

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 987 In-person Visitation by Essential Caregivers

SPONSOR(S): Finance & Facilities Subcommittee, Shoaf

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Finance & Facilities Subcommittee	17 Y, 0 N, As CS	Guzzo	Lloyd
2) Children, Families & Seniors Subcommittee	14 Y, 0 N	Guzzo	Brazzell
3) Health & Human Services Committee			

SUMMARY ANALYSIS

Due to the COVID-19 pandemic, from March 2020, to March 2021, residents of 11 different facility types in Florida were not allowed to receive visitors. The effects of social isolation and loneliness are known to be very harmful to older adults. According to the Centers for Disease Control and Prevention, social isolation significantly increases the risk of premature death from all causes.

To protect Florida's most vulnerable residents from the effects of social isolation, the bill allows a resident of an intermediate care facility for the developmentally disabled (ICFDD), nursing home, or assisted living facility (ALF), or his or her guardian or legal representative, to designate an essential caregiver. The bill prohibits a facility from refusing visitation by the essential caregiver. An essential caregiver can be a family member, friend, guardian, or other individual.

The bill requires AHCA and APD to develop guidelines to assist facilities in establishing essential caregiver visitation policies and procedures, which must require facilities to:

- Allow a resident or client, or his or her guardian or legal representative, to designate an essential caregiver for in-person visitation in the same manner that they would designate a power of attorney;
- Establish a visitation schedule allowing the essential caregiver to visit the resident or client for at least 2 hours every day;
- Establish procedures to enable physical contact between the resident or client and essential caregivers;
- Establish a visitor's log; and
- Obtain the signature of the essential caregiver certifying that the caregiver agrees to follow the facility's safety protocols.

The bill allows a facility to revoke an individual's designation as an essential caregiver if the person violates the facility's safety protocols, which cannot be more stringent than those established for the staff of the facility.

The bill also allows a facility to suspend all essential caregiver visitation rights one time only for up to seven days if in-person visitation poses a serious health risk to the residents of the facility. The bill requires facilities to allow visitation by essential caregivers during a suspension on visitation under certain circumstances on a case by case basis.

The bill requires APD and AHCA to publish a web page explaining essential caregiver visitation rights.

The bill has no fiscal impact on state or local government.

The bill provides an effective date of July 1, 2022.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

The COVID-19 Pandemic

The novel human coronavirus disease 2019 (COVID-19) was first reported in Wuhan, China, in December of 2019, when dozens of cases of pneumonia of unknown etiology were first reported. By early January, 2020, Chinese authorities identified a novel coronavirus as the cause of the outbreak. Shortly thereafter, the first cases of COVID-19—officially named by the World Health Organization (WHO) on February 11, 2020—were detected in Japan and Thailand. On January 20, 2020, the U.S. Centers for Disease Control and Prevention confirmed the first case of COVID-19 in the United States appearing in Washington State. On January 31, 2020, the U.S. Secretary of Health and Human Services declared COVID-19 a public health emergency and on March 11, 2020, the WHO declared COVID-19 a pandemic.¹

On March 1, 2020, Florida's Surgeon General declared a public health emergency.² On March 9, 2020, the Governor issued an executive order to declare a state of emergency and delegate certain powers to the Director of the Division of Emergency Management (DEM), including the ability to restrict visitation in certain health care and long-term care facilities.³

Visitation Restrictions During COVID-19

On March 15, 2020, DEM issued an emergency order to require certain facilities to prohibit the entry of any individual except in specified circumstances.⁴ The emergency order applied to the following facility types:

- Nursing homes;
- Assisted living facilities;
- Intermediate care facilities for the developmentally disabled;
- Transitional living facilities;
- Adult mental health and treatment facilities;
- Adult forensic facilities;
- Civil facilities;
- Adult family care homes;
- Group homes;
- Homes for special services; and
- Long-term care hospitals.⁵

The emergency order authorized the following individuals to enter a facility:

¹ Centers for Disease Control and Prevention, *COVID-19 Timeline*, David J. Spencer CDC Museum: In Association With the Smithsonian Institution, available at <https://www.cdc.gov/museum/timeline/covid19.html> (last accessed January 24, 2022).

