

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 723 Foster Care Services
SPONSOR(S): Murman
TIED BILLS: **IDEN./SIM. BILLS:** SB 1698

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Children's Services (Sub)		Preston	Liem
2) Future of Florida's Families			
3) State Administration			
4) Human Services Appropriations (Sub)			
5) Appropriations			

SUMMARY ANALYSIS

The bill amends §409.1671, Florida Statutes, 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 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 Department of Children and Family Services did not provide a fiscal analysis for the bill.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0723.fff.doc
DATE: February 29, 2004

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|------------------------------|-----------------------------|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. EFFECT OF PROPOSED CHANGES:

Legislative History

In 1994, the Florida Legislature enacted legislation creating §409.1671, Florida Statutes, which provided that what was then the Department of Health and Rehabilitative Services (HRS) could contract for the delivery, administration, or management of protective services, family preservation services, family reunification services, foster care services, and other related services or programs as appropriate. The department was to retain responsibility for the quality of contracted services.¹

In 1996, the Legislature further amended §409.1671, Florida Statutes, to provide legislative intent to encourage HRS² to contract with competent community-based agencies to provide foster care and related services. The legislation stated that privatizing these services would increase community commitment to family reunification, would strengthen care to children and families, and would increase efficiencies and accountability. Each privatized contract was to be evaluated annually with a report being submitted each year, beginning in 1998, to the Governor and the Legislature summarizing among other things, cost efficiency of those contracts. Establishment of a quality assurance program related to the privatization of services was also required. Further, the legislation required the establishment of model programs and required that each of these model programs be established, community-based organizations within the district or subdistrict in which they were operated. Each entity participating in the model program effort to analyze and report the complete direct and indirect costs of delivering these services through the department and the full cost of privatization. Both the quality assurance program and the annual evaluations of the model programs were to be funded from cost savings from the privatization efforts.³

In 1998, The Department of Children and Family Services (DCF) was required by the Legislature to privatize the provision of foster care and related services statewide. Requirements that QA and annual model program evaluations were to be funded from realized cost savings and that model programs were to be established, locally based entities were removed from the statutes.⁴

In 2000, §409.1671, Florida Statutes, was amended to address the risk assumed by community-based care providers as they became responsible for service provision by authorizing DCF to establish and administer a risk pool intended to reduce the financial risk to eligible lead community-based providers

¹ See Chapter 94-164, Laws of Florida.

² The Department of Health and Rehabilitative Services became the Department of Children and Family Services during an agency reorganization in 1996.

³ See Chapter 96-402, Laws of Florida.

⁴ See Chapter 98-180, Laws of Florida

resulting from unanticipated caseload growth.⁵ The risk pool did not have an established years-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 §409.1671, Florida Statutes, required 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 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 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 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.⁶

The 2003 General Appropriations Act provided 10 million dollars 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 section 409.1671(7)(i), Florida Statutes. This appropriation is funded from unrestricted trust fund cash in the Department of Children and Family Services. Funds in this lump sum shall not be released until the Department submits the plan required in s. 409.1671(7), Florida Statutes, and final approval is received by the Legislative Budget Commission.⁷

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, 2004.⁸

Performance Bonds

A performance bond is a surety bond which guarantees that a contractor will 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.⁹

Letters of Credit

A letter of credit is an undertaking or engagement by a bank or other entity made at the request of a "customer" or applicant to make a payment to a named beneficiary within a specified time frame, against the presentation of documents which comply strictly with the terms of and conditions specified in the letter of credit. Its main advantage is providing security to both the applicant and the beneficiary, but such security comes at a price and must be weighed against the additional costs resulting from bank charges. The applicant must also be aware of the conditional nature of a letter of credit and the fact that any payment will not be made unless the terms of the credit are precisely met. A letter of

⁵ See Chapter 2000-139, Laws of Florida.

⁶ See Chapter 2002-219, Laws of Florida.

⁷ See Chapter 2003-397, Laws of Florida.

⁸ See Chapter 2003-399, Laws of Florida.

⁹ See Blacks Law Dictionary, 6th Edition.

credit that is irrevocable can neither be amended or cancelled without the agreement of all parties to the credit. Letters of credit are generally intended to facilitate purchase and sale of goods by providing assurance to the seller of prompt payment upon compliance with specified conditions without the seller having to rely upon the solvency and good faith of the buyer.¹⁰

The bill redirects the Department of Children and Family Services, 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. It also removes a provision which currently appears to restrict the use of funds 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 and provides that an irrevocable letter of credit may substitute for the currently required performance bond.

