

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

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

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Prepared By: The Professional Staff of the Children, Families, and Elder Affairs Committee

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BILL: SPB 7176

INTRODUCER: For consideration by the Children, Families, and Elder Affairs Committee

SUBJECT: Assisted Living Facilities

DATE: January 18, 2012

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Daniell	Farmer	CF	<b>Pre-meeting</b>
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
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**I. Summary:**

This proposed committee bill makes substantial revisions to state law relating to assisted living facilities. Specifically, the bill:

- Requires case managers to maintain records of face-to-face interaction with a mental health resident;
- Requires adequate and consistent monitoring and enforcement of community living support plans and cooperative agreements;
- Requires an assisted living facility (ALF or facility) to provide notice to residents of the confidentiality of certain information when making a complaint to the long-term care ombudsman;
- Specifies that an employee or agent of an agency that has regulatory responsibilities concerning persons in state-licensed facilities are mandatory reporters of abuse, neglect, or exploitation of the elderly;
- Defines “mental health professional”;
- Requires an assisted living facility that serves any mental health resident to obtain a limited mental health license;
- Provides requirements for a facility to follow when relocating or terminating the residency of a resident;
- Provides a process for a resident to challenge a facility’s notice to relocate or terminate the residency of the resident;
- Requires a preservice orientation for all employees or administrators hired on or after July 1, 2012;

- Requires every ALF to be under the management of a licensed administrator and provides educational and training requirements for an applicant to become an ALF administrator (applicant);
- Provides for a provisional license and inactive status in certain circumstances;
- Requires the Department of Elder Affairs (DOEA or department), in conjunction with other agencies, to develop a standardized curriculum for core training and competency tests related to the core training, and to develop curricula for continuing education;
- Requires applicants to have 40 hours of core training and successfully pass the competency test with a minimum score of 80;
- Requires applicants to complete 10 hours of supplemental training on certain topics;
- Requires staff members of an ALF who provide regular or direct care to residents to have 20 hours of core training and successfully pass the competency test with a minimum score of 70;
- Requires administrators and certain staff members of a limited mental health ALF to complete 8 hours of mental health training within 30 days after employment and pass a competency test;
- Requires administrators to have 18 hours every two years of continuing education and certain staff members to have 10 hours every two years of continuing education;
- Creates a certification process for trainers using a third-party credentialing entity approved by DOEA;
- Authorizes a resident to submit a request to a facility to have electronic monitoring devices in the resident's room and requires certain notices and consents to be given; and
- Makes technical and conforming changes.

This bill substantially amends the following sections of the Florida Statutes: 394.4574, 400.0078, 415.103, 415.1034, 429.02, 429.075, 429.176, 429.178, 429.28, and 429.52.

This bill creates the following sections of the Florida Statutes: 429.281, 429.50, 429.512, 429.521, 429.522, and 429.55.

## II. Present Situation:<sup>1</sup>

### Assisted Living Facilities

An assisted living facility (ALF or facility) is a residential establishment, or part of a residential establishment, that provides housing, meals, and one or more personal services for a period exceeding 24 hours to one or more adults who are not relatives of the owner or administrator.<sup>2</sup>

The ALFs are licensed by the Agency for Health Care Administration (AHCA or agency), pursuant to part I of ch. 429, F.S., relating to assisted living facilities, and part II of ch. 408, F.S., relating to the general licensing provisions for health care facilities. The ALFs are also subject to

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<sup>1</sup> Information contained in the Present Situation of this bill analysis is from an interim report by the Committee on Health Regulation of the Florida Senate. See Comm. on Health Reg., The Florida Senate, *Review Regulatory Oversight of Assisted Living Facilities in Florida* (Interim Report 2012-128) (Sept. 2011), available at <http://www.flsenate.gov/PublishedContent/Session/2012/InterimReports/2012-128hr.pdf> (last visited Jan. 17, 2012).

<sup>2</sup> Section 429.02(5), F.S.

regulation under Chapter 58A-5, Florida Administrative Code (F.A.C.). These rules are adopted by the Department of Elder Affairs (DOEA or department) in consultation with AHCA, the Department on Children and Family Services (DCF), and the Department of Health (DOH).<sup>3</sup>

An ALF is required to provide care and services appropriate to the needs of the residents accepted for admission to the facility. The owner or facility administrator determines whether an individual is appropriate for admission to the facility based on an assessment of the strengths, needs, and preferences of the individual; the health assessment; the preliminary service plan; the facility's residency criteria; services offered or arranged for by the facility to meet resident needs; and the ability of the facility to meet the uniform fire-safety standards.<sup>4</sup> If a resident no longer meets the criteria for continued residency, or the facility is unable to meet the resident's needs, as determined by the facility administrator or health care provider, the resident must be discharged in accordance with the Resident Bill of Rights.<sup>5</sup>

As of June 1, 2011, there were 2,956 licensed ALFs in Florida.<sup>6</sup> In addition to a standard license, an ALF may have specialty licenses that authorize an ALF to provide limited nursing services (LNS),<sup>7</sup> limited mental health (LMH) services,<sup>8</sup> and extended congregate care (ECC) services.<sup>9</sup> Out of the 2,956 licensed ALFs, 1,062 have LNS licenses, 1,100 have LMH licenses, and 278 have ECC licenses.<sup>10</sup>

#### ***Limited Nursing Services Specialty License***

An LNS specialty license enables an ALF to provide, directly or through contract, a select number of nursing services in addition to the personal services that are authorized under the standard license.

The nursing services authorized to be provided with this license are limited to acts specified in administrative rules,<sup>11</sup> may only be provided as authorized by a health care provider's order, and must be conducted and supervised in accordance with ch. 464, F.S., relating to nursing, and the prevailing standard of practice in the nursing community. A nursing assessment, that describes the type, amount, duration, scope, and outcomes or services that are rendered and the general status of the resident's health, is required to be conducted at least monthly on each resident who receives a limited nursing service.<sup>12</sup>

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<sup>3</sup> Section 429.41(1), F.S.

<sup>4</sup> Section 429.26, F.S., and Rule 58A-5.030, F.A.C.

<sup>5</sup> Section 429.28, F.S.

<sup>6</sup> Agency for Health Care Administration, *Assisted Living Directory*,

[http://ahca.myflorida.com/MCHQ/Long\\_Term\\_Care/Assisted\\_living/pdf/Directory\\_ALF.pdf](http://ahca.myflorida.com/MCHQ/Long_Term_Care/Assisted_living/pdf/Directory_ALF.pdf) (last visited July 15, 2011).

<sup>7</sup> Section 429.07(3)(c), F.S.

<sup>8</sup> An ALF that serves three or more mental health residents must obtain a limited mental health specialty license. A mental health resident is an individual who receives social security disability income (SSDI) due to a mental disorder or supplemental security income (SSI) due to a mental disorder, and receives optional state supplementation (OSS). *See* ss. 429.075 and 429.02(15), F.S.

<sup>9</sup> Section 429.07(3)(b), F.S.

<sup>10</sup> Agency for Health Care Administration, *Directories*,

[http://ahca.myflorida.com/MCHQ/Long\\_Term\\_Care/Assisted\\_living/alf.shtml](http://ahca.myflorida.com/MCHQ/Long_Term_Care/Assisted_living/alf.shtml) (last visited July 15, 2011).

<sup>11</sup> Rule 58A-5.031, F.A.C.

<sup>12</sup> Section 429.26, F.S., and Rule 58A-5.031(3)(c), F.A.C.