² Florida Department of Health Declaration of Public Health Emergency, March 1, 2020, available at <https://floridahealthcovid19.gov/wp-content/uploads/2020/03/declaration-of-public-health-emergency-covid-19-3.1.20.pdf> (last accessed January 24, 2022).

³ State of Florida, Office of the Governor, Executive Order Number 20-52, Emergency Management – COVID-19 Public Health Emergency (March 9, 2020), available at https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-52.pdf (last accessed January 24, 2022).

⁴ State of Florida, Division of Emergency Management, Emergency Order Number 20-006 (March 15, 2020) available at <https://www.floridadisaster.org/globalassets/executive-orders/covid-19/dem-order-no.-20-006-in-re-covid-19-public-health-emergency-issued-march-15-2020.pdf> (last accessed January 24, 2022).

⁵ Id.

- Facility residents;
- Facility staff;
- Family members and friends during end of life situations;
- Hospice or palliative care workers caring for residents in end-of-life situations;
- Any individual providing necessary health care to a resident;
- Attorneys of records for residents in adult mental health facilities for court related matters if virtual or telephone means are unavailable; and
- Representatives of the state and federal government seeking entry as part of their official duties, including, but not limited to, the Long-Term Care Ombudsman program, representatives of the Department of Children and Families, the Department of Health, the Department of Elderly Affairs, the Agency for Health Care Administration, the Agency for Persons with Disabilities (APD), protection and advocacy organizations for individuals with developmental disabilities, the Office of the Attorney General, any law enforcement officer, and any emergency medical personnel.⁶

Further, the emergency order prohibited any of the above individuals from entering a facility if they failed to meet certain screening criteria, including:

- Being infected with COVID-19 without having two consecutive negative test results separated by 24 hours;
- Showing signs or symptoms of, or disclosing the presence of a respiratory infection, including cough, fever, shortness of breath or sore throat;
- Being in contact with any person known to be infected with COVID-19, who has not tested negative within the past 14 days.⁷

The emergency order was extended on May 18, 2020.⁸ On September 1, 2020, DEM extended the order again and modified it to allow visitation by essential caregivers⁹ and compassionate care visitors¹⁰ under certain circumstances.¹¹ On October 22, 2020, DEM extended the order for a second time and modified it to allow general visitors under certain circumstances.¹² Finally, on March 22, 2021, DEM rescinded the previous executive orders that prohibited visitation and instead required all affected facilities to maintain visitation and infection control policies in accordance with all state and federal laws.¹³

Post-COVID-19 Visitation Reform in Other States

The visitation restrictions imposed on different types of long-term care facilities across the nation, while necessary for the overall wellbeing of those residents, still had negative effects on the residents and their families. A recent study concluded that when implementing visiting restrictions in health care

⁶ Id.

⁷ Id.

⁸ State of Florida, Division of Emergency Management, Emergency Order Number 20-007 (May 18, 2020), available at <https://www.floridadisaster.org/globalassets/executive-orders/covid-19/dem-order-no.-20-007-in-re-covif-19-public-health-emergency-issued-may-18-2020.pdf> (last accessed January 24, 2022).

⁹ Essential caregivers are those who have been given consent by the resident or his or her representative to provide services and/or assistance with activities of daily living to help maintain or improve the quality of care or quality of life for a facility resident. Essential caregivers include persons who provided services before the pandemic and those who request to provide services.

¹⁰ Compassionate care visitors provide emotional support to help a resident deal with a difficult transition or loss, upsetting event, or end-of-life. Compassionate care visitors maybe allowed entry into facilities on a limited basis for these specific purposes.

