

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 91 State Ombudsman Program

SPONSOR(S): Roberson

TIED BILLS: **IDEN./SIM. BILLS:** SB 508

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Healthy Families Subcommittee	11 Y, 0 N	Poche	Brazzell
2) Health Care Appropriations Subcommittee	10 Y, 0 N	Clark	Pridgeon
3) Health & Human Services Committee			

SUMMARY ANALYSIS

HB 91 revises the operating structure and internal procedures of the State Long-Term Care Ombudsman Program (LTCOP), housed in the Department of Elder Affairs (DOEA), to reflect current practices, maximize operational and program efficiencies, and conform to the federal Older Americans Act (OAA), 42 U.S.C. §§ 3001, et seq. The LTCOP is operated pursuant to part I of chapter 400, F.S.

The bill revises part I of chapter 400, F.S., to:

- Provide the state ombudsman with final authority to appoint district ombudsmen;
- Include definitions of “district”, “state ombudsman,” and “representative of the office,” revise the definition of “resident,” and delete the definition of “local council” to reflect a change in organizational structure;
- Revise the duties of the State Long-Term Care Ombudsman Council;
- Revise and clarify the application and training requirements in order to be appointed as an ombudsman, including the addition of a level 2 background screening as part of the application process;
- Expand the duties of ombudsmen in the local districts to comply with the OAA, to include clarified parameters for complaint resolution and the authority to establish resident and family councils within long-term care facilities;
- Remove the notice publication requirement for internal LTCOP district staff meetings;
- Clarify the complaint investigation process and the facility assessment process;
- Conform the complaint investigation process to the requirements of the OAA; and
- Require certain information to be provided to a resident of a long-term care facility upon first entering the facility to confirm that retaliatory action against a resident for filing a grievance or exercising a resident’s rights is prohibited.

The bill appears to have no significant fiscal impact on state or local government.

The bill provides an effective date of July 1, 2014.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Department of Elder Affairs

Florida has nearly 4,400,000 residents aged 60 and older.¹ The state is first in the nation in the percentage of citizens who are elders, measuring 23% of total population in 2010 and estimated to soar to 35% of total population in 2030.²

The Department of Elder Affairs (DOEA), established in 1992, serves as the primary agency for administering human services programs for the elderly and developing policy recommendations for long-term care.³ Section 20.41, F.S., creates the DOEA and details some of its roles and responsibilities.⁴ For example, the DOEA is statutorily required to administer the State Long-Term Care Ombudsman Council⁵ and the local long-term care ombudsman councils,^{6,7} which provide advocacy on behalf of residents of long-term care facilities by identifying, investigating, and resolving complaints made by or on behalf of residents.

The DOEA is designated as the State Unit on Aging, as defined in the Older Americans Act of 1965 (OAA).⁸ Under the OAA, the DOEA is responsible for organizing, coordinating, and providing community-based services and opportunities for older Floridians and their families, including the oversight of services to help elders age in place with dignity and independence and to preserve the rights of the most vulnerable.⁹

The DOEA contracts with an Area Agency on Aging (AAA) in each of eleven Planning and Service Areas (PSAs) to provide coordinated and integrated long-term care services and prevention and early intervention services to the elderly population of Florida.¹⁰ Each of the AAAs then contract with community care lead agencies to provide actual services to the elderly in each PSA.¹¹

The DOEA is authorized to administer certain trust funds, in conjunction with federal funds provided to the state, to operate programs and provide services for the elderly.¹² The programs and services include, but are not limited to, home and community based services, nursing home diversion, the Alzheimer's disease initiative, the Comprehensive Assessment and Review for Long-Term Care Services (CARES) program, and consumer assistance programs, such as the State Long-Term Care Ombudsman Program.

State Long-Term Care Ombudsman Program

¹ Florida Office of Economic and Demographic Research, *2010 Census Summary File 1 Profiles-Detailed Age by Race/Hispanic Origin by Gender*, available at <http://edr.state.fl.us/Content/population-demographics/2010-census/data/index.cfm> (last viewed December 10, 2013).

² Florida Department of Elder Affairs, *Summary of Programs and Services 2013*, page 9, available at <http://elderaffairs.state.fl.us/doea/pubs/pubs/sops2013/2013%20SOPS.pdf>

³ S. 430.03(1), F.S.

⁴ Art. IV, s. 12 of the Florida Constitution permits the creation of the Department of Elder Affairs. The number of executive branch agencies is capped at twenty-five, exclusive of agencies specifically mentioned in the constitution.

