Bill Number: SB 2050 (formerly PCB 7176)  
Bill Sponsor: Committee on Children, Families, and Elder Affairs  
Subject: Assisted Living Facilities  
Companion Bill(s): None  
Similar Bill(s): SB 2074, Committee on Health Regulation  
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I. SUMMARY  
This bill revises and amends laws relating to assisted living facilities (ALFs).  

II. PRESENT SITUATION  
An ALF is a residential facility that provides housing, meals and one or more personal services for a period exceeding 24 hours to one or more adults, typically elders and disabled adults, who are not related to the owner or administrator. ALFs are licensed by the Agency for Health Care Administration (AHCA). The Department of Elder Affairs (DOEA) is responsible for promulgating rules for ALFs which are contained in chapter 58A-5, Florida Administrative Code.¹  

ALFs interact with a number of agencies, including the Department of Children and Families (“the Department”) which takes abuse reports and provides mental health support to those facilities with a limited mental health license, the Attorney General’s Office which may conduct Spot Check monitoring visits and the Long-Term Care Ombudsman Program (“the program”) which advocates for residents in long-term care facilities, including ALFs.  

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 such programs under the OAA. See § 3058g U.S.C. (2006). 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 nursing home, assisted living facility, adult family-care home and continuing care retirement care residents. Florida currently has approximately 300 volunteer long-term care ombudsmen who dedicate their time and  

¹ An excellent description of ALFs and the rules regulating them is available in the Senate staff analysis of SB 2050. Accordingly, this summary focuses on the Ombudsman Program’s role in monitoring ALFs and issues identified by the program.
energy – often more than the 20 hours required per month, per volunteer – to advocate for the state’s frailest citizens.

The program is administered by the DOEA. Paid staff members at the state and local levels coordinate and support the work of certified volunteers serving on district councils. The program is supported with both federal and state funding. The program is under the direction of the State Long-Term Care Ombudsman (“the Ombudsman”).

Ombudsmen have the following responsibilities under federal and state laws:

- Identify, investigate and resolve complaints made by, or on behalf of residents
- Monitor and comment on the development and implementation of federal, state and local laws, regulations, and policies pertaining to the health, safety and welfare of residents in long-term care facilities;
- Provide information to the public regarding long-term care facilities;
- Conduct administrative assessments, at least annually, focusing on factors affecting the rights, health, safety and welfare of the residents;
- Provide assistance for the development of resident and family councils to protect the well being of residents; and,
- Inform residents, facility staff, family members, and other interested individuals about residents’ rights.

Last spring, the Miami Herald began a series of reports detailing problems with ALFs, including lack of training for administrators and staff, lack of monitoring of services provided to residents, especially mental health services, poor coordination among agencies and retaliation against residents who report problems to other agencies. The series chronicled the litany of problems reported to AHCA, the Department and to the program in ALFs primarily serving mental health residents. Many of these residents lack the ability to speak for themselves and are vulnerable to retaliation and threats of discharge. Due to its experience working with long-term care residents, the program has consistently advocated for increased protections for ALF residents, specifically regarding their relocation or termination of residency from an ALF.

ALF residents are unique under Florida law. Many require nursing home level care through the use of diversion and waiver programs, but lack the protections provided under federal and state law available to nursing home residents. They usually rent an “apartment” or “unit” but cannot quickly challenge an eviction in court because existing protections provided under landlord-tenant law specifically exempt them.

Currently, if the administrator of an ALF decides that a resident should be relocated, the facility is required to provide 45 days’ notice of the relocation or termination to the resident and document the reasons for such relocation in writing. There is no statutory requirement that a specific written notice be provided to the resident nor does the facility have to disclose to the resident the reason for relocation. The facility could comply with the statutory requirements by doing as little as informing a resident that he or she will need to move in 45 days and documenting the reasons for such relocation on a facility log or in the resident’s chart. The resident might never see the reasons for his or her relocation.

