HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 871 Home Health Care Services Under the Medicaid Program
SPONSOR(S): Koster
TIED BILLS: **IDEN./SIM. BILLS:** SB 868

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Healthcare Regulation Subcommittee	16 Y, 0 N	Guzzo	McElroy
2) Health Care Appropriations Subcommittee			
3) Health & Human Services Committee			

SUMMARY ANALYSIS

Medicare certification requires home health agencies to provide more than one type of service. However, many Florida home health agencies provide only one service, and only to state Medicaid enrollees, not Medicare participants, so they cannot meet Medicare certification standards.

In January of 2022, the Agency for Health Care Administration (AHCA) updated the Medicaid Provider Enrollment Policy to require home health providers to be either Medicare certified or meet the standards for certification.

To address this issue, HB 871 requires a home health agency that is providing attendant care nursing services or private duty nursing services to enroll in the Florida Medicaid program as the attendant care nursing specialty type or private duty nursing specialty type, or both, as applicable, in order to be reimbursed by AHCA for such services provided to recipients under the program. The bill provides that a home health agency that provides only private duty nursing services or attendant care services, or both, through the Florida Medicaid program is not required to meet federal Medicare conditions of participation or any equivalent accreditation requirements.

The bill may have a significant, yet indeterminate negative fiscal impact on state government (see fiscal comments). The bill has no fiscal impact on local government.

The bill provides an effective date of July 1, 2023.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Florida Medicaid

Medicaid is the health care safety net for low-income Floridians. Medicaid is a partnership of the federal and state governments established to provide coverage for health services for eligible persons. The program is administered by the Agency for Health Care Administration (AHCA) and financed by federal and state funds. AHCA delegates certain functions to other state agencies, including the Department of Children and Families (DCF), the Department of Health, the Agency for Persons with Disabilities, and the Department of Elderly Affairs (DOEA).

The structure of each state's Medicaid program varies and what states must pay for is largely determined by the federal government, as a condition of receiving federal funds.[1] Federal law sets the amount, scope, and duration of services offered in the program, among other requirements. These federal requirements create an entitlement that comes with constitutional due process protections. The entitlement means that two parts of the Medicaid cost equation – people and utilization – are largely predetermined for the states. The federal government sets the minimum mandatory populations to be included in every state Medicaid program. The federal government also sets the minimum mandatory benefits to be covered in every state Medicaid program. These benefits include home health services.[2] States can add benefits, with federal approval.

States have some flexibility in the provision of Medicaid services. Section 1915(b) of the Social Security Act provides authority for the Secretary of the U.S. Department of Health and Human Services (HHS) to waive requirements to the extent that he or she "finds it to be cost-effective and efficient and not inconsistent with the purposes of this title." Section 1115 of the Social Security Act allows states to implement demonstrations of innovative service delivery systems that improve care, increase efficiency, and reduce costs. These laws allow HHS to waive federal requirements to expand populations or services, or to try new ways of service delivery.

Florida operates under a Section 1115 waiver to use a comprehensive managed care delivery model for primary and acute care services, the Statewide Medicaid Managed Care (SMMC) Managed Medical Assistance (MMA) program.[3] Florida also has a waiver under Sections 1915(b) and (c) of the Social Security Act to operate the SMMC Long-Term Care (LTC) program to provide long-term care services, including nursing facility and home and community-based services, to individuals age 65 and over and individuals age 18 and over who have a disability.[4]

Federal Requirements for Home Health Services in Medicaid State Plans

Home health services are a mandatory Medicaid benefit, which under federal law, states are required to provide through their state programs.[5] Specifically, a state must provide "for the inclusion of home health services for any individual who, under the State plan, is entitled to nursing facility services."[6] Home health services within state plans must include: nursing services; home health aide services; and medical supplies, equipment, and appliances. Home health services must be provided to: categorically needy beneficiaries age 21 or over, categorically needy beneficiaries under age 21, if the plan provides

[1] Title 42 U.S.C. §§ 1396-1396w-5; Title 42 C.F.R. Part 430-456 (§§ 430.0-456.725) (2016).
[2] S. 409.905, F.S.
[3] S. 409.964, F.S.
[4] Id.
[5] Medicaid.gov, Mandatory & Optional Medicaid Benefits, available at https://www.medicaid.gov/medicaid/benefits/mandatory-optional-medicaid-benefits/index.html (last visited March 26, 2023).
[6] Sec, 1902(a)(10)(D), 42 U.S.C. 1396a

skilled nursing facility services for them, and medically needy beneficiaries to whom skilled nursing facility services are provided under the plan.[7]

The states have broad discretion and state plans vary regarding the coverage of home health services.