⁵ S. 400.0067, F.S.

⁶ S. 400.0069, F.S.

⁷ S. 20.41(4), F.S.

⁸ S. 20.41(5), F.S.

⁹ S. 430.04, F.S.

¹⁰ S. 20.41(6), F.S.

¹¹ *Id.*

¹² S. 20.415, F.S.

The State Long-Term Care Ombudsman Program (LTCOP) is a statewide, volunteer-based system of local councils that act as advocates for residents of long-term care facilities.¹³ The LTCOP was established by Title VII of the federal Older Americans Act¹⁴ and its operation is governed by state statute.¹⁵ Through 17 districts¹⁶ that together cover the entire state, volunteers identify, investigate, and resolve complaints made by, or on behalf of, residents of nursing homes, assisted living facilities, adult family care homes, and continuing care retirement communities. In addition to investigating and resolving complaints, the LTCOP performs the following services or activities:

- Monitoring of and commenting on the development and implementation of federal, state, and local laws, regulations, and policies regarding health, safety, and welfare of residents in long-term care facilities.
- Providing information and referrals with regard to long-term care facilities.
- Conducting annual assessments of long-term care facilities.
- Aiding the development of resident and family councils.¹⁷

An ombudsman “is a specially trained and certified volunteer who has been given authority under federal and state law to identify, investigate and resolve complaints made by, or on behalf of, long-term care facility residents.”¹⁸ It is important to note that the LTCOP does not have enforcement or regulatory oversight. Certified ombudsmen in the local councils work as independent advocates for residents to mediate disputes on an informal basis.

Florida law requires that the Office of State Long-Term Care Ombudsman (office) maintain a statewide system for collecting and analyzing data relating to complaints and conditions in long-term care facilities.¹⁹ The office must also publish the information pertaining to the number and types of complaints received by the program on a quarterly basis.²⁰ Additionally, federal law requires the office to have a statewide data system to collect, analyze, and report data on residents, facilities, and complaints to federal officials as well as the National Ombudsman Resource Center.²¹

Ombudsmen also complete annual assessments of each long-term care facility in the state to ensure the health, safety, and welfare of the residents.²² No advance warning of the assessment is to be given to the long-term care facility. An ombudsman is not allowed to forcibly enter the facility to complete the assessment; however, the administrator of the facility commits a violation of part I of ch. 400, F.S., if the ombudsman is not allowed to enter the facility, and, in such circumstances, the Agency for Health Care Administration (AHCA) may use appropriate administrative remedies.²³ The AHCA also conducts routine licensure and complaint surveys of nursing homes, assisted living facilities, and adult day care homes. As part of the survey process, the AHCA must complete offsite survey preparation, which includes a review of information about the facility prior to the survey. One of the sources of this information is the State Long-Term Care Ombudsman.

¹³ For 2011-2012, 356 volunteers worked an estimated 85,440 hours which resulted in estimated average savings in salaries and administrative costs of \$1,861,737. See Florida’s Long-Term Care Ombudsman Program, *2011-2012 Annual Report*, available at [http://ombudsman.myflorida.com/publications/ar/LTCOP%20ANNUAL%20REPORT%202011-2012\[1\].pdf](http://ombudsman.myflorida.com/publications/ar/LTCOP%20ANNUAL%20REPORT%202011-2012[1].pdf) (also on file with Healthy Families Subcommittee staff).

¹⁴ 42 U.S.C. §§ 3001 et seq. (as amended by Public Law 106-501).

¹⁵ Part I, Ch. 400, F.S.

¹⁶ The 17 districts are: Northwest Florida, Panhandle, North Central Florida, Withlacoochee Area, First Coast South, First Coast, Mid & South Pinellas, Pasco & North Pinellas, West Central Florida, East Central Florida, Southwest Florida, Palm Beach County, Treasure Coast, Broward County, South Dade & the Keys, North Dade, and South Central Florida. See Florida Department of Elder Affairs, *Summary of Programs & Services 2013*, January 2013, page 27 (available at <http://elderaffairs.state.fl.us/does/pubs/pubs/sops2013/2013%20SOPS.pdf>).

¹⁷ Florida Department of Elder Affairs, *Summary of Programs & Services 2013*, January 2013, page 77 (available at <http://elderaffairs.state.fl.us/does/pubs/pubs/sops2013/2013%20SOPS.pdf>).