### ***Extended Congregate Care Specialty License***

An ECC specialty license enables an ALF to provide, directly or through contract, services performed by licensed nurses and supportive services<sup>13</sup> to persons who otherwise would be disqualified from continued residence in an ALF.<sup>14</sup>

The primary purpose of ECC services is to allow residents, as they become more impaired with physical or mental limitations, to remain in a familiar setting. An ALF licensed to provide ECC services may also admit an individual who exceeds the admission criteria for a facility with a standard license, if the individual is determined appropriate for admission to the ECC facility. A licensed facility must adopt its own requirements within guidelines for continued residency set forth by rule. However, the facility may not serve residents who require 24-hour nursing supervision.<sup>15</sup>

Facilities holding an ECC license must also:

- Ensure that the administrator of the facility and the ECC supervisor, if separate from the administrator, has a minimum of 2 years of managerial, nursing, social work, therapeutic recreation, or counseling experience in a residential, long-term care, or acute care setting or agency serving elderly or disabled persons. A baccalaureate degree may be substituted for 1 year of the required experience and a nursing home administrator is considered to be qualified for the position.
- Provide enough qualified staff to meet the needs of ECC residents considering the amount and type of services established in each resident's service plan.
- Immediately provide additional or more qualified staff, when the AHCA determines that service plans are not being followed or that residents' needs are not being met because of the lack of sufficient or adequately trained staff.
- Ensure and document that staff receive required ECC training.

### ***Limited Mental Health Specialty License***

An ALF that serves three or more mental health residents must obtain an LMH specialty license.<sup>16</sup> A mental health resident is an individual who receives social security disability income (SSDI) due to a mental disorder or supplemental security income (SSI) due to a mental disorder, and receives optional state supplementation (OSS).<sup>17,18</sup> The DCF is responsible for ensuring that

<sup>13</sup> Supportive services include social service needs, counseling, emotional support, networking, assistance with securing social and leisure services, shopping service, escort service, companionship, family support, information and referral, assistance in developing and implementing self-directed activities, and volunteer services. See Rule 58A-5.030(8)(a), F.A.C.

<sup>14</sup> Section 429.07(3)(b), F.S., and Rule 58A-5.030, F.A.C.

<sup>15</sup> Section 429.07(3)(b), F.S.

<sup>16</sup> Section 429.075, F.S.

<sup>17</sup> Section 429.02(15), F.S.

<sup>18</sup> Optional State Supplementation is a cash assistance program. Its purpose is to supplement a person's income to help pay for costs in an assisted living facility, mental health residential treatment facility, or adult family care home, but it is not a Medicaid program. Department of Elder Affairs, *Florida Affordable Assisted Living: Optional State Supplementation (OSS)*, <http://elderaffairs.state.fl.us/faal/operator/statesupp.html> (last visited Aug. 17, 2011).

a mental health resident is assessed and determined able to live in the community in an ALF with an LMH license.<sup>19</sup>

The LMH licensee must execute a cooperative agreement between the ALF and the mental health care services provider. The cooperative agreement specifies, among other things, directions for the ALF accessing emergency and after-hours care for the mental health resident.

Additionally, according to Rule 58A-5.029, F.A.C., facilities holding an LMH license must:

- Provide an opportunity for private face-to-face contact between the mental health resident and the resident's mental health case manager or other treatment personnel of the resident's mental health care provider.
- Observe resident behavior and functioning in the facility, and record and communicate observations to the resident's mental health case manager or mental health care provider regarding any significant behavioral or situational changes which may signify the need for a change in the resident's professional mental health services, supports and services described in the community living support plan, or that the resident is no longer appropriate for residency in the facility.
- Ensure that designated staff have completed the required LMH training.
- Maintain facility, staff, and resident records in accordance with the requirements of the law.

### ***ALF Staffing Requirements***

Every ALF must be under the supervision of an administrator, who is responsible for the operation and maintenance of the facility, including the management of all staff and the provision of adequate care to all residents. An ALF administrator must be at least 21 years of age and, if employed on or after August 15, 1990, must have a high school diploma or general equivalency diploma (G.E.D.), or have been an operator or administrator of a licensed ALF in Florida for at least 1 of the past 3 years in which the facility has met minimum standards. However, all administrators employed on or after October 30, 1995, must have a high school diploma or G.E.D. An administrator must be in compliance with level 2 background screening standards and complete a core training requirement.<sup>20</sup>

Administrators may supervise a maximum of either three ALFs or a combination of housing and health care facilities or agencies on a single campus. However, administrators who supervise more than one facility must appoint in writing a separate "manager" for each facility who must be at least 21 years old and complete a core training requirement.<sup>21</sup>

All staff, who are employed by or contracted with the ALF to provide personal services to residents, must receive a level 2 background screening.<sup>22</sup>

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<sup>19</sup> Section 394.4574, F.S., requires a mental health resident to be assessed by a psychiatrist, clinical psychologist, clinical social worker, psychiatric nurse, or an individual who is supervised by one of these professionals to determine whether it is appropriate for the person to reside in an ALF.

<sup>20</sup> Section 429.174, F.S., and Rule 58A-5.019, F.A.C.

<sup>21</sup> *Id.*

<sup>22</sup> Section 408.809(1)(e), F.S. and s. 429.174, F.S.

### *ALF Staff Training*

Administrators and other ALF staff must meet minimum training and education requirements established by the DOEA by rule.<sup>23</sup> This training and education is intended to assist facilities appropriately respond to the needs of residents, maintain resident care and facility standards, and meet licensure requirements.<sup>24</sup>

The ALF core training requirements established by the DOEA consist of a minimum of 26 hours of training and a competency test. Administrators and managers are required to successfully complete the ALF core training requirements within 3 months from the date of becoming a facility administrator or manager. Successful completion of the core training requirements includes passing the competency test.<sup>25</sup> The minimum passing score for the competency test is 75 percent.<sup>26</sup>

Administrators and managers must participate in 12 hours of continuing education in topics related to assisted living every 2 years. A newly hired administrator or manager, who has successfully completed the ALF core training and continuing education requirements, is not required to retake the core training. An administrator or manager, who has successfully completed the core training but has not maintained the continuing education requirements, is considered a new administrator or manager for the purposes of the core training requirements. He or she must retake the ALF core training and retake and pass the competency test.<sup>27</sup>

Facility administrators or managers are required to provide or arrange for the following in-service training to facility staff:

- Staff who provide direct care to residents, other than nurses, certified nursing assistants, or home health aides must receive a minimum of 1-hour in-service training in infection control, including universal precautions, and facility sanitation procedures before providing personal care to residents.<sup>28</sup>
- Staff who provide direct care to residents must receive a minimum of 1-hour in-service training within 30 days of employment that covers the reporting of major incidents, reporting of adverse incidents, and facility emergency procedures including chain-of-command and staff roles relating to emergency evacuation.
- Staff who provide direct care to residents, who have not taken the core training program, must receive a minimum of 1-hour in-service training within 30 days of employment that covers resident rights in an ALF and recognizing and reporting resident abuse, neglect, and exploitation.

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<sup>23</sup> Rule 58A-5.0191, F.A.C.

<sup>24</sup> Section 429.52(1), F.S.

<sup>25</sup> Rule 58A-5.0191, F.A.C.

<sup>26</sup> Administrators who have attended core training prior to July 1, 1997, and managers who attended the core training program prior to April 20, 1998, are not required to take the competency test. Administrators licensed as nursing home administrators in accordance with Part II of Chapter 468, F.S., are exempt from this requirement.

<sup>27</sup> Rule 58A-5.0191, F.A.C.

