

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.)

Prepared By: Health Care Committee

BILL: CS/SB 1548

INTRODUCER: Health Care Committee and Senator Atwater

SUBJECT: Hospices

DATE: April 5, 2006

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Bedford	Wilson	HE	Fav/CS
2.			HA	
3.				
4.				
5.				
6.				

I. Summary:

The bill changes the definition of hospice in the hospice licensure law to remove the requirement that a hospice be a not-for-profit corporation. The revised definition defines hospice as a centrally administered corporation providing a continuum of palliative and supportive care for the terminally ill patient and her or his family. To conform, the provisions allowing certain for-profit entities to get an exception to the not-for-profit licensure requirement are deleted.

The bill makes it unlawful for a person or entity to offer, describe, or advertise hospice services or otherwise hold itself out as a hospice without stating the year of initial licensure as a hospice in Florida. The bill specifies the manner in which this information is to be communicated.

The bill authorizes the Agency for Health Care Administration (AHCA or agency) to deny a license to a hospice licensure applicant that fails to meet any condition of a certificate of need (CON), unless the agency determines there was good cause. A hospice must use trained volunteers for at least 5 percent of the total patient-care and administrative hours. At least 50 percent of such hours must be direct patient-care hours. The hospice must document the number of volunteers, the hours worked by the volunteers, and the tasks performed by each volunteer.

The Office of Program Policy Analysis and Government Accountability (OPPAGA) is required to submit a report to the Legislature by January 1, 2010, analyzing the impact of for-profit hospices. The bill states that it is the intent of the Legislature that there be no changes in the laws or rules for hospice licensure until 2012. By December 31, 2007, the Department of Elderly Affairs (DOEA), the agency, and all hospices licensed in Florida must develop outcome measures for hospice care. The DOEA, AHCA, and all hospices in Florida must also adopt national quality initiatives and develop an annual report. If any part of the act or application is invalid, it is severable and does not affect the other parts.

This bill amends ss. 400.601, 400.602, 400.606, and 400.6105, F.S.

This bill creates 4 undesignated sections of law.

II. Present Situation:

Hospice Licensure

Hospices are licensed by the Agency for Health Care Administration (AHCA) under pt. VI of ch. 400, F.S. Under s. 400.601(3), F.S., *hospice* is defined as “a centrally administered corporation not for profit, as defined in ch. 617, F.S., providing a continuum of palliative and supportive care for the terminally ill patient and his or her family.” A *corporation not for profit* is defined in s. 617.01401(5), F.S., as a corporation no part of the income or profit of which is distributable to its members, directors, or officers. Florida has 43 licensed hospices; six are owned by for-profit corporations. All meet the requirements in state law and rules for licensure and in federal regulations for Medicare and Medicaid service provision.

Section 400.602(5), F.S., provides that any hospice operating in corporate form exclusively as a hospice, incorporated on or before July 1, 1978, may be transferred to a for-profit or not-for-profit entity, and may transfer the license to that entity. Subsection (6) provides that notwithstanding the definition of hospice in s. 400.601(3), F.S., at any time after July 1, 1995, any entity entitled to licensure under s. 400.602(5), F.S., may obtain a license for up to two additional hospices in accordance with the other requirements of pt. VI of ch. 400, F.S., and upon receipt of any certificate of need that may be required under the provisions of ss. 408.031-408.045, F.S. One company, VITAS, has operated for-profit hospices in Florida since the 1980s under the exception in s. 400.602(5) and (6), F.S. VITAS currently operates five hospices in Florida.

Certificate-of-Need Review for Hospices

The establishment of a hospice or hospice inpatient facility is subject to certificate-of-need (CON) review under s. 408.036(1)(d), F.S. A special provision applies when a CON application is made to establish or expand a hospice. Under s. 408.043(2), F.S., the need for such hospice must be determined based on the need for, and availability of, hospice services in the community. The formula on which the CON is based must discourage regional monopolies and promote competition. The inpatient hospice care component of a hospice, which is a freestanding facility, or a part of a facility, which is primarily engaged in providing inpatient care and related services and is not licensed as a health care facility, must also be required to obtain a CON. Provision of hospice care by any current provider of health care is a significant change in service and therefore requires a CON for such services.