C. SECTION DIRECTORY:

Section 1. Amends §409.1671, Florida Statutes, related to the privatization of foster care and related services, to provide new requirements for 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 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.

Section 2. Provides for an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The Department of Children and Family Services provided no fiscal analysis for this bill. The department has requested \$10 million to fund the shared risk program and \$3 million to fund a community-based care risk/insurance premium which is not addressed in this bill.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

¹⁰ See Uniform Commercial Code, §5-103 and Blacks Law Dictionary, Sixth Edition.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not affect county or municipal government.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The decision to privatize the provision of foster care and related services has transferred the associated financial risk from the state to those entities who 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.¹¹

Unlike the Department of Children and Family Services, private providers do not have the ability to manage that 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 effect 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 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.¹² As more and 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 experiencing problems, some of which were related to financial stability, that jeopardized their existence. One of those agencies, Family Continuity Programs, which began providing services in June 2000, reportedly failed last week having exhausted an almost \$4 million credit line. In spite of this, it is a problem that Florida has been slow to address and has not yet implemented an adequate solution.

Florida law first allowed the department to contract for the provision of foster care and related services in 1994, with that permissiveness becoming a statewide mandate in 1998. As of January 2004, the

¹¹ See CWLS Managed Care and Privatization Child Welfare Tracking Project, Child Welfare League of America, (1998) p. 15.

¹² See Justification Review of the Child Protection Program in the Department of Children and Family Services, Office of Program Policy Analysis and Government Accountability, February 2001.

department has contracts in place with 11 lead agencies, serving 28 counties and 42% of all children receiving child protection services, with a total contract value of just over \$342 million dollars.¹³

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.¹⁴

A \$4.5 million risk pool was established in 2000; and at \$10 million today, it hardly appears adequate 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.

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 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 632.¹⁵

Unfortunately, the provisions of 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 were 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. The analysis of SB 632 provided by the Department of Children and Family Services stated that the bill requires a proposal developed jointly by DCF and the community-based care agencies related to the structure and use of a shared financial risk program and that this proposal will be a significant step towards having a responsive program in place to mitigate financial and liability risk for the community-based care lead agencies.¹⁶ It remains to be seen whether or not the department will meet the proposed extension by almost two years of the proposal deadline.

Section 409.1671, Florida Statutes, contains provisions related to performance bonds and community-based care lead agencies. 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.

Other sections of Florida law related to the use of performance bonds and/or letters of credit are typically more prescriptive relative to the requirements for those bonds or letters of credit. For example, §559.929, Florida Statutes, related to security requirements for trade regulation specifies:

¹³ See Report No. 04-15, DCF's Lead Agency Readiness Assessment process Meets Statutory Requirements, But Needs Strengthening, Office of Program Policy Analysis and Government Accountability, February 2004.

¹⁴ See CWLS Managed Care and Privatization Child Welfare Tracking Project, Child Welfare League of America, (1998) p. 32.

¹⁵ See 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.

¹⁶ See Staff Analysis and Economic Impact, Department of Children and Families, HB 723, February 20, 2004.

- An application must be accompanied by a performance bond in an amount set by the department not to exceed ... the surety on such bond shall be a surety company authorized to do business in the state.
- In lieu of the performance bond required in this part, a registrant or applicant for registration may establish a certificate of deposit or an irrevocable letter of credit in a Florida banking institution in the amount of the performance bond. The department shall be the beneficiary to this certificate of deposit, and the original shall be filed with the department. Any such letter of credit shall provide that the issuer will give the department not less than 120 days written notice prior to terminating or refusing to renew the letter of credit.
- The bond, letter of credit, or certificate of deposit shall be in favor of the department ...
- The department may waive the bond, letter of credit, or certificate of deposit requirement on an annual basis if ... has had 5 or more consecutive years of experience as ... in compliance with this part, has not had any civil, criminal, or administrative action instituted ... by any governmental agency or any action involving fraud, theft, misappropriation of property, or moral turpitude, and has a satisfactory consumer complaint history with the department. Such waiver may be revoked if ... violates any provision of this part.¹⁷

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

¹⁷ See §559.929, Florida Statutes for full text.