¹⁸ Florida’s Long-Term Care Ombudsman Program, *Residents and Families*, available at <http://ombudsman.myflorida.com/ResidentFam.php> (last visited December 10, 2013).

¹⁹ S. 400.0089, F.S.

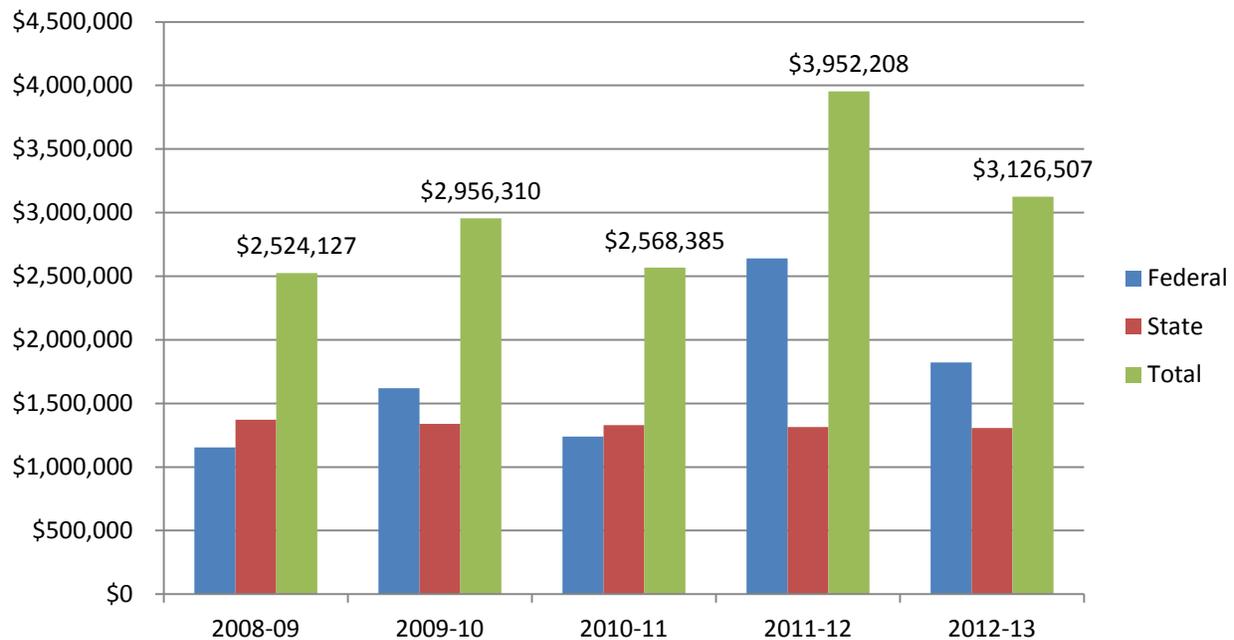
²⁰ Id.

²¹ 42 U.S.C. s. 3058g(c) and 42 U.S.C. s. 3058g(h)(1).

²² S. 400.0074, F.S.; the entire list of responsibilities of an ombudsman can be found at s. 400.0065(1), F.S.

²³ Id.

The following chart shows the recent appropriation history of the LTCOP²⁴:



The following chart details some of the activities of the LTCOP, including the number of facilities assessed, the total number of assessments conducted, and the number of complaints investigated²⁵:

FEDERAL REPORTING YEAR	FACILITIES	ASSESSMENTS	COMPLAINTS INVESTIGATED
2008-2009	3,932	3,932	8,302
2009-2010	4,016	4,016	8,651
2010-2011	4,039	3,347	7,534
2011-2012	4,039	4,269	8,600

Effect of Proposed Changes

The bill revises the operating structure and internal procedures of the LTCOP to reflect current practices, maximize operational and program efficiencies, and conform to the OAA.²⁶ The bill establishes local ombudsman districts to replace the current council structure and outlines district membership, duties and responsibilities.

Definitions

The bill amends the definitions applicable to part I of chapter 400, F.S., by deleting the term “local council.” The bill adds the definition of “district” to refer to a geographical area of the state, as designated by the state ombudsman, where certified ombudsmen carry out the duties of the LTCOP. The bill revises the definition of “ombudsman” to mean an individual certified by the state ombudsman under the statute to carry out the duties of the LTCOP and creates a separate definition of “state ombudsman” to refer to the person appointed by the Secretary of the DOEA to lead the LTCOP. The bill revises the definition of “resident” to include a person aged 18 years or older who resides in a long-term care facility. The bill adds the definition of “representative of the office” to mean the state ombudsman, employees of his or her office, and persons certified to serve as ombudsmen under the LTCOP. Finally, the bill adds the definition of “state ombudsman program” to mean the LTCOP operating under the direction of the state ombudsman’s office.

