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.)

Prepared By: The Professional Staff of the Committee on Health Policy

BILL:	SB 664
INTRODUCER:	Senator Brandes
SUBJECT:	Physician Orders for Life-sustaining Treatment
DATE:	January 26, 2016 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Lloyd	Stovall	HP	**Pre-meeting**
2.			AHS	
3.			AP	

I. Summary:

SB 664 recognizes a Physician Order for Life Sustaining Treatment (POLST) and establishes a Clearinghouse for Compassionate and Palliative Care Plans for state residents as a central registry for advance directives for health care. The Agency for Health Care Administration (AHCA) is directed to establish and maintain the site, either independently or through a national or private clearinghouse. Plans are required to be electronically accessible. The AHCA is also directed to disseminate information about the clearinghouse once available.

The bill also provides requirements for the contents of the POLST form and its proper execution. The Department of Health is required to develop the form by rule.

The effective date of the bill is July 1, 2016.

II. Present Situation:

End of Life Decision-Making

There are a number of different advanced decision making documents an individual may use to express his or her end of life health care decisions. In Florida, state law defines advance directives as witnessed, oral statements or written instructions that express a person's desires about any aspect of his or her future health care, including the designation of a health care surrogate, a living will, or an anatomical gift.[1]

Resuscitation may also be withheld from an individual if a "do not resuscitate" order (DNRO) by the patient's physician is presented to the health care professional treating the patient. For the DNRO to be valid, it must be on the form adopted by the DOH, signed by the patient's physician

[1] *See* s. 765.101, F.S.

and by the patient, or if the patient is incapacitated, the patient's health care surrogate or proxy, court-appointed guardian, or attorney in fact under a durable power of attorney.[2] Florida's DNRO form is printed on yellow paper.[3] It is the responsibility of the Emergency Medical Services provider to ensure that the DNRO form or the patient identification device, which is a miniature version of the form, accompanies the patient.[4] A DNRO may be revoked by the patient at any time, if signed by the patient, or the patient's health care surrogate, proxy, court appointed guardian or a person acting under a durable power of attorney.[5]

A Physician Order for Life-Sustaining Treatment (POLST) documents a patient's health care wishes in the form of a physician order for a variety of end of life measures, including cardiopulmonary resuscitation (CPR).[6] A DNRO is limited to the withholding of CPR. The POLST form can only be completed by a physician and is then provided to the patient to be kept secured in a visible location for emergency personnel.[7] It is suggested that the form be completed when an individual has a serious illness, regardless of age, as the POLST serves as a medical order for a current illness.[8]

Some questions asked on other states' POLST forms include what level of care is wanted for CPR (attempt or do not attempt); medical intervention (comfort only, limited additional intervention, or full treatment); and artificially administered nutrition (none, trial, or long-term). At least 16 other states have implemented or endorsed a POLST program, with Oregon and West Virginia being cited as having mature programs.[9]

In comparison to a POLST, an advance directive's purpose is to give instructions on the appointment of a health care representative, express intentions for future treatment or health care, or for an anatomical gift.[10] Florida law allows such advance directives to be expressed in writing or by orally designating another person to make health care decisions upon that person's incapacity.[11]

A living will is another mechanism used by individuals to express life-prolonging wishes through a written document or a witnessed oral statement.[12] Any competent adult may make a living will or written declaration, at any given time, to address the providing, withholding, or withdrawing of life-prolonging procedures should that individual have a terminal or end-stage condition.[13] A living will requires the signature of the individual in the presence of two witnesses, one of whom is not the spouse nor a blood relative. It becomes the individual's

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[2] *See* ss. 395.1041, 400.142, 400.487, 400.605, 400.6095, 401.35, 401.45, 429.255, 429.73, and 7665.205, F.S.
[3] Rule 64J-2.018, F.A.C.
[4] Id.
[5] Id.
[6] POLST.ORG, *About the National POLST Paradigm,* http://www.polst.org/about-the-national-polst-paradigm/ (last visited Jan. 27, 2016).
[7] POLST.ORG, *FAQ,* http://www.polst.org/advance-care-planning/faq/ (last visited Jan. 27, 2016).
[8] POLST.ORG, *POLST v. Advance Directives,* http://www.polst.org/advance-care-planning/polst-and-advance-directives/ (last visited Jan. 27, 2016).
[9] POLST.ORG, *Programs in Your State,* http://www.polst.org/programs-in-your-state/ (last visited Jan. 26, 2016).
[10] *See* s. 765.101, F.S.
[11] *See* s. 765.101(2), F.S.
[12] *See* s. 765.101(13), F.S.
[13] Section 765.302, F.S.

responsibility to notify health care providers about the living will, so it can be made a part of the individual's medical record.