¹¹ State of Florida, Division of Emergency Management, Emergency Order Number 20-009 (September 1, 2020), available at <https://www.floridadisaster.org/globalassets/covid19/dem-order-20-009-signed.pdf> (last accessed January 24, 2022).

¹² State of Florida, Division of Emergency Management, Emergency Order Number 20-011 (October 22, 2020), available at <https://www.floridadisaster.org/globalassets/executive-orders/covid-19/dem-order-no.-20-011-in-re-covid-19-public-health-emergency-issued-october-22-2020.pdf> (last accessed January 24, 2022).

¹³ State of Florida, Division of Emergency Management, Emergency Order Number 21-001 (March 22, 2021), available at https://ahca.myflorida.com/docs/DEM_Emergency_Order_21-001.pdf (last accessed January 24, 2022).

services, decision makers and nurses need to be aware of their potential negative effects and adapt the provision of care to compensate for such effects.¹⁴

Several states have recently passed legislation to find a common ground between protecting residents of long-term care facilities and over-protecting them.

Alabama

Requires health care facilities, including nursing homes, to allow at least one caregiver or visitor to visit each patient or resident during a public health emergency.¹⁵

Connecticut,¹⁶ Indiana,¹⁷ North Dakota,¹⁸ Oklahoma,¹⁹ and Texas²⁰

Allow long-term care facility residents to designate essential support persons who may visit and support their physical, emotional, psychological, and socialization needs.

New Jersey

Requires each long-term care facility to adopt and institute a written isolation prevention plan and have appropriate technology, staff, and other capabilities in place to prevent the facility's resident from becoming isolated during public emergencies.²¹

South Dakota

Allows residents of an ALF to receive visitors of their choosing, at the time of their choosing, provided the visitation does not impose upon the rights of another resident.²²

Intermediate Care Facilities for the Developmentally Disabled

An intermediate care facility for the developmentally disabled (ICFDD) provides institutional care for individuals with developmental disabilities. A developmental disability is a disorder or syndrome that is attributable to intellectual disability, cerebral palsy, autism, spina bifida, Down syndrome, Phelan-McDermid syndrome, or Prader-Willi syndrome; that manifests before the age of 18; and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely.²³

ICFDDs are licensed and regulated by the Agency for Health Care Administration (AHCA) under Part VIII of ch. 400, F.S., and Chapter 59A-26, F.A.C. ICFDDs provide the following services: nursing services, activity services, dental services, dietary services, pharmacy services, physician services, rehabilitative care services, room/bed and maintenance services and social services.²⁴ ICFDD services are only covered by the Medicaid program. Individuals who have a developmental disability and who meet Medicaid eligibility requirements may receive services in an ICFDD.

There are also two public ICF/DDs known as developmental disabilities centers that are operated by APD — Sunland in Marianna, and Tacachale in Gainesville.

¹⁴ Karen Hugelius, Nahoko Harada, Miki Marutani, *Consequences of Visiting Restrictions During the COVID-19 Pandemic: An Integrative Review*, International Journal of Nursing Studies, vol. 121 (September 2021), available at <https://www.sciencedirect.com/science/article/pii/S0020748921001474> (last accessed January 24, 2022).

¹⁵ 2021-470, § 1, eff. 5/18/2021.

¹⁶ Conn. Gen. Stat. § 31-NEW-Connecticut Essential Workers COVID-19 Assistance Program and Fund Established.

¹⁷ Indiana Public Law 142 (April 29, 2021).

¹⁸ N.D. Cent. Code § 50-10.3 (2021).

¹⁹ Oklahoma HB 2566-2021 Legislative Session, enacted April 27, 2021.

²⁰ Texas Senate Joint Resolution 19-2021 Legislative Session, filed with the Secretary of State June 1, 2021.

²¹ New Jersey P.L. 2020, c. 113.

²² South Dakota, 2021 H.J. 570.

²³ See s. 393.063(12), F.S.