<sup>28</sup> Documentation of compliance with the staff training requirements of 29 CFR 1910.1030, relating to blood borne pathogens, may be used to meet this requirement. Rule 58A-5.0191(2)(a), F.A.C.

- Staff who provide direct care to residents, other than nurses, CNAs, or home health aides must receive 3 hours of in-service training within 30 days of employment that covers resident behavior and needs and providing assistance with the activities of daily living.
- Staff who prepare or serve food and who have not taken the ALF core training, must receive a minimum of 1-hour in-service training within 30 days of employment in safe food handling practices.
- All facility staff are required to receive in-service training regarding the facility's resident elopement response policies and procedures within 30 days of employment, must be provided with a copy of the facility's resident elopement response policies and procedures, and must demonstrate an understanding and competency in the implementation of the elopement response policies and procedures.<sup>29</sup>

The administrator, managers, and staff, who have direct contact with mental health residents in a licensed LMH facility, must receive the following training:<sup>30</sup>

- A minimum of 6 hours of specialized training in working with individuals with mental health diagnoses.
- A minimum of 3 hours of continuing education, which may be provided by the ALF administrator or through distance learning, biennially thereafter in subjects dealing with mental health diagnoses or mental health treatment.

Facilities are required to conduct a minimum of two resident elopement prevention and response drills per year. All administrators and direct care staff must participate in the drills, which must include a review of procedures to address resident elopement. Facilities must document the implementation of the drills and ensure that the drills are conducted in a manner consistent with the facility's resident elopement policies and procedures.<sup>31</sup>

### ***Trainers***

Training for administrators must be performed by trainers registered with the DOEA. The trainer must provide the DOEA with proof that he or she has completed the minimum core training education requirements, successfully passed the competency test, and complied with continuing education requirements (12 contact hours of continuing education in topics related to assisted living every 2 years), and meet one of the following requirements:

- Provide proof of completion of a 4-year degree from an accredited college or university and have worked in a management position in an ALF for 3 years after being core certified;
- Have worked in a management position in an ALF for 5 years after being core certified and have 1 year of teaching experience as an educator or staff trainer for persons who work in ALFs or other long-term care settings;
- Have been previously employed as a core trainer for the DOEA;

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<sup>29</sup> Rule 58A-5.0191, F.A.C.

<sup>30</sup> Section 429.075, F.S. and Rule 58A-5.0191(8), F.A.C.

<sup>31</sup> Section 429.41(1)(a)3., F.S.

- Have a minimum of 5 years of employment with the AHCA, or formerly the Department of Health and Rehabilitative Services, as a surveyor of ALFs;
- Have a minimum of 5 years of employment in a professional position in the AHCA Assisted Living Unit;
- Have a minimum of 5 years employment as an educator or staff trainer for persons working in an ALF or other long-term care settings;
- Have a minimum of 5 years of employment as an ALF core trainer, which was not directly associated with the DOEA; or
- Have a minimum of a 4-year degree from an accredited college or university in the areas of healthcare, gerontology, social work, education or human services, and a minimum of 4 years experience as an educator or staff trainer for persons working in an ALF or other long-term care settings after core certification.<sup>32</sup>

### **Adult Protective Services**

The Department of Children and Family Services (DCF) is required under s. 415.103, F.S., to establish and maintain a central abuse hotline to receive reports, in writing or through a single statewide toll-free telephone number, of known or suspected abuse, neglect, or exploitation of a vulnerable adult<sup>33</sup> at any hour of the day or night, any day of the week.

Upon receiving an oral or written report of known or suspected abuse, neglect, or exploitation of a vulnerable adult, the central abuse hotline must determine if the report requires an immediate onsite protective investigation. For reports requiring an immediate onsite protective investigation, the central abuse hotline must immediately notify the DCF's designated district staff responsible for protective investigations to ensure prompt initiation of an onsite investigation. For reports not requiring an immediate onsite protective investigation, the central abuse hotline must notify the DCF's designated district staff responsible for protective investigations in sufficient time to allow for an investigation to be commenced within 24 hours. If the report is of known or suspected abuse of a vulnerable adult by someone other than a relative, caregiver, or household member, the report shall be immediately transferred to the appropriate county sheriff's office.<sup>34</sup>

The following persons, who know, or have reasonable cause to suspect, that a vulnerable adult has been or is being abused, neglected, or exploited are required to immediately report such knowledge or suspicion to the central abuse hotline:

- A physician, osteopathic physician, medical examiner, chiropractic physician, nurse, paramedic, emergency medical technician, or hospital personnel engaged in the admission, examination, care, or treatment of vulnerable adults;
- A health professional or mental health professional;
- A practitioner who relies solely on spiritual means for healing;

<sup>32</sup> Section 429.52(9)-(10), F.S. and Rule 58T-1.203, F.A.C.

<sup>33</sup> "Vulnerable adult" means a person 18 years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging. Section 415.102(27), F.S.

<sup>34</sup> Section 415.103, F.S.



- Nursing home staff; assisted living facility staff; adult day care center staff; adult family-care home staff; social worker; or other professional adult care, residential, or institutional staff;
- A state, county, or municipal criminal justice employee or law enforcement officer;
- An employee of the Department of Business and Professional Regulation conducting inspections of public lodging establishments;
- A Florida advocacy council member or long-term care ombudsman council member; or
- An officer, trustee, or employee of a bank, savings and loan, or credit union.<sup>35</sup>

### **Florida's Long-Term Care Ombudsman Program**

The federal Older Americans Act (OAA) requires each state to create a Long-Term Care Ombudsman Program to be eligible to receive funding associated with programs under the OAA.<sup>36</sup> In Florida, the program is a statewide, volunteer-based system of district councils that protect, defend, and advocate on behalf of long-term care facility residents, including residents of nursing homes, ALFs, and adult family-care homes. The Office of State Long-Term Care Ombudsman (Office) is administratively housed in the DOEA and is headed by the State Long-Term Care Ombudsman, who is appointed by and serves at the pleasure of the Secretary of Elderly Affairs.<sup>37</sup> The program is supported with both federal and state funding.<sup>38</sup>

The Office is required to establish a statewide toll-free telephone number for receiving complaints concerning matters adversely affecting the health, safety, welfare, or rights of residents of nursing homes, ALFs and adult family care homes. Every resident or representative of a resident must receive, upon admission to a long-term care facility, information regarding the purpose of the State Program, the statewide toll-free telephone number for receiving complaints, and other relevant information regarding how to contact the State Program. Residents or their representatives must be furnished additional copies of this information upon request.<sup>39</sup>

The names or identities of the complainants or residents involved in a complaint, including any problem identified by an ombudsman council as a result of an investigation, are confidential and exempt from Florida's public records laws, unless the complainant or resident, or the legal representative of the complainant or resident, consents to the disclosure in writing; the complainant or resident consents orally and the consent is documented contemporaneously in writing by the ombudsman council requesting such consent; or the disclosure is required by court order.<sup>40</sup>

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<sup>35</sup> Section 415.1034, F.S.

<sup>36</sup> 42 U.S.C. 3058; *see also* s. 400.0061(1), F.S.

<sup>37</sup> Section 400.0063, F.S.

<sup>38</sup> According to *Florida's Long-Term Care Ombudsman Program 2009-2010 Annual Report*, in fiscal year 2009-2010, the program received a total of \$3,242,586 in funding; the state contribution totaled \$1,452,977. Florida's Long-Term Care Ombudsman Program, *2009-2010 Annual Report*, available at <http://ombudsman.myflorida.com/publications/ar/2009-2010%20Annual%20Report.pdf> (last visited Aug. 17, 2011).