Starting January 1, 2016, advance care planning (ACP) services from physicians and other health care professionals will be available as a separate billed service covered by Medicare.[14] If a Medicare beneficiary wants to discuss advance care planning during his or her annual wellness visit, physicians and other health care professionals may provide the service during the visit and bill Medicare separately for it. Such services can be provided in both facility and non-facility settings. Previous to this date, ACP services could only billed as part of another visit; it could not be the sole reason for the physician visit.[15]

Clearinghouse for Compassionate and Palliative Care Plans

In addition to the availability of the POLST form, several states also have registries for the collection of advance directives. In 2012, West Virginia created the WV e-Directive Registry which makes advance directives, DNROs, POLSTs, living wills, and medical powers of attorney available online 24/7 to health care practitioners and facilities when the individual specifically opts in to the registry.[16] Almost 100 hospitals, nursing homes, home care agencies, and private practice health care professionals have access to the WV e-Registry.[17]

Oregon released its first POLST form in 1995.[18] An individual is not required to send a completed POLST form to the registry. If an individual does not want his or her form in the registry, the Oregon POLST form contains an "opt-out" box that can be checked.[19] When a POLST form is submitted to the registry by the primary care physician, the individual receives a confirmation letter in return, a magnet, and a set of stickers with their registry identification number for future access.[20] The number is to be given to the individual's primary care physician and the magnet and stickers put in prominent places, including something the person might usually carry with them. The registry is overseen by the Oregon Health Authority.[21]

Idaho's Health Care Directives Registry is offered through its Secretary of State's office. Individuals may submit several types of health care directive documents, including a Physician Order for Scope of Treatment (POST) form, living will, or durable power of attorney for health care.[22] Documents can be submitted online to the Secretary of State or via the mail. Once

[14] 42 CFR 410.15.
[15] Henry J. Kaiser Family Foundation, *10 FAQs: Medicare's Role in End of Life Care*, http://kff.org/medicare/fact-sheet/10-faqs-medicares-role-in-end-of-life-care/ (last visited Jan. 27, 2016).
[16] West Virginia Center for End-of-Life Care, *e-Directive Registry*, http://www.wvendoflife.org/resources-links/e-directive-registry/ (last visited Jan. 27, 2016).
[17] Id.
[18] POLST Oregon, http://www.or.polst.org/history (last visited Jan. 27, 2016).
[19] POLST Oregon, http://www.or.polst.org/registry-resources (last visited Jan. 27, 2016).
[20] Id.
[21] The Oregon Health Authority is responsible for most state health services. It is overseen by a nine-member citizen Oregon Health Policy Board. For more *see:* http://www.oregon.gov/oha/Pages/index.aspx
[22] Idaho Secretary of State, *Health Care Directive Registry*, http://www.sos.idaho.gov/GENERAL/hcdr.html (last visited Jan. 27, 2016).

registration is confirmed, individuals receive a wallet sized registration card with an individualized filing number and password and information about using the registry.[23]

New York utilizes a secure web-based application for its electronic Medical Orders for Life-Sustaining Treating (eMOLST) forms. The forms can be printed for the medical record and then stored and linked to the electronic eMOLST registry. The forms can be accessed by emergency medical services, hospitals, nursing homes, and most all health care providers in the community via the online portal.[24] The eMOLST form may also be used for minor patients.[25]

III. Effect of Proposed Changes:

Physician Orders for Life-Sustaining Treatment (POLST) (Section 1)

The bill creates s. 408.064, F.S., the Clearinghouse for Compassionate and Palliative Care Plans.

