

FINAL BILL ANALYSIS

BILL #: CS/HB 4045, HB 4047, HB 4049,
HB 4051 and HB 4053

FINAL HOUSE FLOOR ACTION:
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SPONSOR: *Rep. Hudson*

GOVERNOR'S ACTION: Vetoed

COMPANION BILLS: *None*

SUMMARY ANALYSIS

CS/HB 4045 passed the House on April 20 2011, and subsequently passed the Senate on April 29, 2011. The bill was vetoed by the Governor on June 27, 2011.

The Committee Substitute combines the provisions of HB 4045, HB 4047, HB 4049, HB 4051 and HB 4053, which amend or repeal five different sections of statute relating to assisted living facilities (ALFs).

The bill amends or repeals the following sections of law:

- Amends s. 429.19(9), F.S., removing the requirement that the Agency for Health Care Administration (AHCA) annually develop and disseminate, to certain state agencies, a list of all ALFs sanctioned or fined for violations, the number and class of violations, the penalties imposed and the current status of the case.
- Amends s. 429.23(5), F.S., removing the requirement that ALFs submit a monthly report to AHCA listing any liability claims that have been made against the facility.
- Amends s. 429.35(2), F.S., removing the requirement that AHCA forward the results of biennial and interim inspection visits of ALFs, within 60 days after a biennial inspection and 30 days of any interim visit to the local ombudsman council; public library; and the district adult services and mental health program offices of the Department of Children and Families (DCF).
- Amends s. 429.41(3), F.S., removing the requirement that the Department of Elder Affairs (DOEA) submit its proposed rules to the Speaker of the House of Representatives, the President of the Senate, and appropriate committees, prior to promulgation, for review and comment. The bill also deletes a provision that the rules of DOEA encourage the development of homelike facilities that promote the individuality of residents.
- Repeals s. 429.54, F.S., which authorizes DOEA to conduct field visits and audits of ALFs to collect information regarding the cost of room, board and personal care in ALFs. The bill would also repeal the requirement that facility owners must provide reports, audits and accountings of cost, as required by DOEA rules to assist in gathering information.

The bill appears to have no fiscal impact.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Current Situation

Assisted Living Facility Reporting Requirements

Chapter 429, Part I, F.S., and chapter 58A-5, F.A.C., regulate the licensure of assisted living facilities (ALFs). Section 429.19(9), F.S., requires the Agency for Health Care Administration (AHCA) to develop and disseminate an annual list of all facilities sanctioned or fined for violations of state standards. The list must include the number and class of violations involved, the penalties imposed, and the current status of cases. Once the list is developed, it must then be sent to the Department of Elder Affairs (DOEA), the Department of Health (DOH), the Department of Children and Family Services (DCF), the Agency for Persons with Disabilities (APD), the area agencies on aging, the Florida Statewide Advocacy Council, and the state and local ombudsman councils. The list may be provided electronically or through AHCA's website.

As of January 2011, 2,947 ALFs are licensed statewide. Based on the requirement in s. 429.19(9), F.S., AHCA publishes two annual reports on their website.

The AHCA "Administrative Fines" report shows all facilities with administrative fines imposed by final order between July, 2009, and June, 2010. The report specifies the following:¹

- Provider name
- City
- County
- License status (closed or active)
- Legal case number
- Type of deficiency
- Fine amount
- Outcome of the case
- Specific survey violation and class of violation

The AHCA "Sanctions" report shows all facilities with sanctions imposed (moratorium, revocation, denial and suspension) in final order status between July, 2009, and June, 2010. The report specifies the following:²

- Provider name
- Owner
- Current license status
- City
- County
- Legal case number
- Type of case

¹ AHCA Administrative Fines Report, available at, http://ahca.myflorida.com/MCHQ/Long_Term_Care/FDAU/docs/ALF_Fines.pdf.

² AHCA Sanctions Report, available at, http://ahca.myflorida.com/MCHQ/Long_Term_Care/FDAU/docs/ALF_Sanctions.pdf.