<sup>39</sup> Section 400.0078, F.S.

<sup>40</sup> Section 400.0077(1)(b), F.S.

### **The Miami Herald Investigative Series on Assisted Living Facilities**

Beginning on April 30, 2011, the Miami Herald published a three-part series, titled “Neglected to Death,” which exposed several examples of abuses occurring in ALFs and the state regulatory responses to such cases. According to the publication, the Miami Herald spent a year examining thousands of state inspections, police reports, court cases, autopsy files, e-mails, and death certificates and conducting dozens of interviews with operators and residents throughout Florida.

The three-part investigative series gives several examples of abuses or neglect that took place at facilities in Florida, including:<sup>41</sup>

- The administrator of an ALF in Caryville punished his disabled residents by refusing to give them food and drugs, threatened the residents with a stick, doped the residents with powerful tranquilizers, beat residents who broke the facilities rules, forced residents to live without air conditioning even when temperatures reached 100 degrees Fahrenheit, and fell asleep on the job while a 71-year-old woman with mental illness wandered outside the facility and drowned in a nearby pond.
- In an ALF in Kendall, a 74-year-old woman was bound for more than 6 hours, the restraints pulled so tightly that they ripped into her skin and killed her.
- In an ALF in Hialeah, a 71-year-old man with mental illness died from burns after he was left in a bathtub filled with scalding water.
- In an ALF in Clearwater, a 75-year-old Alzheimer’s patient was torn apart by an alligator after he wandered from his ALF for the fourth time.
- In an ALF in Haines City, a 74-year-old suffering from diabetes and depression died after going 13 days without crucial antibiotics and several days without food or water.
- An ALF in Miami-Dade County had a door alarm and video cameras in disrepair, an unlocked back gate on the premises, and an attendant who had fallen asleep, which enabled an 85-year-old to wander from the facility and drown in a pond.
- The administrator of an ALF in Dunedin drove a male resident with a criminal history to a pharmacy to fill a prescription for powerful narcotics but failed to collect the drugs from the resident. The resident fed the drugs to a 20-year-old female resident with mental illness, raped her, and caused her to die of an overdose.
- In an ALF in Tampa, a 55-year-old man died after his caretakers failed to give him food, water, or medicine.
- An ALF in Orlando failed to give an 82-year-old woman critical heart medication for 4 days, failed to read her medical chart, and gave her the wrong drugs on the day she died.
- An ALF in West Melbourne shut off the facility’s exit alarm when it was triggered without doing a head count or calling 911 as a 74-year-old man slipped out the door and drowned in a nearby pond.
- An ALF in Deerfield Beach did not provide protections to a 98-year-old woman who fell 11 times and died of resulting injuries, including a fractured neck.

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<sup>41</sup> Rob Barry, Michael Sallah, and Carol Marbin Miller, *Neglected to Death, Part I*, THE MIAMI HERALD, April 30, 2011, available at <http://www.miamiherald.com/2011/04/30/2194842/once-pride-of-florida-now-scenes.html>. See Part II of the series here: <http://www.miamiherald.com/2011/05/03/2199747/key-medical-logs-doctored-missing.html> (see left side of article to access weblinks to the three-part series) (last visited Jan. 18, 2012).

- A caretaker in an ALF in Miami-Dade County strapped down a 74-year-old woman for at least 6 hours so tightly that she lost circulation in her legs and as a result a blood clot formed which killed her.

The investigative series decried the state's regulatory and law enforcement agencies responses to the alleged egregious acts claiming:<sup>42</sup>

- Nearly once a month residents die from abuse and neglect, with some caretakers altering and forging records to conceal evidence, but law enforcement agencies almost never make arrests.
- Facilities are routinely caught using illegal restraints, including powerful tranquilizers, locked closets, and ropes, but the state rarely punishes them.
- State regulators could have shut down 70 facilities in the past 2 years for a host of severe violations, but only seven facilities were closed.
- Although the number of ALFs has increased substantially over the last 5 years, the state has dropped critical inspections by 33 percent.
- Although the state has the authority to fine ALFs that break the law, the penalties are routinely decreased, delayed, or dropped altogether.
- The state's lack of enforcement has prompted other government agencies to cut off funding and in some cases the agencies refuse to send clients to live in certain ALFs.
- In at least one case, an investigation was never performed by the AHCA, although a woman drowned after wandering off the premises.
- It took the AHCA inspectors an average of 37 days to complete a complaint investigation in 2009, which was 10 days longer than 5 years earlier.
- At least five times, other state agencies were forced to take the lead in shutting down homes when the AHCA did not act.

### **Governor Rick Scott's ALF Task Force**

In response to the Miami Herald Investigative Series on ALFs, Governor Rick Scott announced in his veto message of HB 4045 (2011),<sup>43</sup> that he was going to form an ALF task force for the purpose of examining current assisted living regulations and oversight. Governor Scott directed the task force to develop recommendations to improve the state's ability to monitor quality and safety in ALFs and ensure the well-being of their residents.<sup>44</sup>

The task force, which has also been referred to as the "Assisted Living Workgroup," consisted of 14 members. These members represented the following entities:

- Florida Association of Homes and Services for the Aging.

<sup>42</sup> *Id.*

<sup>43</sup> HB 4045 (2011) repealed a requirement for the annual dissemination of a list of ALFs that had been sanctioned or fined, a requirement for an ALF to report monthly any liability claims filed against it, a requirement to disseminate the results of the inspection of each ALF, provisions concerning rule promulgation for ALFs by the DOEA, provisions concerning the collection of information regarding the cost of care in ALFs, and the authority for local governments or organizations to contribute to the cost of care of local facility residents.

<sup>44</sup> Governor Rick Scott, *Veto Message - HB 4045* (June 27, 2011), available at <http://www.flgov.com/wp-content/uploads/2011/06/hb4045.pdf> (last visited Jan. 18, 2012).

- Eastside Care, Inc.
- Palm Breeze Assisted Living Facility.
- Long Term Care Ombudsman.
- Florida House of Representatives.
- Lenderman and Associates.
- The Florida Bar, Elder Law Section.
- Florida State University, the Pepper Center.
- The Villa at Carpenters.
- Florida Council for Community Mental Health.
- Florida Assisted Living Association.
- Villa Serena I-V.
- Florida Senate.
- Florida Health Care Association.<sup>45</sup>

The task force held meetings on August 8, 2011, in Tallahassee, September 23, 2011, in Tampa, and November 7 and 8, 2011, in Miami. In addition to public testimony and presentations, the task force focused on ALF regulation, consumer protection and choice, and long-term care services and access. The task force supported several recommendations including:

- Increased administrator qualifications;
- Expanded and improved training for administrators and staff;
- Increased survey and inspection activity with a focus on facilities with poor track records;
- A systematic appeal process for residents who want to contest a notice of eviction;
- Increased reporting of resident data by facilities;
- Enhanced enforcement capacity by state agencies;
- Creation of a permanent policy review and oversight council with members representing all stakeholder groups;
- Requiring all facilities with at least one resident receiving mental health care to be licensed as a LMH facility; and
- Providing greater integration of information from all agencies involved in ALF regulation in order to identify potential problems sooner.<sup>46</sup>

The task force also noted that several other issues may need more time to evaluate and recommended that those issues be examined and addressed by a Phase II task force (or workgroup). Finally, there were some issues addressed by the task force that ended up not passing as part of a Phase I or Phase II recommendation.<sup>47</sup>

### **Committee on Health Regulation's Interim Report**

In addition to the task force, the Senate Committee on Health Regulation (committee) was

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<sup>45</sup> Agency for Health Care Administration, *Assisted Living Workgroup Members*, available at <http://ahca.myflorida.com/SCHS/ALWG2011/wgmembers.shtml> (last visited Aug. 17, 2011).