Hospice Service Areas

The 27 service areas for hospices are established in rule 59C-1.0355, F.A.C. The need for additional hospice programs within a service area is determined based on service area resident deaths and a projected population that would elect hospice care. They are as follows:

- Service Area 1 consists of Escambia, Okaloosa, Santa Rosa, and Walton Counties.
- Service Area 2A consists of Bay, Calhoun, Gulf, Holmes, Jackson, and Washington Counties.
- Service Area 2B consists of Franklin, Gadsden, Jefferson, Leon, Liberty, Madison, Taylor, and Wakulla Counties.
- Service Area 3A consists of Alachua, Bradford, Columbia, Dixie, Gilchrist, Hamilton, Lafayette, Levy, Putnam, Suwannee, and Union Counties.
- Service Area 3B consists of Marion County.
- Service Area 3C consists of Citrus County.
- Service Area 3D consists of Hernando County.
- Service Area 3E consists of Lake and Sumter Counties.
- Service Area 4A consists of Baker, Clay, Duval, Nassau, and St. Johns Counties.
- Service Area 4B consists of Flagler and Volusia Counties.
- Service Area 5A consists of Pasco County.
- Service Area 5B consists of Pinellas County.
- Service Area 6A consists of Hillsborough County.
- Service Area 6B consists of Hardee, Highlands, and Polk Counties.
- Service Area 6C consists of Manatee County.
- Service Area 7A consists of Brevard County.
- Service Area 7B consists of Orange and Osceola Counties.
- Service Area 7C consists of Seminole County.
- Service Area 8A consists of Charlotte and DeSoto Counties.
- Service Area 8B consists of Collier County.
- Service Area 8C consists of Glades, Hendry and Lee Counties.
- Service Area 8D consists of Sarasota County.
- Service Area 9A consists of Indian River County.
- Service Area 9B consists of Martin, Okeechobee, and St. Lucie Counties.
- Service Area 9C consists of Palm Beach County.
- Service Area 10 consists of Broward County.
- Service Area 11 consists of Dade and Monroe Counties.

OPPAGA Review of Florida's Hospice Care Industry

Pursuant to a legislative request, the Office of Program Policy Analysis and Government Accountability (OPPAGA) performed a review of the state's hospice industry, as well as a survey of the various approaches to regulating hospice facilities utilized by eight other states,¹ in an effort to evaluate Florida's system of providing hospice care to terminally ill patients.² According to the report (Report No. 06-29) issued in March, 2006,

Florida's method of regulating hospice programs differs from other states in two major ways. Florida is the only state that requires new hospice programs to operate as not-for-

¹ The eight states surveyed (Alabama, Illinois, Maryland, Virginia, Ohio, Tennessee, Texas, and California) are similar to Florida in terms of either size and/or elderly population.

² *Florida's Certificate of Need Process Ensures Qualified Hospice Programs; Performance Reporting Is Important to Assess Hospice Quality*, Office of Program Policy Analysis and Government Accountability, *supra*.

profit corporations and is one of only 12 states that comprehensively regulate the growth of hospice programs using a Certificate of Need process.³

The Office of Program Policy Analysis and Government Accountability reports ownership status does not appear to affect performance of hospice programs

Noting that available information on the issue is limited, OPPAGA reported, “Ownership status does not appear to affect hospice care in Florida or in other states.” Hospice officials in states authorizing both not-for-profit and for-profit hospice facilities reported having no evidence suggesting that ownership status affects the quality of hospice care provided.

Additionally, OPPAGA noted that there was no significant difference in the number of complaints or allegations received by AHCA relating to either not-for-profit or for-profit hospice programs, though the total number of hospice allegations in the state was small.⁴

The Office of Program Policy Analysis and Government Accountability recommended that the Legislature direct AHCA and the Department of Elder Affairs (DOEA) to work with Florida hospice programs to develop standardized quality and outcome measures, as well as a mechanism for collecting and maintaining such information. Moreover, the report urged hospice programs in the state to consider participating in national initiatives such as those developed by the National Hospice and Palliative Care Organization (NHPCO).

The Office of Program Policy Analysis and Government Accountability recommends continued CON approval for new hospice programs.

The Office of Program Policy Analysis and Government Accountability further recommended that, should it elect to license new for-profit hospice programs in the state, the Legislature should maintain its current CON process. The OPPAGA report indicated that such process “ensures that new hospice programs operate only in areas of the state where current hospice programs are not able to meet projected hospice needs,” thereby preventing an excess of hospice facilities within a single geographic locale. The Office of Program Policy Analysis and Government Accountability reported that the CON process also ensures that “hospice programs have the expertise, financial resources, and commitment to meet the needs of their communities.”

The Office of Program Policy Analysis and Government Accountability noted that AHCA is currently exploring modifications to its methodology for identifying areas of the state where existing programs may not be meeting the need for hospice care services.

III. Effect of Proposed Changes:

Section 1. Amends s. 400.601, F.S., to change the definition of hospice to mean a centrally administered corporation providing palliative and supportive care, for the terminally ill patient and her or his family, deleting a requirement that a hospice be a not-for-profit corporation.

³ Ibid.

⁴ Between August 2002, and July 2005, AHCA received only 279 allegations pertaining to hospice operations.

Section 2. Amends s. 400.602, F.S., requiring that, in any offering, describing, or advertising hospice services or hospice-like services, the person or entity must state the year of initial licensure as a hospice in the state or the year of initial licensure of the parent company in the state that owns the hospice. The year must be stated directly below the name in a type no less than 25 percent of the size of the type used for the name. It must be stated at least one time on any document, item, or other medium offering, describing, or advertising hospice services. The provision allowing a hospice incorporated prior to July 1, 1978, to be a for-profit entity is deleted. The provision allowing such for-profit hospice to obtain a license for up to two additional hospices is deleted.