²⁴ Agency for Health Care Administration, *Intermediate Care Facility for Individuals with Intellectual Disabilities (ICF/DD) Services*, available at: https://ahca.myflorida.com/medicaid/Policy_and_Quality/Policy/behavioral_health_coverage/bhfu/Intermediate_Care.shtml (last accessed January 22, 2022).

As of December 21, 2021, there are 104 licensed ICFDDs in Florida with a total of 2,806 beds.²⁵

ICFDD Visitation Requirements

Florida law requires ICFDDs to ensure that all residents of ICFDDs have an unrestricted right to visitation, subject to reasonable rules of the facility.²⁶

The Centers for Medicare and Medicaid Services (CMS) conditions of participation require ICFDDs to promote visits by individuals with a relationship to the client and promote visits by parents or guardians to any area of the facility that provides direct client care services to the client, consistent with the rights of the client and privacy of other clients.²⁷ On June 3, 2021, CMS issued a memo to require all ICFDDs to allow indoor visitation at all times.²⁸

ICFDDs are not currently required to establish a visitation schedule to allow visitation for any period of time and visitation logs are not required. Currently, ICFDDs are not required to implement safety protocols relating to resident visitation.

ICFDD Fines and Penalties

APD is authorized to revoke or suspend a license of an ICFDD or impose an administrative fine on a facility of up to \$1,000 per day for failure to comply any of the requirements in ch. 393, F.S. The aggregate amount of any fine may not be more than \$10,000.²⁹

Nursing Homes

Nursing homes provide 24 hour a day care, case management, health monitoring, personal care, nutritional meals and special diets, physical, occupational, and speech therapy, social activities, and respite care for those who are ill or physically infirm. Nursing homes are regulated by the Agency for Health Care Administration (AHCA) under the Health Care Licensing Procedures Act (Act) in part II of chapter 408, F.S., which provides licensure requirements for all provider types regulated by AHCA, and part II of chapter 400, F.S., which includes unique provisions for nursing home licensure beyond the uniform criteria in the Act.

As of December 21, 2021, there are 705 licensed nursing homes in Florida with a total of 85,778 beds.³⁰

Nursing Home Visitation Requirements

Florida law requires nursing homes to adopt the residents' bill of rights, which provides the rights and responsibilities of residents, and requires nursing homes to treat such residents in accordance with its provisions.³¹ Nursing homes must provide a copy of the resident's bill of rights to each resident or the resident's legal representative at or before the resident's admission to the facility.³² The residents' bill of rights includes, among other things, the right to visit with any person during visiting hours.³³

²⁵ Florida Agency for Health Care Administration, Agency Analysis of 2022 HB 987 (December 27, 2021).

²⁶ S. 393.13(4)(a)3., F.S.

²⁷ 42 C.F.R. § 483.420

²⁸ Centers for Medicare & Medicaid Services, memorandum on visitation at intermediate care facilities for individuals with intellectual disabilities and Psychiatric Residential Treatment Facilities - Coronavirus Disease -2019, ref: QSO-21-14-ICF/IID & PRTF REVISED June 3, 2021, available at <https://www.cms.gov/files/document/qso-21-14-icfiid-prtf-revised-06032021.pdf> (last accessed January 24, 2022).

²⁹ S. 393.0673(1), F.S.

³⁰ *Supra* at note 25.

³¹ S. 400.022(1), F.S.

³² S. 400.022(2), F.S.

³³ S. 400.022(1)(b), F.S.

Nursing homes are not currently required to establish a visitation schedule to allow visitation for any period of time and visitation logs are not required. Currently, nursing homes are not required to implement safety protocols relating to resident visitation.