- Outcome of the case
- Final order date
- Emergency suspension
- Moratorium status and moratorium start date

Currently, ALFs are required to submit a monthly report to AHCA including any liability claim filed against it. The report must include the name of the resident, the dates of the incident leading to the claim, and the type of injury or violation of rights alleged. The report is not discoverable in any civil or administrative action except in actions brought against the facility by AHCA.³ In FY 01-02, there were 80 liability claims reported to AHCA, and for FY 09-10, there were 16 reported. Information from the liability claims report is not used in any regulatory manner by AHCA.⁴

ALFs are required to maintain liability insurance coverage at all times.⁵ A liability claim is a claim made by a resident, or a representative of the resident against the facility and the facility's insurer for damages resulting from an alleged adverse incident occurring at the facility.

An adverse incident is an event over which facility personnel could exercise control (rather than as a result of the resident's condition) and results in:

- Death,
- Brain or spinal damage,
- Permanent disfigurement,
- Fracture or dislocation of bones or joints,
- Any condition requiring the transfer of the resident to another facility to provide more acute care,
- An event that is reported to law enforcement for investigation, or
- Resident elopement which places the resident at risk for harm or injury.⁶

Liability claims can also be made for alleged violation of rights. There are 11 specific rights granted for residents of ALFs and they are outlined in statute. Examples include the right to unrestricted private communication including letters and telephone calls, sharing a room with his or her spouse if both are residents of the facility, and the right to present grievances and recommend changes.⁷

ALFs are required to report adverse incidents that occur in their facilities, to perform an internal investigation, and transmit an investigation report to AHCA. The agency reviews these reports and may investigate and prescribe measures to be taken in response to the incident.⁸ AHCA surveys ALFs once every two years and is authorized to make inspections as it deems necessary.⁹

Section 429.35(2), F.S., requires AHCA within 60 days after biennial inspection and 30 days of any interim visit to forward the results of biennial and interim inspection visits of ALFs to:

³ S. 429.23 (5), F.S..

⁴ Agency for Health Care Administration 2011 Bill Analysis & Economic Impact Statement, HB 4051.

⁵ S. 429.275, F.S.

⁶ S. 429.23 (2) (a), F.S.

⁷ S. 429.28, F.S.

⁸ S. 429.23 (3), (4), & (7), F.S.

⁹ S. 408.811, F.S.

- The local ombudsman council in the appropriate planning and service area of DOEA;
- The local public library; and
- The district adult services and mental health program offices of DCF.

Between January, 2010, and February, 2011, 2,366 biennial inspection visits were conducted.

Section 408.806(8), F.S., allows AHCA to provide electronic access to information or documents, such as inspection report results, as an alternative to sending documents as required by authorizing statutes.¹⁰ The Agency produces written reports of all inspections to the provider. Compliance and noncompliance with regulations are cited in the report. Upon review by the Agency, the reports are posted on the inspections reports website¹¹ and a monthly email is sent to the Office of State Long-Term Care Ombudsman (Office) of all inspections completed. The Office distributes this information to the local ombudsman councils.

DOEA Rule Promulgation for ALFs

Section 429.41, F.S., requires DOEA, with input from AHCA, DCF, and DOH, to adopt rules, policies and procedures relating to the operation and administration of ALFs, establishing fair and reasonable minimum standards to ensure safe and sanitary facilities and the highest quality of resident care, while accommodating the needs and preferences of residents.¹² The minimum standards must be related to:

- Requirements for and maintenance of facilities to ensure the health, safety and comfort of residents;
- Fire alarm, fire protection and fire safety standards;
- Resident elopement prevention and response procedures;
- Preparing and annual updating of a comprehensive emergency management plan;
- Training and qualifications of personnel responsible for caring for residents;
- Maintaining sanitary conditions within the facility and throughout the grounds of the facility;
- Licensure and ownership requirements;
- Inspections, investigations, impositions of fines and penalties, and distribution of funds received from fines and penalties;
- Enforcing the resident bill of rights found in s. 429.28, F.S.; and
- Care and maintenance of residents.¹³