Further, the facility is not obligated to assist the resident in finding a new, safe place to live. No guidelines exist, specifying permissible reasons to relocate or terminate the residency of an ALF resident. In the current environment, if the administration decides it has a conflict with a resident, it may relocate or terminate the residency of a resident as long as it tells the resident 45 days in advance and documents...
somewhere that the resident is being discharged because the administrator does not like this resident.

As a result of this, many residents are frightened to voice their opinions on a multitude of issues affecting their care and quality of life because they fear a potentially discriminatory discharge. Although Florida law ensures residents are able to “present grievances and recommend changes in policies, procedures, and services to the staff...without restraint, interference, coercion, discrimination, or reprisal” (s. 429.28 (1)(l) F.S.), no agency or program, including Florida’s Long-Term Care Ombudsman Program, can help residents assert this fundamental right without fear of an eviction. The lone option available to residents is to retain an attorney and challenge a discriminatory discharge through an expensive and time consuming civil lawsuit. Residents often voice the opinion that it is too difficult to contest a relocation and do not attempt to initiate a lawsuit. This negatively impacts the quality of life for all ALF residents.

Available agency and program data does not provide the full scope of the magnitude of this problem. Unlike nursing homes, assisted living facilities are not charged by statute to notify the Program or the AHCA when a discharge notice is issued. See § 400.0255, Fla. Stat. (2011).

In 2008-09, the program closed 102 complaints involving inappropriate discharges in ALFs. Similar numbers of complaints were received each year, beginning in 2000 when the program began using its current data system. While this number may seem small, the program believes that the extent of the problem is much greater. As an example in nursing homes, where the program has a statutorily mandated role, inappropriate discharges consistently ranks as one of the top two complaints. Many ALF residents and family members recognize that there is little anyone can do to assist them, including the program and legal services organizations under current law, and see no reason or benefit from enlisting the program’s help.

In 2008, Senator Ronda Storms and Representative Hugh Gibson sponsored legislation (SB 2216 and HB 1401) that would have provided discharge protection for residents. During that session, the Department and the long-term care trade associations discussed and agreed to the following provisions to strengthen residents’ rights:

- Residents must receive at least a 45 day written notice prior to a proposed relocation;
- The notice must enumerate the circumstances under which a resident is being relocated, e.g., the resident’s needs cannot be met by the facility, the resident's health has improved to the point the resident no longer requires services by the facility, the health or safety of the other residents is in danger, or for nonpayment;
- A copy of the written notice would be sent by the facility to the Long-Term Care Ombudsman Program;
- Residents may request a review of the notice by the Long-Term Care Ombudsman Program; and
- The Agency for Health Care Administration would develop a standardized relocation or residency termination notice.

Neither version of the bill garnered enough votes to pass the Legislature.

In 2010, the Department of Elder Affairs forwarded a proposal to the Office of Policy & Budget for acceptance by the Governor that incorporated the agreed-upon language above, but did not include a provision affording residents with an opportunity to challenge an eviction through a hearings process. This proposal was accepted by OPB. Sen. Mike Fasano (R-11) filed SB 1102 on January 6, 2010, and Rep. Tom Anderson (R-45) filed HB 817 on January 27, 2010.

The bills were assigned to several committees, but failed to garner support and make it out of any committees. The program’s representatives met multiple times with the long-term care industry groups which argued that no problem existed. Most vigorously arguing against this proposal was the Florida Assisted Living Association, which represents only 12 percent of all ALFs in Florida. The industry was concerned about the enumerated list of acceptable reasons for eviction; however, it could cite no
additional reason that should be included on the list that was not discriminatory.

To address the industry’s concerns, the State Long-Term Care Ombudsman Council established a workgroup to foster a more positive dialogue with the trade associations in hope of reaching a possible agreement on this proposal.