On November 12, 2021, CMS issued a memo requiring nursing homes that are federally certified to accept Medicare or Medicaid to allow indoor visitation at all times and for all residents.³⁴

Nursing Home Fines and Penalties

AHCA is authorized to deny, revoke, or suspend the license of a nursing home, or impose an administrative fine on a nursing home of up to \$500 per day for each violation of any provision of part II of ch. 400, F.S. or applicable rules. The aggregate amount of any fine may not be more than \$5,000.³⁵

Assisted Living Facilities

An assisted living facility (ALF) 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.³⁶ A personal service is direct physical assistance with, or supervision of, the activities of daily living and the self-administration of medication.³⁷ Activities of daily living include ambulation, bathing, dressing, eating, grooming, toileting, and other similar tasks.³⁸ ALFs are licensed and regulated by AHCA under part I of ch. 429, F.S., and part II of ch. 408, F.S., and rule 59A-36, F.A.C.

Facilities are required to provide services in a manner that reduces the risk of transmission of infectious diseases.³⁹ ALFs are also required to include in their admission packet, written infection control policies and procedures, detailing the sanitation methods and other precautions used to combat the spread of infectious diseases.⁴⁰ If any staff member of an ALF has, or is suspected of having, a communicable disease, the facility is required to prohibit the staff member from performing their duties until a written statement is submitted from a health care provider indicating that the individual does not constitute a risk of transmitting a communicable disease.⁴¹

As of December 21, 2021, there are 3,139 licensed ALFs in Florida with a total of 114,979 beds.⁴²

Assisted Living Facility Visitation Requirements

The Resident Bill of Rights prohibits an ALF from depriving an ALF resident of any civil or legal rights, benefits, or privileges guaranteed by law, the Florida Constitution, or the Constitution of the United States.⁴³ The Resident Bill of Rights requires ALFs to ensure that every resident is provided with certain enumerated rights, including the right to unrestricted private communication and visitation with any person they choose between the hours of 9 a.m. and 9 p.m.⁴⁴ Upon request, the facility is required to make provisions to extend visiting hours for caregivers and out-of-town guests, and in similar situations.⁴⁵

³⁴ Centers for Medicare & Medicaid Services, memorandum nursing home visitation, Ref: QSO-20-39-NH Revised November 12, 2021, available at <https://www.cms.gov/files/document/qso-20-39-nh-revised.pdf> (last accessed January 24, 2022).

³⁵ S. 400.121(1), F.S.

³⁶ S. 429.02(5), F.S.

³⁷ S. 429.02(18), F.S.

³⁸ S. 429.02(1), F.S.

³⁹ Rule 59A-36.007(10), F.A.C.

⁴⁰ Rule 59A-36.007(5)(d), F.A.C.

⁴¹ Rule 59A-36.010(2)2., F.A.C.

⁴² *Supra* at note 25.

⁴³ S. 429.28, F.S.

⁴⁴ S. 429.28(1)(d), F.S.

⁴⁵ *Id.*

ALFs are not currently required to establish a visitation schedule to allow visitation for any period of time and visitation logs are not required. Currently, ALFs are not required to implement safety protocols relating to resident visitation.

ALF Fines and Penalties

Section 408.813, F.S. categorizes violations into four classes according to the nature and gravity of its probable effect on residents.

Class "I" violations are those conditions or occurrences related to the operation and maintenance of a provider or to the care of clients which AHCA determines present an imminent danger to the clients of the provider or a substantial probability that death or serious physical or emotional harm would result therefrom.⁴⁶ AHCA may impose an administrative fine of not less than \$5,000 and not exceeding \$10,000 for each class "I" violation.⁴⁷

Class "II" violations are those conditions or occurrences related to the operation and maintenance of a provider or to the care of clients which AHCA determines directly threaten the physical or emotional health, safety, or security of the clients, other than class I violations.⁴⁸ AHCA may impose an administrative fine of not less than \$1,000 and not exceeding \$5,000 for each class "II" violation.⁴⁹

Class "III" violations are those conditions or occurrences related to the operation and maintenance of a provider or to the care of clients which AHCA determines indirectly or potentially threaten the physical or emotional health, safety, or security of clients, other than class I or class II violations.⁵⁰ AHCA may impose an administrative fine of up to \$500 and not more than \$1,000 for each class "III" violation.⁵¹

Class "IV" violations are those conditions or occurrences related to the operation and maintenance of a provider or to required reports, forms, or documents that do not have the potential of negatively affecting clients. These are violations that AHCA determines do not threaten the health, safety, or security of clients.⁵² AHCA may impose an administrative fine of up to \$100 and not more than \$200 for each violation.⁵³

Effect of the Bill

The bill allows a resident of an ICFDD, nursing home, or ALF, or his or her guardian or legal representative, to designate an essential caregiver and prohibits a facility from refusing visitation by the essential caregiver. An essential caregiver can be a family member, friend, guardian, or other individual.