The statute requires that the rules developed by DOEA distinguish between facilities with 16 and fewer beds and facilities with 17 or more beds.¹⁴ DOEA is required to submit all proposed rules to the Speaker of the House of Representatives, the President of the Senate, and appropriate committees for review and comment prior to promulgation.¹⁵ The statute also states that DOEA is to draft rules that encourage the development of homelike facilities that promote dignity, individuality, strengths, and decision-making of the residents.¹⁶

¹⁰ S. 408.806(8), F.S.

¹¹ [http://apps.ahca.myflorida.com/dm_web/\(S\(n3dnev45xakyh155qllelimg\)\)/Default.aspx](http://apps.ahca.myflorida.com/dm_web/(S(n3dnev45xakyh155qllelimg))/Default.aspx)

¹² S. 429.41(1), F.S.

¹³ S. 429.41(1) through (3), F.S.

¹⁴ S. 429.41(2), F.S.

¹⁵ S. 429.41(3), F.S.

¹⁶ *Id.*

The requirement that DOEA submit all proposed rules to the Speaker, the President and appropriate committees differs from the rulemaking procedure contained in HB 1565 (2010).¹⁷ The statutory section requires that all rules proposed by DOEA with regard to establishing criteria and standards for assisted care communities be submitted to the specified parties and entities. However, the rulemaking process outlined in HB 1565 limits extensive legislative review and ratification to those rules that have an impact of \$200,000.00 on small businesses within the first year of enactment and an impact of \$1,000,000.00 within the first five years of enactment. DOEA would be required to comply with the rulemaking procedure outlined in HB 1565 whether or not the rule submission requirement in s. 429.54(3), F.S., existed.

AHCA may waive certain rules to explore and evaluate innovative or cost-effective alternatives in congregate care that allow residents to age in place.¹⁸ The statute provides the procedure for applying for a waiver of the rules by a facility, for reporting of findings within 12 months of receiving the waiver, and for the renewal or revoking of the waiver by AHCA after the 12 month period has expired.¹⁹ Lastly, the statute permits an abbreviated licensing inspection schedule for ALFs that have a good inspection record and requires full inspections for facilities with certain past violations.²⁰

DOEA Field Visits and Audits of ALFs

Section 429.54(1), F.S., authorizes DOEA to conduct field visits and audits of ALFs as necessary to gather information regarding the actual cost of providing room, board, and personal care in ALFs and report said information to the Legislature. ALFs are required to cooperate with DOEA and provide all necessary reports, audits, and accountings to show cost of operation of the ALFs.

Section 429.54(2), F.S., allows local governments or organizations to subsidize the rate of state-authorized payment to ALFs for cost of care of residents, upon approval of DOEA. Currently, DCF administers the Optional State Supplementation (OSS) Program, which provides cash assistance to individuals to help defray the costs of residing in an ALF, mental health residential treatment facility, and adult family care home.²¹ The OSS Program is completely state funded and is not associated with Medicare or Medicaid. Eligibility for OSS funds and the amount of funds received by an individual are determined by DCF.²² In addition to the amount of OSS funds, a person may receive additional financial assistance from third parties to help defray the cost of care, pursuant to additional statutory authority found outside this section.²³

¹⁷ HB 1565 was passed by the Legislature, notwithstanding the veto of Governor Crist, during the 2011 Special Session "A". It can be found in Ch. 2010-279, L.O.F. The law requires state agencies to determine the impact of proposed agency rules on small businesses. If the rules will have an adverse impact on small businesses or increase regulatory costs in the aggregate in the amount of \$200,000.00 in the first year of enactment, an agency must prepare a statement of estimated regulatory cost (SERC). The SERC must determine whether the rules will financially impact small businesses by \$1,000,000.00 or more over the first five years of enactment. If the economic analysis concludes that the rules meet or exceed the threshold, the rules must be presented to the Speaker of the House of Representatives and the President of the Senate and cannot be enacted until ratified by the Legislature.