Florida Legal Services, Inc. agreed that discharge protection was a problem for ALF residents. It was concerned; however, that residents had no opportunity to be heard as the 2010 proposal failed to include a hearing process.

The Elder Law Section of the Florida Bar included a discharge appeals process as one of its legislative priorities after SB 2216 and HB 1401 were proposed in 2008. It has since amended its legislative priority to include supporting “legislation that would increase and enhance the rights of residents of any long-term care facility,” permitting the Section to support proposals that would strengthen discharge procedures, but may or may not include a hearings process.

III. EFFECT OF PROPOSED CHANGES

Section 1
This section requires that the community living support plan required for mental health residents who reside in an ALF be updated annually “to ensure that the ongoing needs of the resident are addressed.” It requires the case manager to keep a record of face-to-face interactions with the resident for at least two years and that the records be available to the Department for inspection. It also tasks the Department with ensuring that adequate and consistent monitoring and enforcement of community living support plans and cooperative agreements exists.

Section 2
This section revises section 400.0078, Florida Statutes, relating to citizen access to information about the program. As revised, it would require that residents specifically receive information upon admission to a long-term care facility, explaining the confidentiality of a complainant’s name and identity and the subject matter of the complaint.

Section 3
This section amends section 415.103, Florida Statutes, to require the Department to maintain a central abuse hotline that receives reports of abuse, neglect or exploitation pursuant to the provision contained in section 9 of the bill discussed below permitting electronic monitoring of a resident’s room.

Section 4
The section revises section 415.1034, Florida Statutes, identifying those individuals who are mandatorily required to report known or suspected abuse, neglect or exploitation. Section 415.1034 would specifically require that employees or agents of state and local agencies be required to report abuse, neglect or exploitation.

Section 5
This section defines mental health professional in section 429.02, Florida Statutes.
Section 6
This section revises the requirements for an ALF to receive a limited mental health (LMH) license. Under the revised section, a facility would be required to obtain a license if the facility serves any mental health residents, rather than the current requirement that the facility obtain the LMH license if it serves 3 or more mental health residents. Additionally, this section requires that the administrator and all staff members who provide regular or direct care to residents comply with the training requirements in section 429.521, Florida Statutes.

Section 7
This section requires an ALF owner to notify AHCA of a change in administrators and to ensure that within 90 days the administrator is licensed and has completed the CORE training requirements for all ALF administrators.

Section 8
This section makes conforming changes to align with other statutory changes.

Section 9
This section revises section 429.28, Florida Statutes, the resident bill of rights for ALF residents. As revised, the resident would be required to receive 30 days’ notice of a relocation or termination of residency from the ALF. While this would reduce the notice period provided to residents, it would permit the resident or legal representative to challenge the relocation pursuant to a new section, 429.281, discussed below.

Additionally, this section adds subsection (m) to section 429.28, permitting residents to place in their room an electronic monitoring device owned and operated by the resident or provided by the resident’s legal representative or guardian.

It requires that the posted notice of the rights, obligations and prohibitions that includes the name and number for the program specifically state that the names or identities of complainants, or residents involved in the complaint along with the subject matter of the complaint are confidential.

Section 10
This section adds section 429.281, specifically setting forth the procedures for resident relocation initiated by the facility and hearings. It defines terms related to relocation and termination of residency. It requires that 30 days’ advance notice be provided to the resident, and, if known, the resident’s legal guardian or representative. It permits notice as soon as practicable to the resident and legal representative when the resident’s needs cannot be met in the ALF or the relocation or termination is necessary for the resident’s welfare or when the health or safety of other residents or employees would be endangered. When notice as soon as practicable is provided, the circumstances must be documented in the resident’s record.

The required notice must be in writing and contain all information required by rule promulgated by the Department. AHCA is required to develop a standard form to be used by all ALFs. The form must provide information on how a resident may request the program’s involvement in reviewing the notice and/or requesting or initiating a hearing through the Department’s Office of Appeals Hearings. The form also requires that a reason and explanation for the relocation be provided to the resident on the standard form. The form must describe the resident’s appeal rights.