Section 3. Amends s. 400.606, F.S., authorizing the agency to deny a license to any hospice that fails to meet any condition specified in a CON, unless the agency determines, in its sole discretion, that good cause exists.

Section 4. Amends s. 400.6105, F.S., requiring trained volunteers to be used for at least 5 percent of the total patient-care or administrative hours, of which at least 50 percent must be direct patient-care hours. The hospice must document and report the use of volunteers, including the number of volunteers, the number of hours worked by each volunteer, and the tasks performed by each volunteer.

Section 5. Creates an undesignated section of law requiring OPPAGA to submit a report to the Legislature by January 1, 2010, analyzing the impact of for-profit hospices on the delivery of care to terminally ill patients. The report must include a review of the quality of care by for-profit hospices, changes in the competitive marketplace, and any other information that is pertinent.

Section 6. Creates an undesignated section of law stating the Legislature's intent that the law and rules for hospice licensure remain the same until 2012, in order to correctly analyze and evaluate the impact of this act on the quality of hospice care.

Section 7. Creates an undesignated section of law requiring DOEA, the agency and licensed hospices in Florida to develop outcome measures in order to determine the quality and effectiveness of hospice care in Florida. The minimum requirements for the outcome measures are:

- The number of patients who report pain on a scale of 1-10, needs to be 50 percent reporting 5 or below by the end of the fourth day of care in a hospice program.
- Each patient and family must receive a satisfaction questionnaire. The satisfaction must be 90 percent or higher for at least 75 percent of the patients.

The DOEA, the agency, and licensed hospices in Florida must:

- Adopt national initiatives like those developed by the National Hospice and Palliative Care organization for measuring the quality of hospice care provided.

- Develop an annual report that analyzes and evaluates the information collected under this act.

Section 8. Creates an undesignated section of law stating that if any part of this act is held invalid then it is severable.

Section 9. Provides that this act shall take effect on July 1, 2006.

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.

B. Public Records/Open Meetings Issues:

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Art. I, s. 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.

D. Other Constitutional Issues:

The bill makes it unlawful for any person or entity to “offer”, “describe”, or “advertise” hospice services or hospice-like services without stating the year of initial licensure of the hospice. It is unclear what “offer,” “describe,” or “advertise,” means or what “hospice-like services” means within the context of this bill. Establishing a criminal offense for acts that are prohibited or required, but that are not clearly defined, is likely to be void for vagueness or for overbreadth under the due process clause of the state and federal constitutions. Both constitutions prohibit a statute from forbidding or requiring the doing of an act in terms so vague that persons of common understanding must necessarily guess at its meaning and differ as to its application.⁵ A statute is overbroad when its proscriptive language embraces not only acts properly and legally punishable, but others, which are constitutionally protected or outside the police power of the state to regulate.⁶ To say that it is unlawful for any person to describe a hospice or hospice-like services without stating the initial licensure date, would be overbroad.

Applicable case law has held that, as long as commercial speech describes lawful activity and is truthful and not fraudulent or misleading, it is entitled to the protections of the First Amendment of the *United States Constitution*. To regulate or ban commercial speech, the government must have substantial governmental interest, which is directly advanced by

⁵ See *Brock v. Hardie*, 154 So.690 (Fla.1934).

⁶ See *Locklin v. Pridgeon*, 30 So.2d 102 (Fla. 1947).

the restriction, and must demonstrate that there is a reasonable fit between the legislature's ends and narrowly tailored means chosen to accomplish those ends. In enacting or enforcing a restriction on commercial speech, the government need not select the least restrictive means, but rather must tailor its restriction to meet the desired objective.⁷ Case law also describes various legally recognized regulatory safeguards, which the state may impose in place of the total ban on commercial speech, such as requiring a disclaimer to ensure that the consumer is not misled.⁸

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This bill allows for-profit corporations to obtain hospice licenses following CON approval. Not-for profit hospices are also affected. They will potentially have increased competition and may have reduced charitable contributions because of competition with for-profit hospices.

C. Government Sector Impact:

There are added functions for DOEA, AHCA, and OPPAGA.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Section 6 of this bill is contrary to the well-settled law that one legislature may not bind a future legislature regarding the exercise of its constitutional power to alter, modify, or repeal a subsequent act. The Florida Supreme Court in Neu v. Miami Herald Pub. Co., 462 So. 2d 821 (1985), found that a legislature may not bind the hands of future legislatures by prohibiting amendments to statutory law.

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

⁷ See *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 100 S.Ct. 2243, 65 L.Ed.2d 341 (1980).

⁸ See *Abramson v. Gonzalez* 949 F.2d 1567 (11th Cir. 1992).

VIII. Summary of Amendments:

None.

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