Neither the state nor any county, school district, municipality, special district, or agency of any of them, shall become a joint owner with, or stockholder of, or give, or lend or use its taxing power or credit to aid any corporation, association, partnership or person; . . . .

The constitutional provision then lists four categories of laws that would not be subject to this prohibition: the investment of public trust funds; the investment in obligations of the United States; the issuance of revenue bonds for designated capital facilities; and the construction and operation of electrical generation or transmission facilities.

In its current form the bill provides for the issuance of a non-interest bearing loan secured by the proceeds of appropriated funds. As such it is not a pledge of the state's credit. This business practice is not unusual and is used in transportation funding. Other provisions of state budgeting statutes permit advances of appropriations under limited circumstances.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may allow for access to the statewide shared financial risk program intended to protect eligible lead agencies that contract with the department for the provision of foster care and related services.

C. Government Sector Impact:

The Governor recommended $10 million in nonrecurring general revenue funds, for Fiscal Year 2004-2005, for the shared risk program. The Senate budget for the same fiscal year also appropriates $10 million in nonrecurring funds for this program, but the revenue source in the Senate proposal is unrestricted, unencumbered agency trust fund cash.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The effect of the amendments to the Risk Pool essentially creates a state agency organized insurance company, although those terms are not specifically used. The bill provides direct involvement by the Office of Insurance Regulation in the development of this indemnification scheme especially in the determination of solvency.

The Community-Based Risk Retention Group is authorized to use the proceeds of the indemnification pool for several enumerated purposes. Among them are the following: significant changes in the availability of federal funds; shortfalls in state funds; significant changes in the mix of available funds; and appropriate incentive structures. Two of these items removed from the bill, and from current law, present themselves as difficult to rate for insurance purposes as they constitute political risks or public policy uncertainty. The term "appropriate incentive structures" is phrased too loosely to be specific: it could include program-based, client-specific incentives or be defined to include a compensation-based result.

VIII. Amendments:

None.

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