<sup>46</sup> Agency for Health Care Admin., *Assisted Living Workgroup, Final Report and Recommendations* (Dec. 12, 2011) (on file with the Senate Committee on Children, Families, and Elder Affairs).

<sup>47</sup> *Id.*

directed by the Senate President to review the regulatory oversight of ALFs in Florida.<sup>48</sup> Based on this review, the committee recommended several options for the Legislature to consider to improve regulatory oversight of ALFs. Some of the recommendations made by the committee included:

- Improving the current system of training administrators;
- Returning responsibility of core training to DOEA or providing DOEA with specific authority to oversee the core training activities;
- Expanding the core training curriculum to include financial planning, day-to-day administration of an ALF, elopement, emergency procedures, and the appropriate use of physical or chemical restraints;
- Requiring that the competency test be updated annually;
- Increasing the minimum passing score for the competency test from 75 percent to 80 percent;
- Requiring additional qualifications of administrators, such as requiring a 2 or 4-year degree that includes some coursework in gerontology or health care;
- Requiring administrators of an LMH facility to have completed some mental health coursework;
- Requiring staff members of an ALF to take a short exam after their requisite training to document receipt and comprehension of the training;
- Increasing elopement training requirements;
- Requiring an LMH specialty license for an ALF that accepts any mental health resident;
- Requiring professional development training by mental health providers or professionals for direct care staff of LMH facilities;
- Ensuring consistency in the monitoring of community living support plans and cooperative agreements;
- Requiring certain staff to immediately report the knowledge or suspicion that a vulnerable adult has been or is being abused, neglected, or exploited to the central abuse hotline operated by DCF; and
- Requiring facilities to notify residents that the complainant's identification and the substance of their complaints are confidential and exempt from Florida's public-record laws.<sup>49</sup>

### III. Effect of Proposed Changes:

This proposed committee bill makes substantial revisions to state law relating to assisted living facilities (ALF or facility).

#### **Limited Mental Health ALFs (sections 1 and 6 of the bill)**

This bill amends s. 394.4574, F.S., relating to the Department of Children and Family Services' (DCF) responsibilities for a mental health resident who resides in an ALF with a limited mental health (LMH) license. First, the bill requires that the community living support plan be updated

<sup>48</sup> The Florida Senate, *Senate Interim Work Plan, 2012 Session*, 121 (2011-12), available at <http://www.flsenate.gov/Committees/InterimReports/2012/workplan.pdf> (last visited Jan. 17, 2012).

<sup>49</sup> Comm. on Health Reg., *supra* note 1, at 32-35.

annually in order to ensure that the ongoing needs of the resident are addressed. The bill also requires that a case manager must keep a record of the date and time of any face-to-face interaction with a mental health resident. The record must be made available to DCF for inspection and be maintained for two years following the date of the interaction. Finally, the bill requires DCF to ensure there is adequate and consistent monitoring and enforcement of community living support plans and cooperative agreements.

The bill amends s. 429.075, F.S., to require that an ALF obtain a LMH license if the ALF serves any mental health resident. The bill also specifies that each administrator and staff member of an LMH facility must meet the limited mental health training requirements established by the bill in addition to any other training or education requirements.

### **Long-Term Care Ombudsman (sections 2 and 9)**

The bill requires a long-term care facility to provide information regarding the confidentiality of a complainant's name and identity and of the subject matter of a complaint upon admission to the facility.

Additionally, the bill amends the statute relating to the resident's bill of rights to require that written notice be given to residents of a facility that states that the names or identities of the complainants, or residents involved in a complaint, and the subject matter of a complaint made to the Office of State Long-Term Care Ombudsman or a local long-term care ombudsman council are confidential.

### **Reporting of Abuse (sections 3 and 4)**

This bill amends s. 415.1034, F.S., to include an employee or agent of any state or local agency that has regulatory responsibilities concerning, or provides services to, persons in state-licensed facilities to the list of persons who are required to report abuse, neglect, or exploitation of vulnerable adults.

The bill also amends s. 415.103, F.S., requiring DCF to maintain a central abuse hotline that receives reports made pursuant to the section of law created by the bill relating to the electronic monitoring of a resident's room.

### **Resident Relocation or Termination of Residency (sections 9 and 10)**

This bill creates s. 429.281, F.S., requiring a facility to give a resident 30 days notice prior to relocation or termination of residency, except in certain circumstances. The notice must be in writing and include the following:

- Information on how a resident may request that the local long-term care ombudsman council review the notice;

- The reason that the resident is being relocated or the residency is being terminated and an explanation supporting the action;
- The effective date of the relocation or termination of residency and the location to which the resident is being relocated, if known; and
- Information describing the resident's challenge rights and the procedures for filing a challenge.

This notice must be given to the resident, the resident's legal guardian or representative, and the local long-term care ombudsman council within five business days after signature by the resident.

The bill provides a resident the right to a hearing to challenge a facility's proposed relocation or termination of residency. If requested, the local long-term care ombudsman council must assist the resident with filing the challenge. The resident may request a hearing at any time within 10 days after the resident's receipt of the facility's notice. If a hearing is requested, it shall stay the proposed relocation or termination of residency pending a decision from the hearing officer.

The hearings are to be conducted by the Office of Appeals Hearings of DCF (office) and the office must notify the facility of a resident's request for a hearing. The resident, or the resident's legal guardian or representative, and the facility administrator, or the facility's legal representative or designee, are required to be present at the hearing. A representative of the local long-term care ombudsman council may be present at the hearing. The burden of proof at the hearing is by the preponderance of the evidence and a hearing officer must render a decision within 15 days after receipt of request for a hearing, unless the facility and the resident agree to extend the deadline. An aggrieved party may appeal the hearing officer's decision to the district court of appeal in the district where the facility is located.

The bill provides for an emergency relocation or termination of residency if pursuant to state or federal law. Notice of an emergency relocation or termination of residency must be made by telephone or in person and given to the resident, the resident's legal guardian or representative, and the local long-term care ombudsman council, if requested. The notice must be given before relocation, if possible, or as soon thereafter as practical. The resident's file must include documentation showing who was contacted, the method of contact, and the date and time of the contact. Written notice must be given to the resident the next business day.

The bill defines the terms "relocation" and "termination of residency." Relocation means "to move a resident from the facility to another facility that is responsible for the resident's care." Termination of residency means "to release a resident from the facility and the releasing facility ceases to be responsible for the resident's care."

The bill also grants rulemaking authority to DCF to administer this section.

Finally, the bill amends s. 429.28, F.S., to include reference to a resident's right to challenge the notice of relocation or termination of residency in the resident's bill of rights.

**ALF Administrator Licensure (sections 12 and 13)**

This bill requires every ALF in the state to be under the management of an assisted living facility administrator (administrator) who holds a valid license or provisional license. To be eligible to be an administrator, an applicant must:

- Be at least 21 years old;
- Have a 4-year baccalaureate degree that includes some coursework in health care, gerontology, or geriatrics; have a 4-year baccalaureate degree and provided at least two years of direct care in an ALF or nursing home; or have a 2-year associate degree and provided at least two years of direct care in an ALF or nursing home;
- Complete all required training and pass all required competency tests with a minimum score of 80;
- Complete background screening; and
- Otherwise meet the requirements of part I of ch. 429, F.S.