Under this section, definitions are provided for the following terms:

- "Advance directive" means the same as in s. 765.101, F.S.;[26]
- "Compassionate and palliative care plan" or "plan" means an end-of-life document or any medical directive document recognized by this state and executed by a resident of this state, including but not limited to, an advance directive, do-not-resuscitate order, physician order for life-sustaining treatment (POLST), or health care surrogate designation;
- "Department" means the Department of Health;
- "Do-not-resuscitate order" means an order issued pursuant to s. 401.45(3), F.S.;
- "End-stage condition" means the same as in s. 765.101, F.S.;[27] and
- "Physician order for life-sustaining treatment" or "POLST" means a voluntary document, executed on a form adopted by department rule, which specifies a patient's desired end-of-life care and medical treatment to ensure that his or her wishes are honored. A POLST emphasizes advance care planning and shared decision-making among a patient and his or her health care professionals and loved ones about the medical care the patient would like to receive upon the occurrence of specified conditions at or near the end of his or her life.

POLST Form Requirements (Section 1)

The Department of Health must develop and adopt by rule a POLST form. The form must require the signature of the patient's physician after consultation with the patient, or if the patient

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[23] Id.
[24] eMOLST - Electronic Medical Orders for Life Sustaining Treatment in New York State, http://www.compassionandsupport.org/index.php/for_professionals/molst_training_center/emolst (last visited Jan. 27, 2016).
[25] Medical Orders for Life Sustaining Treatment - Professionals (FAQS), http://www.compassionandsupport.org/index.php/for_professionals/molst_training_center/frequently_asked_questions/molst_faqs_page_1 (last visited Jan. 27, 2016).
[26] "Advance directive" means a witnessed written document or oral statement in which instructions are given by a principal or in which the principal's desires are expressed concerning any aspect of the principal's health care or health information, and includes, but is not limited to, the designation of a health care surrogate, a living will, or an anatomical gift made pursuant to part V of ch. 765, F.S.
[27] "End-stage condition" means an irreversible condition that is caused by injury, disease, or illness which has resulted in progressively severe and permanent deterioration, and which, to a reasonable degree of medical probability, treatment of the condition would be ineffective.

is incapacitated, the patient's authorized health care surrogate or proxy or with the patient's court appointed guardian.

To be valid, the POLST form must:

- Include the patient's physician signed, written statement that in his or her good faith clinical judgement, at the time the POLST form was completed, the patient had the ability to communicate and make health care decisions. If the patient was not able, then the physician can attest to the ability of the patient's health care surrogate to communicate and make health care decisions;
- Indicate prominently that completion of the form is voluntary, the use of the form is not a condition of any treatment, and the form cannot be given any affect if the patient is conscious and competent to make health care decisions;
- Not include any pre-selected decisions or instructions;
- Be completed only by or for a patient determined by the patient's physician to have an end-stage condition or a patient who, in the good faith clinical judgment of his or her physician, is suffering from at least one life-limiting medical condition that will likely result in the death of the patient within 1 year;
- Include information on hydration in the context of the patient's actual condition at the time the POLST is executed;
- At a minimum, be reviewed by the patient's physician when the patient:
  - Is transferred from one health care setting or level of care to another or to return home;
  - Experiences a substantial change in his or her condition as determined by that physician; or
  - Changes his or her treatment preference;
- Expires 1 year after the POLST is executed or through the end of the course of treatment addressed by the POLST, whichever occurs first.

Clearinghouse for Compassionate and Palliative Care Plans (Section 1)

The Agency for Health Care Administration (AHCA) is responsible for establishing and maintaining a reliable and secure database that will allow Florida residents to electronically submit their individual plans for compassionate and palliative care. The database may only be accessed by a health care provider who is treating the resident.

The AHCA is directed to seek input on the clearinghouse from state residents, compassionate and palliative care providers, and health care facilities for its development and implementation. The AHCA may also subscribe to or participate in a national or private clearinghouse that will accomplish the same goals in lieu of establishing an independent clearinghouse. Once clearinghouse information is available, the AHCA is required to publish and disseminate information regarding the availability of the clearinghouse to Floridians. The AHCA must also provide training to health care providers and health care facilities on how to access plans.