⁴⁶ S. 408.813(2)(a), F.S.

⁴⁷ S. 429.19(2)(a), F.S.

⁴⁸ S. 408.813(2)(b), F.S.

⁴⁹ S. 429.19(2)(b), F.S.

⁵⁰ S. 408.813(2)(c), F.S.

⁵¹ S. 429.19(2)(c), F.S.

⁵² S. 408.813(2)(d), F.S.

⁵³ S. 429.19(2)(d), F.S.

The bill requires AHCA and APD to develop guidelines to assist facilities in establishing essential caregiver visitation policies and procedures, which must require facilities to:

- Allow a resident or client, or his or her guardian or legal representative, to designate an essential caregiver for in-person visitation in the same manner that a resident or client would designate a power of attorney;
- Establish a visitation schedule allowing the essential caregiver to visit the resident or client for at least 2 hours every day;
- Establish procedures to enable physical contact between the resident or client and essential caregivers;
- Establish a visitor's log; and
- Obtain the signature of the essential caregiver certifying that the caregiver agrees to follow the facility's safety protocols.

Failure to comply with any of the above requirements could result in the denial, revocation or suspension of a facility's license or the imposition of an administrative fine.

The bill allows a facility to revoke an individual's designation as an essential caregiver if the person violates the facility's safety protocols. The facility's safety protocols cannot be more stringent than the safety protocols established for the staff of the facility.

The bill also allows a facility to suspend all essential caregiver visitation rights one time only for up to seven days if in-person visitation poses a serious health risk to the residents of the facility. The bill requires facilities to allow visitation by essential caregivers during a suspension on visitation on a case by case basis under certain circumstances.

Specifically, visitation by essential caregivers during a suspension must be allowed under any circumstances deemed appropriate by APD or AHCA, and when:

- An end-of-life situation exists;
- A client who was living with his or her family before recently being admitted to the provider's facility is struggling with the change in environment and lack of physical family support;
- A client is grieving the loss of a friend or family member who recently died;
- A client needs cueing or encouragement to eat or drink that was previously provided by a family member or caregiver, and the client is experiencing weight loss or dehydration; and
- A client who used to talk and interact with others is experiencing emotional distress, is seldom speaking, or is crying more frequently.

The bill prohibits a facility from requiring essential caregivers to provide necessary care and services to residents.

Finally, the bill requires APD and AHCA to publish a web page explaining essential caregiver visitation rights.

The bill provides an effective date of July 1, 2022.

B. SECTION DIRECTORY:

Section 1: Creates s. 393.131, F.S., relating to essential caregivers; in-person visitation.

Section 2: Creates s. 400.026, F.S., relating to essential caregivers; in-person visitation.

Section 3: Creates s. 429.276, F.S., relating to essential caregivers; in-person visitation.

Section 4: 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:
None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:
None.

2. Expenditures:
None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

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 bill provides sufficient rule-making authority to AHCA and APD to implement the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On January 27, 2022, the Finance & Facilities Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment:

- Removes the authority for a facility to request an extension on a suspension of essential caregiver visitations;
- Requires facilities to allow visitation by essential caregivers during a suspension on visitation under certain circumstances on a case by case basis; and
- Requires APD and AHCA to publish a web page explaining essential caregiver visitation rights.

The analysis is drafted to the committee substitute as passed by the Finance & Facilities Subcommittee.