²⁴ Id. at page 78.

²⁵ Id. at page 79.

²⁶ See supra, FN 14.

The bill revises many sections of part I of chapter 400, F.S., to remove reference to the current ombudsman councils and replaces that term with more specific terms referring to districts, the ombudsman or ombudsmen, and representatives of the those offices. This change in terminology is consistent with the terms of the OAA.

State Long-Term Care Ombudsman and Office Representative Duties and Responsibilities

In s. 400.0065(2)(c), F.S., which outlines the duties and responsibilities of the State Long-Term Care Ombudsman, the bill deletes reference to staff positions established for the purpose of coordinating the activities of the local councils. The bill specifies who may be a representative of the office of the ombudsman and the requirements for the certification.

The bill eliminates the authority of the state ombudsman to enter into an agreement with the State Advocacy Council for the purpose of coordinating activities and avoiding duplication of effort.

State Long-Term Care Ombudsman Council

The bill removes references to the local councils in the outline of the duties of the State Long-Term Care Ombudsman Council (Council), established in s. 400.0067, F.S. The bill requires the state ombudsman to submit a list of his or her recommendations for individuals to serve in at-large positions on the Council to the Secretary of DOEA, who will then appoint those members of the Council. Current law gives the Governor the authority to appoint at-large members to the Council. The bill also permits the district manager, in consultation with the district ombudsmen, to recommend replacement of the selected ombudsman who represents the district on the Council. If a replacement ombudsman is named by the district manager, the state ombudsman must be notified of the replacement.

The bill also revises the internal operational aspects of the Council, such as permitting the Council to perform its duties if one or more positions are vacant and providing procedures for dealing with the absence of a member from 50 percent or more of the meetings.

Long-Term Care Ombudsman Districts

The bill revises s. 400.0069, F.S., which establishes local ombudsman councils and details their duties and membership. The bill deletes reference to the term "local council" and replaces it with "long-term care ombudsman districts." This reflects the change in structure of the LTCOP from a large state council with multiple local councils, each acting autonomously, to a more hierarchal structure consisting of a district ombudsman and representatives of the office of the state ombudsman. Every person working in a district ombudsman office will be certified as an ombudsman and will be permitted to carry out the duties and responsibilities of an ombudsman.

The state ombudsman is given the authority to appoint ombudsmen in the districts. At his or her discretion, the state ombudsman may appoint an ombudsman to a district other than where he or she resides. This reflects the change in program structure to emphasize that the LTCOP is to be directed and administered by the state ombudsman and the districts are to act as an extension of the state ombudsman with regard to policy and operations. The district ombudsmen may provide technical assistance in forming resident and family councils within the long-term care facilities.

The bill provides a list of individuals who may not be appointed as an ombudsman. The list includes:

- An owner or representative of a long-term care facility;
- A provider or representative of long-term care services;
- An employee of the Agency for Health Care Administration;
- An employee of the Department of Elder Affairs (except for representatives of the office);
- An employee of the Department of Children and Families; or
- An employee of the Agency for Persons with Disabilities.

The bill requires a person to successfully complete a level 2 background screening before he or she can be appointed as an ombudsman. A Level 2 background screening is detailed in ss. 435.04 and 430.0402, F.S. The bill clarifies that the state ombudsman has final authority to appoint an individual as an ombudsman. The bill also gives the state ombudsman the authority to rescind any appointment of an ombudsman.

Training

When a person is appointed as an ombudsman, the bill states that the person may participate in district activities but may not represent the office or conduct an investigation until he or she completes initial training required under s. 400.0091(1), F.S., and is certified as an ombudsman by the state ombudsman. The bill specifies certain training requirements for all representatives of the office of the state ombudsman contained in s. 400.0091, F.S. First, the bill requires all representatives of the office to have a minimum of 20 hours of training upon appointment as an ombudsman. Second, the bill requires 10 hours of training each year after appointment.