Statutory Revisions to Include POLST (Sections 2 - 10, and 12)

Provisions in statute requiring health professional staff to honor "do not resuscitate" orders (DNROs) are revised to include recognition of a POLST document in the same manner.

The table below reflects the statutes impacted by these revisions.

Statutory Revisions - Addition of POLST Language	
F.S. Citation	**Description**
§395.1041	Hospital Licensing and Regulation: Access to emergency services and care
§400.142	Nursing Homes; Emergency medication kits; DNROs
§400.487	Home Health Service Agreements; DNROs
§400.605	Hospices; Administration; forms; fees
§400.6095	Hospice; patient admission; assessment; plan of care; discharge; death
§401.35	Medical Transportation Services: Rules
§401.45	Denial of emergency treatment; civil liability
§429.255	Assisted Living Facilities; Use of personnel; emergency care
§429.73	Rules and standards relating to adult family-care homes
§765.205	Responsibility of the surrogate

Section 11 - amends s. 456.072, F.S., relating to discipline for health care practitioners generally, to allow a licensee to withhold or withdraw cardiopulmonary resuscitation (CPR) or the use of an automated external defibrillator if presented with an order not to resuscitate or a POLST which includes a DNRO. The DOH is directed to adopt rules for the implementation of such orders. Additionally, the bill provides that licensees who withhold CPR or the use of an automated external defibrillator may not be subject to criminal prosecution and may not be considered to have acted in a negligent or unprofessional manner for carrying out DNRO or POLST orders.

The bill further provides that the absence of an order [not] to resuscitate pursuant to s. 408.064, F.S., or a POLST form executed pursuant to s. 408.064, F.S., does not preclude a licensee from withholding or withdrawing CPR or the use of an external automated defibrillator or otherwise carrying out medical orders allowed by law.

The effective date of the bill is July 1, 2016.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

A separate public records exemption bill for the Clearinghouse for Compassionate and Palliative Care Plans (SB 662) is linked to this bill to ensure the information contained on the POLST forms is kept confidential and exempt from s. 119.07(1), F.S., and s. 24(a), article I of the State Constitution. The POLST forms contain sensitive medical information and personal identifying information that if not protected, would likely dissuade individuals from participation in the clearinghouse.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Potentially, a private sector vendor would be selected to operate the Clearinghouse for Compassionate and Palliative Care Plans. The AHCA estimates the fiscal impact to the state for this contract for implementation to be $350,000 for the first year and $140,000 for maintenance costs to participate in a national or private clearinghouse.[28]

Patients might request their providers complete and submit POLST forms on their behalf to the clearinghouse, which could increase a provider's administrative costs.

C. Government Sector Impact:

The AHCA estimates the costs for the Clearinghouse for Compassionate and Palliative Care Plans to be $350,000 for the first year of implementation and $140,000 per year for maintenance costs to participate in a national or private clearinghouse.[29]

The DOH estimates minimal fiscal impact relating to rule development for the POLST form and orders not to resuscitate pursuant to a POLST form.[30] The department indicates these costs can be absorbed within existing resources.[31]

The Department of Elderly Affairs (DOEA) estimates a minimal fiscal impact related to rulemaking for implementation of the POLST forms at hospices, assisted living facilities, and adult family day cares.[32] The DOEA indicates these costs can be absorbed within existing resources.[33]

VI. Technical Deficiencies:

Line 413 should refer to an order <u>not</u> to resuscitate.

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[28] Agency for Health Care Administration, *Senate Bill 1052 Analysis*, p. 4 (Feb, 20, 2015) (on file with the Senate Committee on Health Policy).
[29] Id.
[30] Department of Health, *Senate Bill 664 Analysis*, p. 3 (Oct. 30, 2015) (on file with the Senate Committee on Health Policy).
[31] Id at 4.
[32] Department of Elderly Affairs, *Senate Bill 664 Analysis*, p. 2 (Dec. 15, 2015) (on file with the Senate Committee on Health Policy).
[33] Id at 4.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 395.1041, 400.142, 400.487, 400.605, 400.6095, 401.35, 401.45, 429.255, 429.73, 456.072, and 765.205.

This bill creates section 408.064 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.