An administrator who has been employed continuously for at least the two years immediately before July 1, 2012, does not have to meet the educational, core training, and competency test requirements as long as the administrator submits proof to the Agency for Health Care Administration (AHCA or agency) of compliance with continuing education requirements and the administrator has not been an administrator of a facility that was cited for a class I or class II violation within the previous two years. Additionally, an administrator who is licensed in accordance with part II of ch. 468, F.S., is exempt from the educational and core training requirements. However, these administrators must still complete the mental health training and pass the associated competency test if the administrator is employed at an LMH facility, and the administrator must complete supplemental training required in s. 429.521(2)(b), F.S.,<sup>50</sup> prior to licensure.

The bill provides that AHCA shall establish licensure fees, which shall be renewed biennially and may not exceed \$250 for the initial licensure or \$250 for each licensure renewal.

The bill creates s. 429.512, F.S., providing provisional licensure and inactive status requirements. A provisional license may only be issued to fill a position that unexpectedly becomes vacant and may be issued to a person who does not meet all of the licensure requirements established in s. 429.50, F.S. A provisional license is only good for one period, which may not exceed six months. The agency may set an application fee for a provisional license which may not exceed \$500.

An administrator's license becomes inactive if the administrator does not complete the required number of continuing education courses and pass the corresponding tests, or if the administrator does not timely pay the licensure renewal fee. An administrator may also apply for inactive status. The agency may not reactivate a license unless the inactive or delinquent licensee has paid all applicable fees. The agency shall establish by rule all required fees.

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<sup>50</sup> Section 429.521, F.S., is created in this bill and relates to training requirements. See "Training Requirements" in the Effect of Proposed Changes section of this analysis.



## **Training Requirements (sections 5, 11, and 14)**

### *Generally*

The bill requires each employee and administrator of an ALF who is newly hired on or after July 1, 2012, to attend a preservice orientation which covers topics that enable an employee to relate and respond to the population of that facility. The orientation must be at least two hours and, at a minimum, cover the following topics:

- Care of persons who have Alzheimer's disease;
- Deescalation techniques;
- Elopement prevention; and
- Behavior management.

Upon completion of the orientation, the employee shall sign an affidavit, under penalty of perjury, stating that he or she has completed the orientation. This affidavit must be placed in the employee's work file.

The bill creates s. 429.521, F.S., to provide training requirements for administrators, applicants to become an ALF administrator (applicants), and staff members of an ALF. The Department of Elder Affairs (DOEA or department) is charged with the responsibility to establish a standardized core training curriculum for applicants and for staff members who provide regular or direct care to residents. The curricula must be offered in English and Spanish, reviewed annually, and updated as needed to reflect changes in the law, rules, and best practices.

The curriculum for applicants must cover, at a minimum, the following topics:

- State law and rules relating to ALFs.
- Resident's rights and procedures for identifying and reporting abuse, neglect, and exploitation.
- Special needs of elderly persons, persons who have mental illness, and persons who have developmental disabilities.
- Nutrition and food service.
- Medication management, recordkeeping, and proper techniques for assisting residents who self-administer medication.
- Firesafety requirements.
- Care of persons who have Alzheimer's disease and related disorders.
- Elopement prevention.
- Aggression and behavior management, de-escalation techniques, and Baker Act protocols and procedures.
- Do not resuscitate orders.
- Infection control.
- Admission, continuing residency, and best practices in the industry.
- Phases of care and interacting with residents.

The department must also develop a supplemental course consisting of topics related to extended

congregate care, limited mental health, and business operations, which must be completed by an applicant.

The curriculum for staff members who provide regular or direct care to residents must cover, at a minimum, the following topics:

- The reporting of major incidents.
- The reporting of adverse incidents.
- Emergency procedures.
- Residents' rights.
- The recognition and reporting of resident abuse, neglect, and exploitation.
- Resident behavior and needs.
- Assistance with the activities of daily living.
- Infection control.
- Aggression and behavior management and deescalation techniques.

The department must create two competency tests, one for applicants and one for staff members, which tests the individual's comprehension of the required training. These tests must be offered in English and Spanish, reviewed annually, and updated as needed to reflect changes in the law, rules, and best practices. The tests may be made available through testing centers.

The department must establish a five-member panel of mental health professionals to develop a comprehensive, standardized training curriculum and competency test for administrators and certain staff members of an LMH facility. This test must be offered in English and Spanish, reviewed annually, and updated as needed to reflect changes in the law, rules, and best practices. The test may be made available online or through testing centers.

The bill defines "mental health professional" in s. 429.02, F.S., to mean an individual licensed under chs. 458, 459, 464, 490, or 491, F.S.,<sup>51</sup> who provides mental health services as defined under s. 394.67, F.S.,<sup>52</sup> or an individual who has at least five years of experience providing services that improve an individual's mental health or treat mental illness.

Finally, the department must establish curricula for continuing education (CE) for administrators and staff members. The CE must include topics similar to that of the core training required for staff members and applicants. At a minimum, CE must cover:

- Elopement prevention;
- Deescalation techniques; and
- Phases of care and interacting with residents.

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<sup>51</sup> Chapter 458, F.S., is the regulation of the medical practice. Chapter 459, F.S., is the regulation of osteopathic medicine. Chapter 464, F.S., is the regulation of nursing. Chapter 490, F.S., is the regulation of psychological services. Chapter 491, F.S., is the regulation of psychotherapy services.

<sup>52</sup> Mental health services is defined as "therapeutic interventions and activities that help to eliminate, reduce, or manage symptoms or distress for persons who have severe emotional distress or a mental illness and to effectively manage the disability that often accompanies a mental illness so that the person can recover from the mental illness, become appropriately self-sufficient for his or her age, and live in a stable family or in the community." Section 394.67(15), F.S.

The department must ensure that all CE curricula include a test upon completion of the training which demonstrates comprehension of the training. The training and test must be offered in English and Spanish, reviewed annually, and updated as needed to reflect changes in the law, rules, and best practices. The CE and test may be offered through online courses and any fees associated to the online service are borne by the participant.

#### *Applicants and Administrators*

An applicant for licensure as an assisted living facility administrator (applicant) must complete a minimum of 40 hours of core training. In addition to the 40 hours, each applicant must complete at least 10 hours of supplemental training related to extended congregate care, limited mental health, and business operations, including, but not limited to, human resources, financial management, and supervision of staff. Upon completion of the training, an applicant must pass a competency test with a minimum score of 80.

If the applicant fails a competency test, the individual must wait 10 days before retaking it. If the applicant fails a competency test three times, the individual must retake the applicable training before retaking the test.

A licensed administrator must take at least one hour of inservice training regarding the facility's policies regarding resident elopement response within 30 days after employment at the facility. Additionally, each administrator of an LMH facility must complete a minimum of eight hours of mental health training and pass a competency test related to the training within 30 days after employment at the facility. A minimum score of 80 is required to show successful pass of the mental health competency test. If an administrator does not pass the mental health competency test within six months after completing the training, the administrator is ineligible to be an administrator at an LMH facility until the individual passes the test.

An administrator of an ECC facility must complete six hours of ECC training within 30 days after employment, and an administrator of an LNS facility must complete four hours of training related to special needs and care of those persons who require limited nursing services within 30 days after employment.

An administrator must participate in continuing education (CE) for a minimum of 18 contact hours every two years and pass the corresponding test upon completion of the CE course with a minimum score of 80. The administrator must take the CE and pass any corresponding tests before license renewal.