This section requires that a copy of the form notice be provided to the resident, the resident’s legal representative and the local program office by the ALF within five business days of the resident signing the form.

It entitles a resident to a hearing and requires the program to represent the resident at the hearing when
requested by the resident. If a resident requests a hearing within 10 days of receipt of the notice, the request stays such notice until the conclusion of the hearing process.

It requires the hearing process be completed within 15 days of the receipt of a hearing request unless the facility and resident agree to extend the deadline or the resident or facility show good cause for an extension. Emergency relocations or terminations of residency would be permitted; however, notice would need to be provided before the relocation, if possible or as soon thereafter. Documentation of contacting the resident’s legal representative must be made in the resident’s chart. Notice would only be provided to the program when requested. Written notice on the standard form must be provided the following business day.

This section specifies the persons who must be present at a hearing, the resident or legal representative and the facility administrator or legal representative, and permits a representative of the program to be present at each hearing.

This section requires the Department to establish procedures by rule for the hearings requested by residents. It permits an aggrieved party to appeal a hearing officer’s decision to the appellate court in the district where the facility is located.

Section 11

This section requires an ALF administrator or staff member hired after July 1, 2012, to attend a pre-service orientation covering several topics, including caring for persons with Alzheimer’s disease, de-escalation techniques, elopement prevention and behavior management. Both the administrator and employee must affirm that the employee has attended the orientation.

It removes a number of requirements relating to education of ALF administrators.

Section 12

This section adds section 429.50, Florida Statutes, providing for licensure of ALF administrators. Every ALF must be under the direction of a licensed administrator. The Department of Health (DOH) is responsible for granting such licenses. To be eligible to be licensed, an individual must:

- Be at least 21 years old;
- Have a 4-year degree college degree that includes some coursework in health care, gerontology, or geriatrics or have a four-year degree and two years’ direct care in an ALF or nursing home or a two-year associate degree with some courses in health care, gerontology or geriatrics and two years’ direct care in a nursing home or ALF;
- Complete the training requirements and pass the competency test with a minimum score of 80;
- Complete a background screening;
- Meet other requirements of this section.

The section has a “grandfathering” provision, allowing those ALF administrators who have been continuously employed for at least two years before July 1, 2012, to apply for a license without meeting the educational requirements specified in this part and without meeting the additional CORE training requirements specified in section 429.521, Florida Statutes. The administrator must still complete the mental health training if the administrator is employed in a facility with an LMH license.

This section permits DOH to establish fees for licensure, not to exceed $250, and to promulgate rules as necessary to implement this section.

Section 13

This section permits DOH to establish by rule requirements for provisional licensure. A provisional
license may only be granted to fill an ALF administrator position which unexpectedly becomes vacant and may be issued only for one 6-month period. DOH is authorized to set fees for granting a provisional license.

Section 14

This section of the bill creates section 429.521, Florida Statutes, specifying the training requirements for ALF administrators and staff members. The Department of Elder Affairs (DOEA), in conjunction with other stakeholders, must establish a standardized CORE training curriculum. It specifies certain topics to be covered including, resident rights. DOEA must also create a standardized CORE training for ALF staff members who provide direct care to residents.

DOEA must create a competency test for administrators and one for staff members. DOEA must establish curricula for continuing education for administrators and staff members and must ensure that all continuing education includes a test.

This bill increases the CORE training requirements for an administrator, requiring an applicant for an ALF administrator license must complete 40 hours. It specifies that an applicant who fails the competency test must wait 10 days before retaking it and if the applicant fails the test three times, he/she must retake the training.

An administrator of a facility with a LMH license must complete a minimum of 8 hours of training and pass a competency test within 30 days of hire. An administrator that does not successfully complete the training within six months is ineligible to be an administrator.