¹⁸ S. 429.41(3), F.S.

¹⁹ S. 429.41(4), F.S.

²⁰ S. 429.41(5), F.S.

²¹ S. 409.212, F.S.

²² *Id.*, see also Rule 65A-1.205, F.A.C. and Rule 65A-2.032, F.A.C.

²³ S. 409.212(4), F.S.

Subsidies provided by local governments or organizations do not impact the amount of money which a resident of an ALF receives from the state. The statute prohibits the state from reducing the amount of assistance it provides to the resident of an ALF by any amount of any local subsidy received from a local government or organization. According to the DOEA, local governments or organizations are not providing local subsidies to residents of ALFs under this statute.²⁴

Effect of Changes

The bill removes the requirement in s. 429.19(9), F.S., that AHCA develop and distribute an annual list of all ALFs sanctioned or fined for violations, the number and class of violations, the penalties imposed and the current status of the case.

While AHCA will no longer be required by law to post and distribute this report, online or otherwise, the law does not prohibit AHCA from doing so. The bill effectively gives AHCA discretion to affirmatively compile and publish the information, or compile and provide the information in response to a public records request. AHCA has indicated they intend to remove the information from their website and make it available through a public records request.²⁵

This bill removes the requirement in s. 429.23(5), F.S., that ALFs submit a monthly report to AHCA listing any liability claims made against it.

The bill also amends s. 429.35(2), F.S. AHCA will no longer be required to distribute biennial and interim inspection reports to local ombudsman councils, public libraries, and the district adult services and mental health program offices of DCF.

According to AHCA, the current distribution process is obsolete because access to these inspection results can be viewed electronically. The Office of State Long-Term Care Ombudsman currently receives a monthly email containing detailed results of all inspections completed. This information is then distributed to the local ombudsman councils. The purpose of the reports being sent to local public libraries is to make the information available to the public. However, the reports can be viewed by the public via AHCA's website.²⁶

The bill removes the requirement in s. 429.41(3), F.S., that DOEA submit its proposed rules to the Speaker, the President and appropriate committees prior to promulgation for review and comment. The bill also repeals the requirement that DOEA rules encourage the development of homelike facilities that promote the individuality, decision-making and other aspects of residents.

Finally, the bill repeals s. 429.54, F.S., which authorizes DOEA to conduct field visits and audits to gather information regarding the cost of providing room, board and personal care to residents of ALFs. ALFs would no longer need to compile information and produce reports, audits or accountings of cost to assist DOEA in creating its report to the Legislature.

Local governments or organizations may provide local subsidies to residents of ALFs through other statutory authority.²⁷ The local subsidy would not need to be approved by DOEA.

²⁴ Telephone conversation with DOEA staff, February 18, 2011.

²⁵ Florida Agency for Health Care Administration, Bill Analysis and Economic Impact Statement, House Bill 4053(February 22, 2011).

²⁶ Id.

²⁷ S. 409.212(4), F.S.

However, the prohibition against reducing state supplements to ALFs based on the amount of local subsidy received by ALFs is removed by repeal of this statute. Therefore, it is possible that the state could survey all ALFs to determine the amount local subsidy being received and reduce the OSS payment to residents accordingly.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

ALFs will be positively impacted through the repeal of s. 429.54, F.S. because facilities will no longer be required to gather data and produce reports, audits or accountings of cost to assist DOEA in gathering information to complete its report to the Legislature. The cost savings would come in the form of staff hours saved by not gathering information or creating the specified documents. Also, staff would not be required to assist DOEA representatives during the field visit and/or audit, and possible post-visit or audit discussions regarding the need for additional information from the facility.

D. FISCAL COMMENTS:

None.