Complaint Investigations and Facility Assessments

The bill revises s. 400.0073, F.S., to address complaint investigations. The bill removes reference to “local council” and replaces it with “district”, which is consistent with the elimination of the local councils and the implementation of the district structure. A representative of the office of the ombudsman is now tasked with identifying and investigating any complaint by or on behalf of a resident that meets specified criteria already in law. The bill replaces reference to the local council with “representative of the office” to clarify who has responsibility in complaint investigations.

The bill requires onsite administrative assessments to be completed by representatives of the office in a resident-centered manner. The bill requires an ombudsman who is denied access to a facility by a facility administrator to report the denial to the state ombudsman, who shall then report the incident to the AHCA for possible disciplinary action, including action against the facility license. Lastly, the bill permits the DOEA, in consultation with the state ombudsman, to develop rules to implement procedures for conducting onsite assessments of long-term care facilities.

The bill makes changes to the notification and resolution process for complaints contained in s. 400.0075, F.S. First, the bill permits a representative of the office of the ombudsman to identify a verified complaint and bring it to the attention of the facility administrator, while adhering to the confidentiality provisions in s. 400.0077, F.S. The administrator must set target dates, with the concurrence of the ombudsman, for resolution of the complaint. If the complaint is not resolved by the target date or remedial action to address the complaint is not forthcoming, the bill permits the representative of the office to extend the target date if he or she believes that additional time will lead to a resolution of the complaint or refer the complaint to the district manager.²⁷

If an ombudsman determines, during an investigation, that the health, safety, welfare, or rights of a resident are in immediate danger, the bill requires immediate notification of the district manager. The bill then requires the district manager, after verifying the nature of the threat, to notify appropriate state agencies, law enforcement, the state ombudsman, and legal advocate.²⁸ The bill permits the legal advocate to provide appropriate information to law enforcement to initiate an investigation if he or she believes a criminal act was committed in conjunction with the complaint.

The bill requires the DOEA to consult with the state ombudsman to develop rules governing conflicts of interest involving ombudsmen and implementing state and local complaint procedures. The bill requires that the rules governing complaint procedures include rules on receiving, investigating, and resolving complaints of residents of long-term care facilities.

²⁷ The district manager is a state employee who provides administrative management for the district office.

²⁸ The legal advocate is established in the Office of the State Long-Term Care Ombudsman by s. 400.0063(3), F.S. The legal advocate is selected by the state ombudsman and must be a member in good standing with The Florida Bar. Some of the duties of the legal advocate include assisting the state ombudsman in carrying out his or her duties with respect to abuse, neglect, or violation of rights of residents of long-term care facilities and pursuing administrative, legal, and other appropriate remedies on behalf of residents.

The bill requires the state ombudsman or his or her designee to assume responsibility for resolving a complaint that has been referred by a district. The bill grants the state ombudsman the authority to take certain action if the facility fails to resolve or remedy the complaint. These actions by the state ombudsman can include publicizing the complaint, publicizing the recommendations for resolution of the complaint, and recommending facility reviews to the appropriate state agency that licenses a particular non-compliant facility to ensure the conditions that gave rise to the original complaint are resolved and do not recur.

The bill requires the office of the state ombudsman to establish an email address for receiving complaints from, or on behalf of, residents of long-term care facilities. The bill also requires that each resident, or his or her representative, upon first entering a long-term care facility and as part of the initial information packet provided by the facility, receive specific information stating that retaliatory action cannot be taken against a resident for filing a grievance against the facility or otherwise exercising his or her resident's rights.

The bill clarifies, in light of eliminating the local council structure and implementing the district structure, that representatives of the office of the state ombudsman and the members of the Council have immunity from civil and criminal liability for any action taken in good faith performance of their duties as outlined in the statute.

Conforming Changes

Finally, the bill makes conforming changes to the following statutes to reflect the provisions of the bill: sections 20.41, 400.021, 400.022, 400.0255, 400.1413, 400.162, 400.19, 400.191, 400.23, 400.235, 415.1034, 415.104, 415.1055, 415.106, 415.107, 429.02, 429.07, 429.19, 429.26, 429.28, 429.34, 429.35, 429.67, 429.85, and 744.444, F.S.