Medicare Coverage of Home Health Visit Services

Medicare covers "intermittent" skilled nursing home health services, care that is needed fewer than 7 days each week or daily for less than 8 hours each day for up to 21 days.[8] People who require more than intermittent skilled nursing care would not usually qualify for home health.

Federal Conditions of Participation and Conditions for Coverage

The federal Centers for Medicare & Medicaid Services (CMS) develops Conditions of Participation (CoPs) and Conditions for Coverage (CfCs) that health care organizations must meet in order to begin and continue participating in the Medicare and Medicaid programs.[9] These health and safety standards are intended to maintain quality of care and protect the health and safety of beneficiaries. CMS also ensures that the standards of accrediting organizations recognized by CMS meet or exceed the Medicare standards set forth in the CoPs / CfCs (through a process called "deeming").

One component of the CoPs for home health agencies is Outcome and Assessment Information Set (Oasis) data. The Home Health Oasis is a standardized data set that measures quality and outcomes. It contains information regarding the patient such as the clinical condition, comorbidities, physical and mental state, functional status, living situation and health care needs.

Contrasting Definitions of Home Health Agency

Under Medicare federal law, home health services may include, but are not required to include, physical therapy, occupational therapy, or speech pathology and audiology services.[10] In other words, according to CMS, a home health agency "is primarily engaged in providing *skilled* nursing services *and other therapeutic services*."[11]

Under Florida licensure law, a home health agency means "a person that provides *one or more* home health services."[12] Home health services means "health and medical services and medical supplies furnished to an individual in the individual's home or place of residence. The term includes the following: [13]

- Nursing care;
- Physical, occupational, respiratory, or speech therapy;
- Home health aide services;
- Dietetics and nutrition practice and nutrition counseling; and
- Medical supplies, restricted to drugs and biologicals prescribed by a physician."

Private duty nursing, attendant care nursing, and skilled nursing are services that can be provided by a licensed practical nurse (LPN) or a registered nurse (RN).[14] Private duty nursing and attendant care

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[7] 42 CFR § 441.15.
[8] Centers for Medicare & Medicaid Services, Medicare & Home Health Care, available at https://www.medicare.gov/Pubs/pdf/10969-medicare-and-home-health-care.pdf (last visited March 26, 2023).
[9] Centers for Medicare & Medicaid Services, Conditions for Coverage & Conditions of Participation, available at https://www.cms.gov/Regulations-and-Guidance/Legislation/CFCsAndCoPs (last visited March 26, 2023).
[10] 42 C.F.R. §440.70(b).
[11] Centers for Medicare & Medicaid Services, Home Health Providers, available at https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandComplianc/HHAs (last visited March 26, 2023).
[12] s. 400.462(12)
[13] s. 400.462(15), F.S.
[14] Agency for Health Care Administration, Florida Medicaid Home Health Visit Services Coverage Policy (November 2016), available at https://ahca.myflorida.com/content/download/7034/file/59G-4-130_Home_Health_Visit_Services_Coverage_Policy.pdf (last visited March 23, 2023).

nursing services can be provided by a home health agency enrolled as a skilled nursing provider or a home health agency enrolled as a non-skilled nursing provider.[15] A Florida-licensed home health agency does not have to provide skilled nursing services. A Florida-licensed home health agency may provide just one service, including non-skilled nursing services such as private duty nursing or attendant nursing care services. Florida currently covers those services despite a discrepancy created by a recent change made to the Florida Medicaid Provider Enrollment Policy.