Staff members who provide regular or direct care to residents must complete a minimum of 20 hours of CORE training within 90 days after employment. A staff member must pass a competency test with a score of 70. A staff member must take 8 hours of mental health training within 30 days of employment and obtain a score of 70 on the competency test.

DOEA and AHCA are both authorized to require additional, specific training courses if either determines that there are problems in the ALF which could be reduced through training.

Section 15

The section requires DOEA to approve and provide oversight for one or more third-party credentialing entities to develop and implement training. It provides requirements for the credentialing authorities.

Section 16

This section of the bill defines electronic monitoring and establishes the standards for such monitoring. It specifically states that the monitoring must be open and obvious and that the facility and agency are not civilly liable for covert monitoring. It requires AHCA to develop a standard form that is completed and signed upon admission, listing the legal requirements, including that a person who places the device in the resident’s room may be civilly liable if the privacy rights of another are violated, that the costs must be borne by the resident, but the facility must permit use of the device and the legal requirement to report abuse, neglect or exploitation.

It states that only a resident may consent to the monitoring if the resident has not been judicially determined to be incapacitated. It prohibits a power of attorney from consenting regardless of the terms of the power of attorney. It states that the resident must obtain consent from other residents living in the room before installing the device. A notice must be posted in a conspicuous location that electronic monitoring is taking place. It prohibits relocation or termination of residency based on a resident’s choice to install or not to install electronic monitoring, but it permits the facility to relocate the resident to another
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room to accommodate the resident’s choice. The bill permits the tape to be admitted into evidence in a civil, criminal or administrative action.

IV. ESTIMATED FISCAL IMPACTS ON STATE GOVERNMENT:

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A. Revenues
1. Recurring 0 0 0
2. Non-Recurring 0 0 0

B. Expenditures
1. Recurring Unknown
2. Non-Recurring Unknown

V. ESTIMATED FISCAL IMPACTS ON LOCAL GOVERNMENTS:

None.

VI. ESTIMATED IMPACTS ON PRIVATE SECTOR:

Because this bill increases regulation of ALF administrators, it will have an impact on the private sector long-term care industry. How much of an impact is unknown at this time.

VII. FISCAL COMMENTS

Additional staff will be required in several agencies which will require additional expenditures.
VIII. LEGAL ISSUES

A. Does the proposed legislation conflict with existing federal law or regulations? If so, what laws and/or regulations?

Yes. The fundamental right to privacy is impacted by the electronic monitoring. See the Senate staff analysis for a discussion of this issue.

Additionally, as discussed in the Senate staff analysis, without specific reasons for relocation provided, it may be difficult to determine if a relocation or termination of residency is legally permissible. With nursing home discharges, the hearings officer reviews the evidence to determine if the facility has established by clear and convincing evidence that the discharge is legally permissible.

Finally, the prohibition on a power of attorney consenting to electronic monitoring regardless of what is in the document seems to conflict with chapter 709, Florida Statutes. It is generally recognized that a principal can give broad powers to an agent to act on his or her behalf.

B. Does the proposed legislation raise significant constitutional concerns under the U.S. or Florida Constitutions (e.g. separation of powers, access to the courts, equal protection, free speech, establishment clause, impairment of contracts)?

As discussed, it may raise privacy concerns.

C. Is the proposed legislation likely to generate litigation and, if so, from what interest groups or parties?

Yes. Many ALF residents could begin challenging their relocations.

D. Other:

VIII. COMMENTS AND SUGGESTED AMENDMENTS:

The program recommends that the requirement that individuals be specifically informed that their complaints are confidential be deleted as this is misleading. Pursuant to the Older Americans Act and section 400.0077, Florida Statutes, all information relating to a complaint may be released under a court order or at the resident's request. The information release would include the complainant's name. Stating that this information is confidential implies that it would never be released to anyone.

The program recommends that acceptable reasons for an individual's relocation or termination of residency be specifically identified.