B. SECTION DIRECTORY:

- Section 1:** Amends s. 400.0060, F.S., relating to definitions.
- Section 2:** Amends s. 400.0061, F.S., relating to legislative findings and intent; long-term care facilities.
- Section 3:** Amends s. 400.0063, F.S., relating to establishment of Office of State Long-Term Care Ombudsman; designation of ombudsman and legal advocate.
- Section 4:** Amends s. 400.0065, F.S., relating to State Long-Term Care Ombudsman; duties and responsibilities.
- Section 5:** Amends s. 400.0067, F.S., relating to State Long-Term Care Ombudsman Council; duties; membership.
- Section 6:** Amends s. 400.0069, F.S., relating to local long-term care ombudsman councils; duties; membership.
- Section 7:** Amends s. 400.0070, F.S., relating to conflicts of interest.
- Section 8:** Amends s. 400.0071, F.S., relating to State Long-Term Care ombudsman program complaint procedures.
- Section 9:** Amends s. 400.0073, F.S., relating to state and local ombudsman council investigations.
- Section 10:** Amends s. 400.0074, F.S., relating to local ombudsman council onsite administrative assessments.
- Section 11:** Amends s. 400.0075, F.S., relating to complaint notification and resolution procedures.
- Section 12:** Amends s. 400.0078, F.S., relating to citizen access to state Long-Term Care ombudsman program services.
- Section 13:** Amends s. 400.0079, F.S., relating to immunity.
- Section 14:** Amends s. 400.0081, F.S., relating to access to facilities, residents, and records.
- Section 15:** Amends s. 400.0083, F.S., relating to interference; retaliation; penalties.
- Section 16:** Amends s. 400.0087, F.S., relating to department oversight; funding.
- Section 17:** Amends s. 400.0089, F.S., relating to complaint data reports.
- Section 18:** Amends s. 400.0091, F.S., relating to training.
- Section 19:** Amends s. 20.41, F.S., relating to Department of Elder Affairs.

- Section 20:** Amends s. 400.021, F.S., relating to definitions.
- Section 21:** Amends s. 400.022, F.S., relating to residents' rights.
- Section 22:** Amends s. 400.0255, F.S., relating to resident transfer or discharge; requirements and procedures; hearings.
- Section 23:** Amends s. 400.1413, F.S., relating to volunteers in nursing homes.
- Section 24:** Amends s. 400.162, F.S., relating to property and personal affairs of residents.
- Section 25:** Amends s. 400.19, F.S., relating to right of entry and inspection.
- Section 26:** Amends s. 400.191, F.S., relating to availability, distribution, and posting of reports and records.
- Section 27:** Amends s. 400.23, F.S., relating to rules; evaluation and deficiencies; licensure status.
- Section 28:** Amends s. 400.235, F.S., relating to nursing home quality and licensure status; Gold Seal Program.
- Section 29:** Amends s. 415.1034, F.S., relating to mandatory reporting of abuse, neglect, or exploitation of vulnerable adults; mandatory reports of death.
- Section 30:** Amends s. 415.104, F.S., relating to protective investigations of cases of abuse, neglect, or exploitation of vulnerable adults; transmittal of records to state attorney.
- Section 31:** Amends s. 415.1055, F.S., relating to notification to administrative entities.
- Section 32:** Amends s. 415.106, F.S., relating to cooperation by the department and criminal justice and other agencies.
- Section 33:** Amends s. 415.107, F.S., relating to confidentiality of reports and records.
- Section 34:** Amends s. 429.02, F.S., relating to definitions.
- Section 35:** Amends s. 429.07, F.S., relating to license required; fee.
- Section 36:** Amends s. 429.19, F.S., relating to violations; imposition of administrative fines; grounds.
- Section 37:** Amends s. 429.26, F.S., relating to appropriateness of placements; examinations of residents.
- Section 38:** Amends s. 429.28, F.S., relating to resident of bill of rights.
- Section 39:** Amends s. 429.34, F.S., relating to right of entry and inspection.
- Section 40:** Amends s. 429.35, F.S., relating to maintenance of records; reports.
- Section 41:** Amends s. 429.67, F.S., relating to licensure.
- Section 42:** Amends s. 429.85, F.S., relating to residents' bill of rights.
- Section 43:** Amends s. 744.444, F.S., relating to power of guardian without court approval.
- Section 44:** Provides an effective date of July 1, 2014.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

By eliminating the local council structure, the bill removes internal staff meetings at the district level from the requirements of the Sunshine Act. As a result, the bill removes the notice requirement for internal staff meetings, which is expected to save the DOEA an average of \$3,382 per year, based on costs over the last three years.

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:

The DOEA has appropriate rule-making authority to institute the provisions of the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.