#### *Staff Training*

Each staff member hired on or after July 1, 2012, who provides regular or direct care to residents, must complete a minimum of 20 hours of core training within 90 days after employment. The department may exempt certain persons who can demonstrate completion of training substantially similar to the core training. Upon completion of the training, the staff member must pass a competency test with a minimum score of 70. If a staff member fails the competency test, the individual must wait 10 days before retaking the test. If a staff member fails

the test three times, the individual must retake the initial core training before retaking the test. If a staff member does not pass the test within one year after employment, the individual may not provide regular or direct care to residents until the individual successfully passes the test.

Additionally, each staff member of an LMH facility who provides regular or direct care to residents must complete a minimum of eight hours of mental health training and pass a competency test related to the training within 30 days after employment at the facility. A minimum score of 70 is required to show successful pass of the mental health competency test. If a staff member does not pass the mental health competency test, the staff member is ineligible to provide regular or direct care to residents until the individual passes the test.

Each staff member of an ALF must receive at least one hour of inservice training regarding the facility's policies related to resident elopement response within 30 days after employment at the facility. A staff member who prepares or serves food must receive a minimum of one hour of inservice training in safe food handling practices within 30 days after employment. Additionally, a staff member who manages medications and assists with the self-administration of medications must complete four additional hours of training provided by a registered nurse, licensed pharmacist, or department staff within 30 days after employment.

Finally, each staff member who provides regular or direct care to residents must participate in continuing education for a minimum of 10 contact hours every two years and pass the corresponding test upon completion of the CE course with a minimum score of 70. If an individual does not complete all required CE and pass the corresponding tests, the individual may not provide regular or direct care to residents until the individual does so.

### **Core Training Certification (section 15)**

Section 429.522, F.S., is created to provide a certification process for individuals wishing to become a core trainer. The Department of Elder Affairs (DOEA or department) is directed to approve and provide oversight for one or more third-party credentialing entities<sup>53</sup> for the purpose of developing and administering core trainer certification programs for persons providing training to applicants for licensure of an ALF and to staff members of an ALF. In order to obtain approval from DOEA, the third-party credentialing entity shall:

- Establish professional requirements and standards. At a minimum a core trainer applicant must meet one of the following requirements:
  - Provide proof of completion of a 4-year baccalaureate degree from an accredited college or university and have worked in a management position in an ALF for at least three years;
  - Have worked in a management position in an ALF for at least five years and have at least one year of teaching experience as an educator or staff trainer for persons working in an ALF or other long-term care setting;
  - Have been previously certified as a core trainer for DOEA;
  - Have a minimum of five years of employment with AHCA as a surveyor of

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<sup>53</sup> The bill defines a third-party credentialing entity as a “department-approved nonprofit organization that has met nationally recognized standards for developing and administering professional certification programs.”

- ALFs;
  - Have a minimum of five years of employment in a professional position in AHCA’s assisted living unit;
  - Have a minimum of five years of employment as an educator or staff trainer for persons working in an ALF or other long-term care setting;
  - Have a minimum of five years of employment as a core trainer for an ALF, which employment was not directly associated with DOEA; or
  - Have a minimum of a 4-year baccalaureate degree from an accredited college or university in the areas of health care, gerontology, social work, education, or human services, and a minimum of four years of experience as an educator or staff trainer for persons working in an ALF or other long-term care setting.
- Apply core competencies according to DOEA’s standards;
- Maintain a professional code of ethics and establish a disciplinary process and a decertification process;
- Maintain a database, accessible to the public, of all persons who have core trainer certification, including any history of violations;
- Require annual continuing education for trainers; and
- Administer a continuing education provider program to ensure that only qualified providers offer CE opportunities for certificateholders.

Minimum requirements for an individual seeking core trainer certification<sup>54</sup> are:

- Completion of the minimum core training requirements for an applicant for licensure as an ALF administrator and successful passage of the corresponding competency tests with a minimum score of 80;
- Compliance with the continuing education requirements for administrators of an ALF; and
- Compliance with the professional requirements and standards set forth above.

### **Electronic Monitoring (sections 9 and 16)**

This bill provides that a resident has the right to have an electronic monitoring device that is owned and operated by the resident or provided by the resident’s guardian or legal representative in the resident’s room.

The bill creates s. 429.55, F.S., and provides the following definitions:

- “Authorized electronic monitoring” means the placement of an electronic monitoring device in the room of a resident of an ALF and the making of tapes or recordings through the use of the device after making a request to the facility and obtaining all necessary consent to allow electronic monitoring.
- “Electronic monitoring device” means video surveillance cameras or audio devices installed in the room of a resident which are designed to acquire communications or other

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<sup>54</sup> The bill defines core trainer certification as “a professional credential awarded to individuals demonstrating core competency in the assisted living facility practice area by a department-approved third-party credentialing entity.” The bill also defines “core competency” and “core curriculum.”

sounds occurring in the room.

- “Covert use of electronic monitoring device” means the placement and use of the electronic monitoring device is not open and obvious, and the facility and AHCA are not informed about the device. The agency and the facility are not civilly liable in connection with the covert placement or use of an electronic monitoring device.

Upon admission to an ALF, a resident must sign a form that states:

- That a person who places an electronic monitoring device in the room of a resident or uses or discloses a tape or other recording made by the device may be civilly liable for any unlawful violation of the privacy rights of another;
- That a person who covertly places an electronic monitoring device in the room of a resident or who consents to or acquiesces in the covert placement of the device has waived any privacy right the person may have in connection with images or sounds that may be acquired by the device;
- That a resident is entitled to conduct authorized electronic monitoring and that the resident should contact AHCA if the facility refuses to allow electronic monitoring;
- The basic procedures that must be followed in order to request authorized electronic monitoring;
- That the electronic monitoring device and all installation and maintenance costs must be paid for by the resident;
- The legal requirement to report abuse or neglect when electronic monitoring is being conducted; and
- Any other pertinent information.

Only a resident may request authorized electronic monitoring, unless the resident does not have capacity, in which case the resident’s guardian or legal representative may request it. The agency shall prescribe a form for a resident to request authorized electronic monitoring, which must require the resident to:

- Release the facility from any civil liability for a violation of the resident’s privacy rights in connection with the use of the electronic monitoring device;
- If the electronic monitoring device is a video surveillance camera, choose whether the camera will always be unobstructed or not;
- Obtain consent of the other residents in the room.

Consent can only be given by the other resident in the room, or the resident’s guardian or legal representative, and it must require the other resident to release the facility from any civil liability for a violation of the resident’s privacy rights in connection with the use of the electronic monitoring device. The other resident may provide certain conditions upon issuing consent.

If authorized electronic monitoring is being conducted in the room of a resident and another resident is moved into the room who has not yet consented, authorized electronic monitoring must cease until the new resident has consented.

A resident who conducts authorized electronic monitoring must post and maintain a conspicuous

notice at the entrance of the resident's room which states that the room is being monitored by an electronic monitoring device. Additionally, each facility must post a notice at the entrance to the facility stating that the rooms of some residents may be monitored electronically. A facility may not refuse to admit an individual to residency in the facility and may not remove a resident from the facility because of a request to conduct authorized electronic monitoring. The facility must also make reasonable physical accommodations for authorized electronic monitoring. The facility may require that the device be installed in a manner that is safe and that the electronic monitoring be conducted in plain view. A facility may place a resident in a different room to accommodate a request to conduct authorized electronic monitoring.

The bill creates a mandatory reporting requirement on anyone who views or listens to a tape or recording by an electronic monitoring device that acquired an incident of abuse or neglect.

The bill provides requirements for use of the tape or recording in a court of law, enforcement provisions, and rulemaking authority to AHCA.

**Other (sections 7, 8, and 17)**

The bill amends ss. 429.176 and 429.178, F.S., to conform to other changes made by the bill.

The bill provides an effective date of July 1, 2012.

**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:

The federal right to privacy extends to fundamental interests such as marriage, procreation, contraception, family relationships, and the rearing and educating of children.<sup>55</sup> The Supreme Court has held that a right to privacy shall be upheld unless the government's policy meets the strict scrutiny test, meaning that the government's action may only be justified by a compelling state interest which is narrowly tailored to carry out the legitimate state interest at stake.

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<sup>55</sup> *City of North Miami v. Kurtz*, 653 So. 2d 1025, 1027 (Fla. 1995).

Florida's constitutional privacy clause, pursuant to article I, section 23 of the Florida Constitution, provides greater protection than the federal constitution. The Florida Supreme Court has stated that if an individual makes a constitutional challenge under the privacy clause, the individual must first establish that there was government action and that the individual has a "legitimate expectation of privacy."<sup>56</sup> If a legitimate expectation of privacy exists then the state must demonstrate not only a compelling interest for intruding on one's privacy, but also that the least intrusive means were used in accomplishing its goal.<sup>57</sup>

This proposed committee bill may implicate the right to privacy as constitutionally protected under s. 23 of article I of the Florida Constitution. This bill provides that a resident has the right to have an electronic monitoring device that is owned and operated by the resident or provided by the resident's guardian or legal representative in the resident's room. Looking at the constitutionality of "granny cams" within the context of nursing homes, Florida law explicitly protects the privacy of nursing home residents.<sup>58</sup> Additionally, Florida courts have acknowledged privacy rights afforded to dwellers of semi-permanent residences, such as nursing homes and motels, compared to the privacy of those in public places, such as emergency rooms.<sup>59</sup> Since Florida courts have upheld a resident's privacy rights within the context of a nursing home, there is an argument that the courts would also uphold the privacy rights of a resident in an assisted living facility.

The privacy analysis is further affected by the party involved. For example, nursing home employees and residents, as compared to visitors, may be afforded a larger zone of acceptable invasion of privacy.<sup>60</sup> Residents have an expectation of privacy in certain areas of the facility. However, a resident may choose to waive his or her privacy rights. Also, in Florida, the right to privacy is considered to be retained by a person who has been adjudicated as incompetent.<sup>61</sup> However, Florida law authorizes a guardian to make decisions regarding the person's residential environment. "As the decision to impose video surveillance implicates both of these rules, the courts might ultimately be left with the decision as to whether a legal guardian may waive the privacy rights of her charge in this context."<sup>62</sup>

The same analysis that applies to residents would apply to the privacy rights of roommates. A resident seeking to monitor a shared room would therefore be required to obtain written consent from the roommate.<sup>63</sup> In the case of visitors to the facility, providing visitors with notice that the facility is monitored by video cameras may negate any reasonable expectation of privacy. Courts have repeatedly held that where notice of video surveillance is clearly displayed in a public place, a person cannot expect privacy.<sup>64</sup>

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<sup>56</sup> *Id.* at 1028.

<sup>57</sup> *Winfield v. Division of Pari-Mutuel Wagering, Dept. of Business Regulation*, 477 So. 2d 544, 547 (Fla. 1985).

<sup>58</sup> Section 400.022(1)(n), F.S.

<sup>59</sup> Elizabeth Adelman, *Video Surveillance in Nursing Homes*, 12 ALB. L.J. SCI. & TECH. 821, 827 (2002).

<sup>60</sup> *Id.* at 828.

<sup>61</sup> Tracey Kohl, *Watching Out for Grandma: Video Cameras in Nursing Homes May Help to Eliminate Abuse*, 30 FORDHAM URB. L.J. 2083, 2096 (Sept. 2003).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 2097.

<sup>64</sup> *Id.* at 2100.



This bill complies with the requirements stated above. It requires a resident to waive his or her privacy rights in order to conduct authorized electronic monitoring in the resident's room. If the resident is in a shared room, the other resident in the room must also provide consent prior to allowing authorized electronic monitoring. Additionally, the assisted living facility must post a notice at the entrance to the facility stating that some of the rooms may be monitored electronically, and a resident conducting authorized electronic monitoring must post and maintain a conspicuous notice at the entrance of the resident's room which states that the room is being monitored by an electronic monitoring device.

Although the use of electronic monitoring has not been widely used in assisted living facilities, a few states across the nation have authorized it in nursing home settings. The first state to enact a law directly addressing the use of "granny cams" was Texas in 2001. It does not appear that Texas' law has been challenged as unconstitutionally intruding on a person's right to privacy. The language in this bill relating to the use of authorized electronic monitoring was modeled after the Texas law. Although this bill implicates the right to privacy, the bill may pass constitutional muster.

#### **V. Fiscal Impact Statement:**

##### **A. Tax/Fee Issues:**

None.

##### **B. Private Sector Impact:**

Applicants for licensure to be an assisted living facility administrator, administrators, and certain staff members of an ALF may incur costs to take the required training, continuing education, and tests required in this bill. However, the exact fiscal impact is unknown at this time.

##### **C. Government Sector Impact.<sup>65</sup>**

The Agency for Health Care Administration and the Department of Elder Affairs may incur an indeterminate amount of costs associated with the additional rulemaking and oversight responsibilities provided for in the bill. However, the exact fiscal impact is unknown at this time.

Additionally, the Office of Appeals Hearings of the Department of Children and Family Services may incur additional workload associated with challenges to a facility's proposed relocation or termination of residency.

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<sup>65</sup> As of the time this analysis was published, Senate professional staff did not have analyses for SPB 7176 from AHCA, DOEA or DCF. Senate professional staff has requested analyses from the agency and departments and has a meeting scheduled with AHCA to discuss the bill. Senate professional staff will update this bill analysis with fiscal information as it is received.

**VI. Technical Deficiencies:**

Lines 468-471 of the bill provide that each administrator and staff member of an LMH facility must meet the limited mental health training requirements in the bill. This language makes the limited mental health training a requirement for every staff member of the facility. The intent of the bill is not to require every staff member to complete the mental health training, rather only those staff members who provide regular or direct care to residents. The Legislature may wish to amend the bill to clarify this intent.

On line 765 and 766, the bill may need to be amended to provide that upon completion of the preservice orientation, the *administrator and* employee shall sign an affidavit stating that he or she completed the orientation.

The Legislature may wish to amend lines 895-898 to include language stating that “an administrator who is licensed in accordance with part II of chapter 468 is eligible for licensure without meeting the educational requirements of this section and without completing the core training and passing the competency test required in s. 429.521(2).” This section should mirror the grandfather provision for administrators who have been employed continuously for at least two years immediately before July 1, 2012. A technical change may need to be made on lines 881-882 in order to make the two provisions match.

**VII. Related Issues:**

The proposed committee bill provides a resident the right to a hearing to challenge a facility’s proposed relocation or termination of residency. The hearing is conducted by the Office of Appeals of the Department of Children and Family Services and the burden of proof is by the preponderance of the evidence. Section 429.28, F.S., provides the resident bill of rights, which gives rights to the resident. If a facility violates any of the rights contained in the bill of rights, the resident would have a legal right to go to a court of competent jurisdiction to seek redress. The resident bill of rights does not include the right to not be relocated to another facility or to have residency terminated. Therefore, it is unclear what legal ground a resident has to challenge a facility’s proposed relocation or termination of residency.

**VIII. Additional Information:****A. Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.