Florida Medicaid Provider Enrollment Policy

In January of 2022, AHCA updated their provider enrollment policy to require home health providers to be "either Medicare certified or meet the standards for certification."[16] However, it is not possible for Florida home health agencies who do not provide skilled nursing services to receive Medicare certification because Medicare certification requirements require a home health agency to provide skilled nursing services. Home health providers "meet one of the following requirements to qualify for limited or full enrollment in Florida Medicaid: [17]

- Have Medicare certification.
- Meet the requirements for Medicare certification by demonstrating compliance during a survey conducted by the Division of Health Quality Assurance (HQA).
- Be accredited and surveyed for deemed status as meeting the CMS CoPs by:
    - The Joint Commission (TJC),
    - The Community Health Accreditation Partner (CHAP), or
    - The Accreditation Commission for Health Care (ACHC)

Of the three approved accrediting organizations,[18] none will schedule a survey for deemed status without a letter from CMS approving their 855A form.[19] This form indicates an applicant's intent to enroll as a Medicare provider.

AHCA based this rule change on the assumption that Medicare certification is required, however; AHCA notes that federal law is ambiguous on this point.[20]

Effect of the Bill

HB 391 requires a home health agency that is providing attendant care nursing services or private duty nursing services to enroll in the Florida Medicaid program as the attendant care nursing specialty type or private duty nursing specialty type, or both, as applicable, in order to be reimbursed by AHCA for such services provided to recipients under the program.

The bill provides that a home health agency that provides only private duty nursing services or attendant care services, or both, is not required to meet the Medicare CoPs or any equivalent accreditation requirements. Home health agencies providing private duty or attendant care nursing services *and* skilled nursing or other therapeutic services would still be required to meet the Medicare CoPs pursuant to AHCA rule, which would need to be updated upon the passage of this bill.

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[15] Agency for Health Care Administration, Private Duty Nursing Services Coverage Policy, Section 4.2, available at https://ahca.myflorida.com/content/download/7036/file/59G-4-261_Private_Duty_Nursing_Services_Coverage_Policy.pdf (last visited March 26, 2023).

[16] Agency for Health Care Administration, Florida Medicaid Provider Enrollment Policy at pg. 48 (January 2022), available at https://www.flrules.org/Gateway/reference.asp?No=Ref-13974 (last visited March 23, 2023).

[17] Id.

[18] Agency for Health Care Administration, Home Health Agencies Accrediting Organizations for Skilled Home Health Agencies, available at https://ahca.myflorida.com/MCHQ/Health_Facility_Regulation/Lab_HomeServ/HHA/hha_accreditation.shtml (last visited March 26, 2023).

[19] U.S. Department of Health & Human Services, Medicare Enrollment Application, Institutional Providers, available at https://www.cms.gov/Medicare/CMS-Forms/CMS-Forms/downloads/cms855a.pdf (last visited March 26, 2023).

[20] Agency for Health Care Administration, Agency Analysis of 2023 HB 871 (March 25, 2023).

The bill also defines the terms "attendant care nursing services" and "private duty nursing services" to mean "nursing treatment as defined in s. 464.003[21], provided at a level of care which requires more individualized and continuous care than can be provided through a home health visit for a Medicaid recipient." Attendant care nursing services is the treatment provided to Medicaid recipients 21 years of age or older. Private duty nursing services is the same treatment provided to Medicaid recipients younger than 21 years of age.

The bill provides an effective date of July 1, 2023.

B. SECTION DIRECTORY:

Section 1: Amends s. 409.905, F.S., relating to mandatory Medicaid services.
Section 2: Provides an effective date of July 1, 2022.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   See fiscal comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

AHCA interprets the bill to require Florida Medicaid to cover the cost of providing attendant care nursing services to adults, which would be a service expansion.[22] Since attendant care nursing is currently offered only to those LTC recipients identified as requiring this service, it is difficult to determine the exact expenditure amount. In FY 2021-22, there were 299 recipients getting attendant care nursing at a cost of $15,621,986 or an average of $52,247.44 per recipient and 574 recipients presently receiving home health services in FFS. The extent of the fiscal impact depends on how many home health service recipients participate.[23]

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[21] "Nursing treatment" means the establishment and implementation of a nursing regimen for the care and comfort of individuals, the prevention of illness, and the education, restoration, and maintenance of health. S. 464.003(17), F.S.
[22] *Supra* note 20.
[23] Id.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

AHCA has sufficient rule-making authority to implement the provisions of the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill may require revision to rectify the AHCA interpretation that it establishes a service expansion.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES