

**Elder Equality:
A Roadmap for Supporting and Protecting LGBT Seniors**

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INTRODUCTION AND SUMMARY OF RECOMMENDATIONS

This report presents and explains several issues relevant to LGBT seniors in Florida. The report first lays out state-level sexual orientation protections to set the landscape of existing protections under state law. It then highlights the following areas: housing and care programs, including access to caregiving, congregate homes, and hospital and hospice care; extending certain Medicaid provisions related to paying for long-term care; and veterans benefits. Each of these sections includes an explanation of the challenges LGBT seniors face, an overview of current federal and Florida law, and then concludes with suggested Florida-specific policy changes. Advocates in other states, too, can use this report to determine areas of focus and tailor state-specific changes. Below is a summary of these recommendations.

Ensure that State Aging Programs are Attentive to the Needs of LGBT Seniors

- Include LGBT seniors in the State Plan on Aging and needs assessments by state area agencies on aging to ensure that the state provides services to seniors without discrimination based on sexual orientation and gender identity or expression.
- Adopt departmental nondiscrimination policies for the Department of Elder Affairs (DOEA) and the Agency for Health Care Administration (AHCA) to govern personnel hiring and administration of funds provided through the state and the Older Americans Act (OAA).
- Include LGBT volunteers and other volunteers that will advocate on behalf of LGBT seniors as part of the state Long-Term Care Ombudsman program.
- Provide or organize cultural competency training for caregiving agencies, congregate homes, and hospital personnel, among others, through the area agencies on aging and the Long-Term Care Ombudsman program.

Extend Medicaid Impoverishment and Family Medical Leave Protections to LGBT Families

- Extend Medicaid impoverishment protections currently available to spouses and others to same-sex partners and other caregivers to improve economic security for LGBT seniors and their families.
- Pass an inclusive state Family Medical Leave Act (FMLA) in Florida to provide unmarried partners and caregivers time off from work to care for a family member. A state FMLA would benefit not only LGBT seniors, but also many others who depend on care provided by family members and other caregivers.

Protect and Support LGBT Seniors' Access to Caregiving, Health Care, and Housing

- Advance state legislation prohibiting discrimination based on sexual orientation and gender identity or expression in housing that covers congregate homes to protect LGBT seniors living in assisted living facilities and nursing homes.
- Work with state and local Housing and Urban Development (HUD) offices and the Long-Term Care Ombudsman program to ensure that congregate homes comply with new HUD regulations that prohibit discrimination in HUD-assisted housing based on sexual orientation, gender identity, or marital status.
- Adopt agency rules that ensure LGBT seniors in nursing homes and assisted living facilities can receive visits and live with their partner or individual of their choice.
- Ensure that hospitals comply with new Health and Human Services (HHS) regulations that aim to protect hospital visitation rights and reinforce these federal regulations by advancing state-level protections for visitation and medical decision-making.

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I. FLORIDA STATE-LEVEL LGBT PROTECTIONS¹

State-level sexual orientation protections fall generally into three categories: health-related antidiscrimination laws; education- and counseling-related antidiscrimination laws; and hate crimes laws. This section also includes protections based on HIV status.

A. Health-Related Antidiscrimination Laws

- Hospice programs must make services available to all terminally ill persons and their families without regard to sexual orientation (among other classifications).²
- As part of their underwriting process, health insurers³ and health maintenance organizations (HMOs)⁴ must not use sexual orientation to determine exposure to HIV. These antidiscrimination provisions aim to protect health insurance and HMO subscribers and applicants.
- Medical tests for HIV or for medical conditions related to HIV must only be given to or required of an individual if the test is based on the person's medical history.⁵
- Health insurers and HMOs must not use sexual orientation to determine which applicants or subscribers to test for HIV.⁶
- Health insurers and HMOs must not use other information to establish an applicant's sexual orientation, including the applicant's marital status, living arrangements, occupation, gender, beneficiary designation, or zip code or other territorial classification.⁷

B. Education and Counseling-Related Antidiscrimination Laws and Cultural Competency Requirements

- Teachers: The Principles of Professional Conduct for the Education Profession in Florida apply to all teachers certified by the state to teach in Florida. The Principles prohibit teachers from "harass[ing] or discriminat[ing] against any student on the basis of race, color, religion, sex, age, national or ethnic origin, political beliefs, marital status, handicapping condition, sexual orientation, or social and family background."⁸ The Principles further require that teachers "make [a] reasonable effort to assure that each student is protected from harassment or discrimination."⁹
- Mental health counselors: Before issuing a state license to a mental health counselor, the state certifies that the applicant has fulfilled certain course requirements.¹⁰ One such course requirement is "social and cultural foundations," a course covering content

¹ See Appendix for the full text of these statutes and regulations.

² FLA. STAT. § 400.6095 (2011); FLA. ADMIN. CODE r. 59C-1.0355 (2011).

³ FLA. STAT. § 627.429.

⁴ *Id.* § 641.3007. A health maintenance organization (HMO) is a group health care practice that provides health maintenance and treatment services to subscribers who pay a predetermined fixed fee set without regard to the amount or kind of services received.

⁵ § 627.429(d) (health insurance); § 641.3007(4)(d) (HMOs).

⁶ *Id.*

⁷ *Id.*

⁸ FLA. ADMIN. CODE r. 6B-1.006(3)(g) (2011).

⁹ *Id.*

¹⁰ FLA. STAT. § 491.005(4) (2011).

in “[m]ulticultural and pluralistic trends including characteristics and concerns of diverse groups based on such factors as . . . sexual orientation” in addition to “age, race, religious preference, physical disability, . . . ethnicity and culture, family patterns, gender, socioeconomic status, and intellectual ability.”¹¹

- Social workers: To be eligible for certification by the state, a candidate must pass a written theory examination administered by the Department of Health and developed by the American Association of State Social Work Boards (AASSWB).¹² Content on the written theory exam includes “[e]ffects of culture, race, ethnicity, sexual orientation, and gender.”¹³

C. Hate Crimes Law

- Penalty enhancement: The penalty for a felony or misdemeanor will increase pursuant to the schedule outlined in the statute if the crime “evidences prejudice based on . . . [the] sexual orientation” or “race, color, ancestry, ethnicity, religion, sexual orientation, national origin, homeless status, mental or physical disability, or advanced age of the victim.”¹⁴
- Reporting: The Governor, through the Florida Department of Law Enforcement, must collect and disseminate data on incidents of criminal acts that evidence prejudice based on sexual orientation, as well as the other bases outlined above.¹⁵

II. HOUSING AND CARE PROGRAMS

This section addresses the challenges LGBT seniors encounter when accessing and receiving care from caregivers, congregate homes, hospice programs, and hospitals. It begins in part (A) by providing the regulatory structure of Florida’s elder housing and care programs. Because Florida and federal law regulate these programs differently, parts (B) through (D) address access to caregiving,¹⁶ congregate homes,¹⁷ and hospital and hospice care¹⁸ separately. Each part begins with a brief explanation of the challenges facing LGBT seniors, then moves into the relevant current law, and concludes with suggestions for advocacy and policy change.

A. Regulatory Structure

The Florida Agency for Healthcare Administration (AHCA) and the Florida Department of Elder Affairs (DOEA) regulate and manage most policies and services regarding senior housing and care in Florida. The AHCA’s Bureau of Long Term Care Services is responsible for the regulation, licensure, and certification of nursing homes, assisted living facilities, and adult

¹¹ FLA. ADMIN. CODE r. 64B4-31.010 (2011).

¹² *Id.* r. 64B25-28.015(3).

¹³ *Id.* r. 64B25-28.015(4)(b). This content makes up two percent of the exam.

¹⁴ FLA. STAT. § 775.085(1)(a). The statute refers to the penalty enhancement as a “reclassification” of the penalty or offense. It provides, for example, that “a misdemeanor of the second degree is reclassified to a misdemeanor of the first degree.” *Id.*

¹⁵ *Id.* § 877.19(2).

¹⁶ *See infra* at 5.

¹⁷ *See infra* at 7.

¹⁸ *See infra* at 14.

family care homes (“congregate homes”), as well as hospice care programs. Within the AHCA, the Division of Health Quality Assurance and, specifically, the Hospital and Outpatient Services Unit is responsible for licensing, registering, and regulating hospitals.

The DOEA is the primary state agency responsible for administering human services programs for the elderly and for developing policy recommendations for long-term care.¹⁹ It is the designated state unit on aging under the Older Americans Act (OAA) of 1965, a federal initiative that aims to provide comprehensive services to the elderly. It is also responsible for ensuring that each of Florida’s eleven Area Agencies on Aging provides the elderly with the best services available.²⁰ The DOEA provides most services through its Division of Statewide Community-Based Services, which works through the state’s Area Agencies on Aging and local service providers to deliver essential services to the elderly. The DOEA directly administers a wide range of programs, including the Long-Term Care Ombudsman Program, the National Family Caregiver Support Program, and certification of trainers of Assisted Living Facility administrators.

An independent nonpartisan Advisory Council, comprised of seventeen commissioners each appointed to a three-year term, advises the Secretary of the DOEA. The governor appoints one member from each of the state’s eleven planning and service areas and two at-large members. The President of the Senate and the Speaker of the House each appoint two at-large members. The majority of the Council’s members must be age sixty or older and the governor must assure that there is “balanced minority and gender representation” on the Council.²¹

Florida funds its elder services through Older Americans Act (OAA) funds, state funds, and the Tobacco Settlement Trust Fund. *Neither the Department of Elder Affairs nor the Agency for Health Care Administration has a departmental nondiscrimination policy that governs personnel hiring or administration of funds.*

B. Access to Caregiving

Older LGBT people are often disconnected from their families of origin and are four times less likely to have children than are non-LGBT older adults.²² They are also twice as likely to live alone.²³ As a result, LGBT seniors risk being without caregivers when they need them. It also means that LGBT seniors depend more on partners, friends, and families-of-choice—referred to broadly here as “LGBT caregivers”—than the heterosexual senior population.²⁴ Given these caregiving patterns, support laws like the federal Family Medical Leave Act may not help LGBT seniors and their caregivers. Few states have their own family and medical leave laws, and fewer recognize LGBT caregivers.²⁵

¹⁹ FLA. STAT. § 430.03.

²⁰ *Id.* § 430.04.

²¹ *Id.* § 430.05.

²² Robert Espinoza, *Integrating Lesbian, Gay, Bisexual, and Transgender Older Adults into Aging Policy and Practice*, 21 PUB. POL’Y & AGING REP. 1, 9 (Summer 2011), available at <http://www.lgbtagingcenter.org/resources/resource.cfm?r=418>

²³ *Id.*

²⁴ Arnold H. Grossman, Anthony R. D’Augelli, & Eliza A. Dragowski, *Caregiving and Care Receiving Among Older Lesbian, Gay, and Bisexual Adults*, 18 J. LESBIAN & GAY SOC. SERV. 3–4, 17 (2007).

²⁵ CTR. FOR AMERICAN PROGRESS ET AL., *IMPROVING THE LIVES OF LGBT OLDER ADULTS* 33 (2010), available at www.americanprogress.org/issues/2010/04/pdf/lgbt_elders.pdf [hereinafter CAP REPORT].

i. Access to Caregiving: Current Law

Access to caregiving concerns sit outside the regulatory framework described above in part (A) because Florida does not have a law that requires *private* employers to grant employees time off to care for a family member with a serious illness. Most Florida employers with 50 or more employees have obligations to provide leave under the federal Family and Medical Leave Act (FMLA),²⁶ but this law provides little assistance to LGBT seniors whose caregivers may not fall within that law’s definition of “family.”²⁷

Florida *state* employees have some leave protections under state law.²⁸ State employees may take family medical leave for a serious family illness, including an accident; disease; condition that poses imminent danger of death; requires hospitalization involving an organ transplant, limb amputation, or other procedure of similar severity; or any mental or physical condition that requires in-home care.²⁹ Leave cannot exceed beyond six months.³⁰ The statute defines “family” narrowly to mean a child, parent, or spouse, which in turn are not defined.³¹ *The family medical leave laws thus leave many families and caregivers little security should they need to provide care for LGBT seniors.*

ii. Access to Caregiving: Suggestions for Advocacy and Policy Change

Equality Florida can undertake several actions at the state level to help improve caregivers’ ability to care for LGBT seniors. *Most crucially, Equality Florida can advocate for the passage of a state Family and Medical Leave Act that covers caregivers, regardless of whether they are related by blood or marriage.* The state FMLA could include language recognizing “an adult family member, or another individual, who provides in-home and community care to an older individual.”³² The legislature could also amend Florida’s current leave law, which applies to state employees, by adding a similar provision.

The California Family Rights Act (CFRA) provides another model of an inclusive state FMLA.³³ The CFRA requires large employers to give 12 weeks of unpaid leave to care for a seriously ill domestic partner (registered domestic partners in California are entitled to the same benefits as heterosexual spouses). Since the state of Florida does not recognize domestic partnerships or same-sex couples’ marriages and, in any case, many LGBT seniors receive care from individuals with whom they may not have a legal relationship under state law, *the LGBT*

²⁶ 29 U.S.C. § 2601 (2006) *et seq.* (covered employees are entitled to take unpaid, job-protected leave to care for the employee’s spouse, child, or parent who has a serious health condition with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave.)

²⁷ The Family Medical Leave Act (FMLA) guarantees leave to care for a parent, child, or spouse with a serious health condition; to care or bond with a newborn child or adopted or foster child; or recover from one’s own serious health condition. *See id.*

²⁸ *See* FLA. STAT. § 110.221 (2011).

²⁹ *Id.* § 110.221(1).

³⁰ *Id.* § 110.221(2)(b).

³¹ *Id.* § 110.221(1).

³² *See* CAP REPORT, *supra* note 25, at 41.

³³ CAL. FAM. CODE § 297.5 (2012); CAL. GOV. CODE § 12945.2 (2012). Essentially, the CFRA is a variation on the federal FMLA that extends an employer’s obligation to provide leave for an employee to care for a registered domestic partner.

senior population would be best served by a state FMLA that defines family by caregiving function.

Less formally, Equality Florida can leverage the National Family Caregivers Support Program, which provides grants to states to fund a range of supports that assist family and caregivers to care for their loved ones at home, including through individual counseling, support groups, caregiver training, respite care, and other supplemental assistance.³⁴ In 2006, the Program broadened its definition of family caregivers to make more LGBT caregivers eligible. The program is open not only to a spouse or blood relative, but also an “individual, who is an informal provider of in-home and community care to an older individual.”³⁵ Equality Florida can reach out to LGBT caregivers and senior centers to inform them about services they can receive from the National Family Caregiver Support Program to help bridge the gap in current caregiving laws.

More generally, Equality Florida can help improve the quality and amount of care LGBT seniors receive outside of formal congregate housing and hospital structures by advancing certain state legislation. *The Older Californians Equality and Protection Act is a helpful model. The Act requires state units on aging to include LGBT elders in needs assessments and area plans and ensure that all services for elders are free from discrimination based on sexual orientation and gender identity or expression.* Along similar lines, Equality Florida can work at the agency level with the DOEA to ensure that educational and program materials provided by senior centers, mainstream aging organizations, and Area Agencies on Aging are sensitive to and inclusive of LGBT elders.

C. Congregate Homes

LGBT seniors who access care through more formal means such as congregate homes (i.e. nursing homes or assisted living facilities) also confront challenges. Little LGBT-specific programming exists in congregate homes and facilities rarely train staff to offer culturally competent services to LGBT seniors.³⁶ LGBT seniors living in congregate homes may face discrimination by staff members and fellow residents.³⁷ For example, LGBT seniors in congregate homes risk being denied visits from caregivers and partners of whom the facility staff do not approve, even when it is illegal to deny this access.³⁸ Facility management may also refuse requests by same-sex partners who wish to room together in congregate homes.³⁹ Congregate homes further routinely refuse to involve LGBT caregivers in medical decision-making, even when a legal directive is in place.⁴⁰

³⁴ See *National Family Caregiver Support Program*, U.S. DEP’T OF HEALTH & HUMAN SVCS., ADMIN. ON AGING, http://www.aoa.gov/AoA_programs/HCLTC/Caregiver/index.aspx (last visited Mar. 31, 2012).

³⁵ 42 U.S.C. § 3030s (2006).

³⁶ NAT’L GAY & LESBIAN TASKFORCE, OUTING AGE 2010 44 (2010), *available at* http://www.thetaskforce.org/downloads/reports/reports/outingage_final.pdf [hereinafter OUTING AGE].

³⁷ CAP REPORT, *supra* note 25, at 35–36.

³⁸ *Id.* at 36.

³⁹ *Id.*

⁴⁰ *Id.*

i. Congregate Homes: Current Law

Chapter 400 of Florida Statutes governs the licensing, certification, and regulation of nursing homes and Chapter 429 governs assisted living facilities.⁴¹ As mentioned above, the AHCA licenses, certifies, and regulates nursing homes and assisted living facilities.⁴² The DOEA also regulates assisted living facilities.⁴³ The sections below outline the visitation and cohabitation rights of congregate home residents, as well as other resident rights and grievance procedures relevant to LGBT seniors.

1. Visitation Rights of Congregate Home Residents

Visitation rights differ depending on whether a resident lives in a nursing home or an assisted living facility. Florida nursing homes residents enjoy the right to visits from *any person* of the resident's choice at any time during visiting hours.⁴⁴ Facility visiting hours must be flexible and take into consideration special circumstances such as out-of-town guests and working relatives.⁴⁵ Notwithstanding the visitation policy of the facility, Florida law guarantees residents *immediate* access to family or other relatives at all times (subject to the residents right to deny or withdraw consent).⁴⁶ Chapter 400 and its corresponding regulations define neither "family" nor "relative."⁴⁷ Without a statutory or regulatory definition of family or relative, LGBT nursing home staff may limit the ability of LGBT residents to immediate visits with same-sex spouses, partners, or other family members and caregivers.

Most nursing homes receive some federal funding (usually through Medicare or Medicaid) and are thus also subject to the Nursing Home Reform Act (NHRA)⁴⁸ and Centers for Medicare and Medicaid Services (CMS) regulations,⁴⁹ which mirror Florida's nursing home visitation rights.⁵⁰ The Department of Health and Human Services (HHS) new rule on hospital visitation (explained below, in section (II)(D) on Hospitals and Hospice Care) does not explicitly

⁴¹ FLA STAT. ch. 400 (2011).

⁴² See FLA. ADMIN. CODE tit. 59 (2011).

⁴³ See *id.* ch. 58 (all non-licensing related regulations, which are dealt with in Chapter 59). Few facilities are exempt from chapters 400 and 429. Exempt facilities are those operated by the federal government; hospitals (which are addressed under chapter 395); facilities operated or owned by nationally recognized fraternal organizations in continuous operation for at least sixty years before July 1, 1989, and open only to members and their spouses; and any facility operated by an organized church whose members rely on treatment by prayer or spiritual means. See FLA. STAT. §§ 400.051, 429.04.

⁴⁴ FLA. STAT. § 400.022(1)(b).

⁴⁵ *Id.*

⁴⁶ *Id.* § 400.022 (1)(c)(2).

⁴⁷ See FLA. ADMIN. CODE ch. 59A-4.

⁴⁸ 42 U.S.C. § 1395i-3 (2006).

⁴⁹ 42 C.F.R. § 483.10 (2012). The resident has the right to visits from "immediate family" and "other relatives of the resident." Centers for Medicare and Medicaid Services (CMS) regulations define "immediate family" as "husband or wife; natural or adoptive parent, child or sibling; stepparent, stepchild, stepbrother, or stepsister; father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law; grandparent or grandchild." *Id.* § 488.301. The regulations do not define "other relatives of the resident," although the term likely refers to others who are related to the resident by blood or through marriage.

⁵⁰ Medicaid regulations differ slightly in that they give a nursing home resident the right to visit with "others who are visiting" subject to "reasonable restrictions." 42 C.F.R. § 483.10(j)(viii). Florida appears to have interpreted "reasonable restrictions" as "during visiting hours." Because same-sex partners and many LGBT caregivers will fall only into the "others who are visiting" category, restricting visitation to limited visiting hours is arguably an unreasonable restriction.

extend to nursing homes.⁵¹ These federal rules thus provide no specific additional protections for LGBT seniors in nursing homes or their caregivers.

Residents in assisted living facilities have the right to visit with any person of their choice at any time between the hours of 9:00 am and 9:00 pm, at a minimum.⁵² There are no provisions similar to those for nursing homes that guarantee either immediate or reasonable access to agencies, physicians, or immediate family or other relatives.⁵³ Upon request, the facility must extend visiting hours for caregivers and out-of-town guests, and in other similar situations.⁵⁴ Neither the statute nor regulations define “caregiver” and may thus provide an opening for partners and caregivers to secure visitation in assisted living facilities.

2. Cohabitation Rights of Congregate Home Residents

Residents in congregate homes may want to reside with their spouse or partner, if that person lives in the same facility, or another roommate of their choice. Florida *nursing home* statutory provisions do not address a nursing home resident’s right to live with a spouse, partner, or roommate. Federal CMS regulations give a resident “the right to share a room with his or her spouse when married residents live in the same facility and both spouses consent to the arrangement.”⁵⁵ Because the Defense of Marriage Act limits the federal definition of marriage to heterosexual spouses, this provision provides no assistance to same-sex spouses of LGBT seniors, much less unmarried same-sex partners.

Florida law gives residents of *assisted living facilities* the right to share a room with their spouse if both are residents of the facility.⁵⁶ The statute does not define “spouse,” but, again, given that Florida law does not recognize marriages of same-sex couples, it is unlikely that a resident’s same-sex spouse (or unmarried partner) would fall within the term “spouse.” *Florida law, however, does provide that “a resident shall be given the option of . . . choosing his or her roommate.”*⁵⁷ Neither the statute nor the regulations define “roommate,” allowing for the possibility that LGBT seniors could choose their spouse or partner as a roommate if both live in the assisted living facility.

⁵¹ In its hospital visitation regulation, the Department of Health and Human Services (HHS) responded to comments it received on its proposed rule, acknowledging that several commenters suggested the rule’s requirements should apply to “hospices, nursing homes, ambulatory surgical centers (ASCs), and intermediate care facilities for the mentally disabled (ICF/MRs).” HHS went on to explain that the new hospital visitation rule does not apply to these facilities, which “require generous visitation privileges for all patients.” See Medicare and Medicaid Programs: Changes to the Hospital and Critical Access Hospital Conditions of Participation To Ensure Visitation Rights for All Patients, 75 Fed. Reg. 70831-01, 70840-41 (Nov. 19, 2010). The “generous” visitation rights are defined in the CMS regulations explained in the text above. Moreover, as noted above, Florida law ensures nursing home residents the right to visits from any person of their choice during visiting hours.

⁵² FLA. STAT. § 429.28(1)(d) (2011).

⁵³ Chapter 429, relating to assisted living facilities, defines “relative” as an individual who is the father, mother, stepmother, son, daughter, brother, sister, grandmother, grandfather, great-grandmother, great-grandfather, grandson, granddaughter, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister. See FLA. STAT. § 429.02(18).

⁵⁴ *Id.*

⁵⁵ 42 C.F.R. § 483.10(m) (2012).

⁵⁶ FLA. STAT. § 429.28(1)(g).

⁵⁷ *Id.* § 429.27(1)(a).

3. Other Resident Rights

Florida law enumerates additional rights of both nursing home and assisted living facility residents that LGBT seniors can use to address the discriminatory and abusive treatment LGBT seniors face in congregate homes. The “Residents Bill of Rights,” for example, guarantees residents the right to, among others, (1) be treated with consideration and respect and with due recognition of personal dignity, individuality, and the need for privacy; and (2) exercise civil and religious liberties, including the right to independent personal decisions.⁵⁸ The facility also cannot impose any religious beliefs or practices on the resident.⁵⁹ In addition, the Bill of Rights gives residents the right to (1) live in a safe and decent living environment, free from abuse and neglect and (2) access to adequate and appropriate health care consistent with established and recognized standards within the community.⁶⁰ The facility must also give a resident 45 days notice of relocation or termination of residency from the facility.⁶¹ It does not appear that the facility provide a reason for the relocation or eviction or that the resident has a right to appeal the facility’s decision.

Nursing home residents enjoy the rights enumerated above as well as additional protections.⁶² These protections include (1) freedom from governmental intrusion into their private life, as provided in Article I, § 23 of the Florida Constitution;⁶³ (2) the right to be free from mental and physical abuse, extended involuntary seclusion, and physical and chemical restraints; (3) the right to have privacy in treatment and in caring for personal needs; to close room doors and to have facility personnel knock before entering the room; and (4) the right to receive adequate and appropriate health care and protective and support services, including social services; mental health services, if available; planned recreational activities; and therapeutic and rehabilitative services.⁶⁴

Florida law further requires facilities to provide staff members with a statement of these rights as well as annual training to all staff members on residents’ rights.⁶⁵ *Despite all of these rights, however, Florida has no state law prohibiting sexual orientation or gender identity discrimination in housing or public accommodations, and thus no such state-level protection explicitly exists for LGBT seniors in congregate homes.*

4. Grievance Procedure for Violation of Residents’ Rights

Residents in all congregate homes have the right to present grievances and recommend changes in policies, procedures, and services to the staff of the facility, governing officials, or any other person without restraint, interference, coercion, discrimination, or reprisal. This right includes access to ombudsman volunteers and advocates and the right to be a member of, and active in, and to associate with, advocacy or special interest groups.⁶⁶

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *See id.* § 400.022. *See also id.* § 651.083(1).

⁶³ *Id.* § 651.083(1).

⁶⁴ *Id.* § 400.022.

⁶⁵ *Id.* § 400.022(2).

⁶⁶ *See id.* §§ 400.022, 651.083 (nursing homes), 429.28 (assisted living facilities).

Every nursing home must have a grievance procedure available to its residents and their families. The grievance procedure must include an explanation of how to pursue redress of a grievance and each nursing home must respond to the grievance within a reasonable time after its submission.⁶⁷ Similarly, assisted living facilities must provide residents the name, address, and telephone numbers of the local ombudsman council and central abuse hotline and, when applicable, the Advocacy Center for Persons with Disabilities, Inc., and the Florida local advocacy council, where complaints may be lodged.⁶⁸

Residents of both nursing home and assisted living facilities can report complaints to the Long-Term Care Ombudsman Councils, a program run by the DOEA that advocates for and investigates complaints by residents of congregate homes and trains facility staff about resident rights.⁶⁹ In addition, ombudsmen monitor the development and implementation of federal, state and local laws, regulations, and policies applicable to congregate homes and recommend policy changes; maintain a statewide reporting system to collect and analyze data; provide information regarding congregate homes; and annually assess each long-term facility to ensure the health, safety and welfare of the residents.⁷⁰

Residents can file a complaint directly with the DOEA, which will investigate it.⁷¹ Residents of both nursing home and assisted living facilities also have a cause of action for the violation of the rights described above.⁷² The action may be brought by the resident or his or her guardian, or by a person or organization acting on behalf of a resident with the consent of the resident or his or her guardian, or by the personal representative of the estate of a deceased resident regardless of the cause of death.⁷³

ii. Congregate Homes: Suggestions for Advocacy and Policy Change

Equality Florida can assist LGBT seniors living in congregate housing through a number of targeted regulatory and legislative fixes. More informally, Equality Florida can work closely with the DOEA and its Long-Term Care Ombudsman program to ensure that congregate homes protect LGBT seniors' rights, are attentive to grievance procedures, and train staff to offer culturally competent services.

1. Leveraging State and Federal Housing and Health Regulations

Equality Florida can use a new federal Department of Housing and Urban Development rule to protect LGBT seniors in congregate housing. *In February 2012, the Department of Housing and Urban Development adopted a rule requiring HUD-assisted or insured housing*

⁶⁷ *Id.* § 400.1183.

⁶⁸ *Id.* § 492.28(2).

⁶⁹ *Id.* § 400.006 *et seq.*

⁷⁰ See Florida Department of Elder Affairs, *Florida's Long-Term Care Ombudsmen Program*, STATE OF FLORIDA, <http://ombudsman.myflorida.com/index.php> (last visited March 31, 2012).

⁷¹ Florida's Long-Term Care Ombudsman Program, *File a Complaint*, STATE OF FLORIDA, <http://ombudsman.myflorida.com/Complaint.php> (last visited March 31, 2012).

⁷² See FLA. STAT. §§ 400.023 (nursing homes), 429.29 (assisted living facilities).

⁷³ See Florida's Long-Term Care Ombudsman Program, *File a Complaint*, STATE OF FLORIDA, <http://ombudsman.myflorida.com/Complaint.php> (last visited March 31, 2012).

*programs to make eligibility determinations without regard to actual or perceived sexual orientation, gender identity, or marital status.*⁷⁴ Specifically, the rule requires owners and operators of HUD-assisted housing, or housing whose financing is insured by HUD, to make housing available without regard to the sexual orientation or gender identity of an applicant for, or occupant of, the housing. The policy applies to HUD's rental assistance and homeownership programs, including the Federal Housing Administration (FHA) mortgage insurance programs, community development programs, and public and assisted housing programs.

This new regulation reaches LGBT seniors through at least two HUD programs that target seniors: Section 202 Supportive Housing for the Elderly Program and the Section 232 LEAN Program. First, the Section 202 Program aims to provide interest-free capital advance grants to private, nonprofit sponsors who finance housing for the elderly.⁷⁵ Section 202 housing is open to any low-income household comprised of at least one person who is at least 62 years old at the time of initial occupancy. Second, the Office of Residential Care Facilities (ORCF)-managed HUD Section 232 LEAN Program supports the construction and rehabilitation of nursing homes, assisted-living facilities, intermediate-care facilities, and board-and-care homes by providing mortgage insurance.⁷⁶

As a result of this regulation, Florida congregate homes that receive Section 202 or 232 support—or *any other HUD-insurance or assistance*—must make housing available without regard to the resident's sexual orientation, gender identity, or marital status. *Equality Florida can work closely with nursing homes, the Long-Term Care Ombudsman program, and HUD to ensure that HUD enforces its new regulations.* Equality Florida can also work with Florida housing agencies, like the Florida Housing Finance Corporation, to encourage them to promulgate a similar state-level rule that requires elder housing grantees of state funds to obtain certification as culturally competent to serve LGBT elders.

In addition, Equality Florida can work with HUD and state housing agencies to extend this new rule to cover roommate determinations by congregate homes, so that LGBT seniors can live with their partner. This new rule should allow all congregate home residents—including nursing home residents—to choose a roommate of their choice (as Florida law currently allows for assisted living facilities' residents). The DOEA and AHCA are also appropriate agencies for promulgating such regulations.

Finally, *Equality Florida can leverage the antidiscrimination protections in the Florida hospice statute.* Chapter 400 already requires hospice programs, regulated by the DOEA, to make their services available without regard to sexual orientation. Such protections should extend to nursing homes (also addressed in chapter 400) and assisted living facilities (also regulated by DOEA). Equality Florida can work with the DOEA to promulgate a rule extending

⁷⁴ See Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5662 (Feb. 3, 2012) (to be codified at 24 C.F.R. § 5, 200, 203, 236, 400, 570), *available at* <http://portal.hud.gov/hudportal/documents/huddoc?id=12lgbtfinalrule.pdf>

⁷⁵ See Section 202 Supportive Housing for the Elderly Program, U.S. DEP'T OF HOUSING & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/progdesc/eld202 (last visited Mar. 31, 2012).

⁷⁶ See General Overview of FHA Insurance and LEAN Section 232, U.S. DEP'T OF HOUSING & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/federal_housing_administration/healthcare_facilities/section_232/lean_processing_page/general_overview_of_fha_insurance (last visited Mar. 31, 2012).

this protection to assisted living facilities and with the AHCA to extend this protection to nursing homes. With such a nondiscrimination policy in place, Equality Florida might then have more leverage to work with the AHCA to promulgate a regulation specifically defining “other relatives” under the nursing home statute to include same-sex spouses, partners, and other LGBT caregivers.

2. Using Resident Grievance Procedures

Many of the rights guaranteed to residents of Florida congregate homes are written broadly and can be used to protect against sexual orientation discrimination in the provision of congregate home care and services, and even against the refusal of a congregate home to let a same-sex couple share a room. An individual resident denied visits from a spouse, partner, or caregiver or the choice to live with his or her partner can file a complaint through official grievance procedures. The resident can file a civil action in court arguing that the facility has violated his or her right to be treated with “consideration and respect and with due recognition of personal dignity, individuality, and the need for privacy,” or his or her right to “exercise civil liberties, including the right to independent personal decisions.”⁷⁷

Complaints made through formal grievance proceedings as opposed to the courts are, on average, more likely to be received favorably because volunteers working for the Long-Term Care Ombudsman handle them. *Equality Florida and partner organizations can help address the composition of the volunteer ombudsman program. In addition, advocates can provide LGBT cultural competency training to the Ombudsman program, which in turn can train or organize trainings of, facility staff.* Because nursing home statutes are largely silent about roommate selection, an LGBT senior invoking these rights with support from an Ombudsman volunteer may have some power to secure the right to live with his or her partner through informal negotiations between the senior, the Ombudsman, and the nursing home. In assisted living facilities where residents may choose their roommate, such negotiations can help counteract discriminatory disapproval from facility staff. Similarly, with visitation rights, an Ombudsman can help make sure that facility staff interpret undefined terms such as “caregiver” (for assisted living facilities) and “other relatives” (for nursing homes) so that facilities treat LGBT seniors, their family, and their caregivers fairly.

Promulgating regulations that clearly give LGBT caregivers and partners broad visitation and cohabitation rights is one way to secure LGBT seniors’ rights. Nevertheless, educating and working with the Long-term Care Ombudsman may be a more immediate way for Equality Florida to protect LGBT seniors in congregate homes during any pending rulemaking and to better ensure rules will be understood, followed, and enforced once promulgated.

3. Advocate for Mandatory Cultural Competency Training and Programs

To address the training of care program staff, Equality Florida can advocate for adjustments to AHCA and DOEA regulations for the training of health professionals to include mandatory LGBT cultural competency training. To ensure enforcement of this training requirement, Equality Florida can work with the DOEA to promulgate regulations that mandate

⁷⁷ FLA. STAT. § 429.28(1).

that any agency receiving public aging funds adopt comprehensive LGBT cultural competency programs.

4. Advocate for Nondiscrimination Laws

Finally, *Equality Florida* can also work with the state legislature to pass a law prohibiting discrimination based on sexual orientation or gender identity or expression in housing and public accommodations. While many of the regulations proposed above can have the same effect as a broader nondiscrimination act, legislation can be farther-reaching and would have greater force and would not be as easily overturned by a subsequent legislature. Legislation would also likely give agencies greater authority to regulate more extensively to protect LGBT seniors' rights. Of course, such legislation may be more difficult to pass than regulations are to promulgate.

D. Hospital and Hospice Care

As with congregate homes, LGBT seniors and their caregivers face discrimination in hospitals and hospice programs. In many states, including Florida, LGBT caregivers cannot represent LGBT elders in health care situations, hospice care decisions, or end-of-life care situations because they are not related by blood or marriage.⁷⁸ When state law includes LGBT caregivers in medical decision-making, they usually prioritize marriage or blood relations over the LGBT caregiver.⁷⁹ Moreover, visitation may be restricted for family members not related by blood or marriage, including same-sex partners.⁸⁰

i. Hospital and Hospice Care: Current Law

Chapter 400 of the Florida Statutes governs the licensing, certification, and regulation of hospice care programs, and chapter 395 governs hospitals.

1. Hospice Care

The DOEA in conjunction with the AHCA regulates hospice care.⁸¹ A hospice program is a program that provides a continuum of palliative and supportive care for the terminally ill patient and his or her family⁸² and a hospice facility houses inpatient beds licensed exclusively to the hospice program, but does not house any inpatient beds licensed to a hospital or nursing home.⁸³

Florida law requires that each hospice program to make its services available to all terminally ill persons and their families without regard to age, gender, national origin, *sexual orientation*, disability, diagnosis, cost of therapy, ability to pay, or life circumstances.⁸⁴ This law

⁷⁸ OUTING AGE, *supra* note 36, at 61.

⁷⁹ CAP REPORT, *supra* note 25, at 9.

⁸⁰ *Id.* at 61.

⁸¹ FLA. ADMIN. CODE ch. 58A-2 (2011) (regulation by DOEA), 59A-35 (licensing by AHCA).

⁸² *Id.* ch. 59C-1.0355(2)(f).

⁸³ *Id.* ch. 59C-1.0355(2)(8).

⁸⁴ FLA. STAT. § 400.6095 (2011) (emphasis added). This requirement does not apply to residential facilities, which are facilities operated by a licensed hospice program to provide a residence for hospice patients (as opposed to care in the patient's home or at the hospital). See FLA. ADMIN. CODE r. 59C-1.0355(2)(j).

is one of the only Florida provisions that specifically protects against sexual orientation-based discrimination.

Each hospice program must also develop a “plan of care” for each patient, which includes identification of the “primary caregiver,” or an alternative plan of care in the absence of a primary caregiver, to ensure that the patient’s needs are met.⁸⁵ The statute does not define “primary caregiver,” but should include a same-sex spouse, partner, or other caregiver of the senior.

2. Hospital Care

The ACHA regulates and licenses hospitals, primarily pursuant to chapter 395.⁸⁶ Here, the Patient’s Bill of Rights and Responsibilities may be particularly helpful in protecting LGBT seniors from abuse and unequal treatment.⁸⁷ It requires health care facilities and providers to observe stated standards regarding a patient’s right to individual dignity and privacy, among other rights.⁸⁸ The nondiscrimination provision in the Patients’ Bill of Rights protects a patient’s rights to “impartial access to medical treatment or accommodations, regardless of race, national origin, religion, handicap, or source of payment,”⁸⁹ but not gender, sexual orientation, or gender identity.⁹⁰

With respect to visitation rights, current Florida law provides little protection. Florida’s Patient’s Bill of Rights directly addresses neither the rights of spouses, partners, relatives, or other representatives of the patient, nor the patient’s rights to allow these individuals to visit. No other Florida statute address visitation rights in hospitals. Further, a Florida court recently dismissed a suit on behalf of a same-sex partner against a hospital that denied access to her dying partner and refused to recognize that she held her partner’s health care power of attorney.⁹¹

Spurred by this Florida decision, the federal government promulgated regulations requiring all hospitals that receive Medicare or Medicaid funds to develop policies that allow

⁸⁵ FLA. STAT. § 400.6095(5)(a).

⁸⁶ *See id.* ch. 408.

⁸⁷ *Id.* § 381.026(4)(a)(1) *et seq.*

⁸⁸ Other rights include: prompt response to questions and requests; reasonable possession and use of personal property; know the name, function, and qualifications of the patient’s caregivers; know about available patient support services; know his or her diagnosis, treatment plan, alternatives, risks, and prognosis, unless medically inadvisable, and the patient has a right to refuse the information; refuse treatment; know the rules or regulations of the facility applicable to patient conduct; express grievances; be informed of financial resources available for his or her care; receive a reasonable estimate of costs before treatment and an itemized bill and an explanation of the charges; treatment for any emergency medical condition that will deteriorate from failure to provide such treatment; any mode of treatment that is, in his or her own judgment and the judgment of his or her health care practitioner, in the best interests of the patient, including complementary or alternative health care treatments. *See id.*

⁸⁹ FLA. STAT. § 381.026(4)(d)(1).

⁹⁰ Florida’s public accommodations law protects against discrimination based on sex, but not sexual orientation or gender identity. It provides: “All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this chapter, without discrimination or segregation on the ground of race, color, national origin, sex, handicap, familial status, or religion.” *Id.* § 760.08.

⁹¹ *See Langebehn v. Jackson Mem’l Hosp.*, Case No. 08-21813-CIV-JORDAN (S.D.Fl. 2009). Langebehn’s case drew widespread attention to discriminatory hospital visitation policies and disregard of legal documents already in place.

patients to designate anyone, including a same-sex spouse, a partner, or close friend, as visitors.⁹² Essentially all hospitals in the United States receive Medicare or Medicaid funds, so the rule's reach is substantial. Oral designation of a "support person" is sufficient to establish who can visit.⁹³ If the patient becomes unable to say whether or not a visitor is allowed, the "support person" has the authority to make decisions about visitors on the patient's behalf.⁹⁴ If the patient is incapacitated and cannot make an oral designation, hospital staff must, in general, respect the statement by a patient's "support person" that he or she is that person.⁹⁵ It is important to note that the regulation addresses designation as *visitors*—not individuals designated to make medical decisions.

3. Representing LGBT Seniors in Health Care and End-of-Life Decisions

Florida law also provides little protection to LGBT seniors and their caregivers with respect to health care decisions in a hospital or end-of-life care decisions in any facility. An individual can designate a "health care surrogate" in an advanced directive and that surrogate may be anyone of the individual's choosing;⁹⁶ however, if the surrogate is not the individual's spouse, the spouse or adult children must be informed of this decision.⁹⁷ While this law gives rights to LGBT caregivers should they execute a health care surrogate document, there is still a risk that Florida hospitals would not recognize an LGBT patient's advanced directive,⁹⁸ although the HHS regulation described above requires hospitals to respect that document. If an individual has not designated a health care surrogate, as is often the case, Florida law allows the following individuals (in the specified order) to make health care decisions for the patient:

- (1) the judicially appointed guardian of the patient who has been authorized to consent to medical treatment;
- (2) the patient's spouse;
- (3) an adult child of the patient, or if the patient has more than one adult child, a majority of

⁹² See 42 C.F.R. § 482.13 (2012). Specifically, the regulation provides that a hospital must: "Inform each patient (or support person, where appropriate) of the right, subject to his or her consent, to receive the visitors whom he or she designates, including, but not limited to, a spouse, a domestic partner (including a same-sex domestic partner), another family member, or a friend, and his or her right to withdraw or deny such consent at any time." *Id.* § 482.13(2). A hospital "cannot deny visitation privileges based on race, color, national origin, religion, sex, gender identity, sexual orientation, or disability." *Id.* § 482.13(3).

⁹³ See Medicare and Medicaid Programs: Changes to the Hospital and Critical Access Hospital Conditions of Participation To Ensure Visitation Rights for All Patients, 75 Fed. Reg. 70831, 70836 (Nov. 19, 2010) (to be codified at 42 C.F.R. §§ 482, 485), available at <http://www.gpo.gov/fdsys/granule/FR-2010-11-19/2010-29194/content-detail.html>.

⁹⁴ *Id.* at 70836.

⁹⁵ *Id.* at 70837. Only when more than one person claims the right to be an incapacitated patient's "support person" can the hospital require documentation. *Id.* at 70837. Documentation can include an advanced directive; existence of legal relationship recognized by another state; an affidavit acknowledging a committed relationship; financial interdependence or shared residence; written documentation from the patient even if not a legally-recognized advanced directive. *Id.* Thus, if a conflict arises, although the hospital may require documentation, the rule does not require the hospital to choose a legal relative/family member recognized by state law (i.e. parent) over a family member the state law does not recognize. Alternatively, however, the rule does not require that a partner or same-sex spouse be chosen over a parent; though the hospital must make these decisions without discrimination based on the sexual orientation or gender identity of the patient or "support person." Thus, a policy or practice of choosing the parent of the lesbian or gay patient over that patient's spouse or partner, but choosing the spouse or partner of a heterosexual patient over his or her parent would likely violate the rule.

⁹⁶ FLA. STAT. § 765.202 (2011).

⁹⁷ *Id.* § 765.204(3).

⁹⁸ See, e.g., Summary of *Langebehn v. Jackson Memorial Hospital*, LAMBDA LEGAL, <http://www.lambdalegal.org/in-court/cases/langbehn-v-jackson-memorial> (last visited March 31, 2012).

the adult children who are reasonably available for consultation;

(4) a parent of the patient;

(5) the adult sibling of the patient or, if the patient has more than one sibling, a majority of the adult siblings who are reasonably available for consultation;

(6) an adult relative of the patient who has exhibited special care and concern for the patient and who has maintained regular contact with the patient and who is familiar with the patient's activities, health, and religious or moral beliefs;

(7) a close friend of the patient; or

(8) a clinical social worker.⁹⁹

This order-of-priority list privileges legal and blood relations over same-sex spouses or families-of-choice. Under state law, "spouse" does not include a same-sex spouse. Although the statute does not define "relative," it is likely limited to blood and legal relatives. "Close friend of the patient" means "any person 18 years of age or older who has exhibited special care and concern for the patient, and who presents an affidavit to the health care facility or to the attending or treating physician stating that he or she is a friend of the patient; is willing and able to become involved in the patient's health care; and has maintained such regular contact with the patient so as to be familiar with the patient's activities, health, and religious or moral beliefs."¹⁰⁰ A close friend will only be given decision-making authority "if no individual in a prior class is reasonably available, willing, or competent to act."¹⁰¹ An LGBT caregiver or partner could fit into the category of "close friend," but must overcome substantial hurdles before being given decision-making authority.

ii. Hospital and Hospice Care: Suggestions for Advocacy and Policy Change

Recent federal HHS regulations provide some inroads to improving written or ad hoc discriminatory hospital visitation policies. Equality Florida can also work with the state legislature to create stronger default rules that will allow LGBT caregivers to make medical decisions on behalf of LGBT seniors.

1. Leveraging Health and Human Services (HHS) Rule on Hospital Visitation

As noted above, HHS regulations now require all hospitals that receive Medicare and Medicaid funds to develop visitation policies that allow patients to designate anyone, including a same-sex spouse, a partner, or close friend, as visitors.¹⁰² *To supplement this rule at the state level, Equality Florida can work with the AHCA to promulgate a similar regulation for all AHCA-licensed hospital facilities.* Ideally, the Florida state legislature would amend the Patient's Bill of Rights to include a similar visitation policy (especially because no policy currently exists), which

⁹⁹ FLA. STAT. § 765.401.

¹⁰⁰ *Id.* § 756.101(3).

¹⁰¹ *Id.* § 765.401.

¹⁰² See 42 C.F.R. § 482.13 (2012). Specifically, the regulation provides that a hospital must: "Inform each patient (or support person, where appropriate) of the right, subject to his or her consent, to receive the visitors whom he or she designates, including, but not limited to, a spouse, a domestic partner (including a same-sex domestic partner), another family member, or a friend, and his or her right to withdraw or deny such consent at any time." *Id.* § 482.13(2). A hospital "cannot deny visitation privileges based on race, color, national origin, religion, sex, gender identity, sexual orientation, or disability." *Id.* § 482.13(3).

would then give the Department of Health the authority to promulgate a regulation explicitly extending visitation rights to LGBT caregivers and partners.

2. Improving Default Health Care Decision-Making Authority

Florida law currently allows an LGBT caregiver or partner to make medical decisions on an LGBT senior's behalf only if the LGBT senior has issued an advance directive. *Equality Florida can work to pass legislation and promulgate regulations that respect families-of-choice for decisions around medical procedures—even where legal documents are not in place.* For example, Maryland passed bills that allow domestic partners who meet certain criteria to make medical and burial decisions for each other.¹⁰³ The Colorado Designated Beneficiary registry allows individuals to fill out and submit a form that, among other things, allows a person to designate another individual for medical decision-making purposes.¹⁰⁴ Equality Florida can work to pass this or similar legislation outlining who should be given medical decision-making authority in the absence of legal documentation. Advocates can also work with AHCA to ensure that hospitals respect legal documents relating to medical decision-making.

3. Advocating for Nondiscrimination Laws

As discussed above in section (II)(C) on Congregate Homes, passing a nondiscrimination act prohibiting sexual orientation and gender identity/expression discrimination in public accommodations would protect LGBT seniors against harassment and denial of services in hospitals. Florida's hospice law currently includes such a nondiscrimination provision and this protection could—and should—be extended to hospitals and other facilities.

In addition, Equality Florida can use standards outlined by the Joint Commission on the Accreditation of Health Care Organizations (JCAHO), which accredits about 80% of U.S. hospitals, to advance agency action. The JCAHO standards state, for example, that hospitals must prohibit discrimination based on sexual orientation and gender identity or expression, and include protections for LGBT families.¹⁰⁵ Equality Florida can use these recommendations to encourage the AHCA to adopt similar criteria as a part of its hospital licensure process.

III. EXPANDING MEDICAID IMPOVERISHMENT PROTECTIONS IN FLORIDA

In addition to protecting LGBT seniors by ensuring they have equal access caregiving and health care, Equality Florida can work to extend certain financial protections available to seniors. Medicaid pays for long-term care (LTC) services for seniors who meet its income eligibility requirements. When a spouse needs Medicaid coverage for LTC, married couples must often sacrifice their homes or drive themselves into poverty to cover the high cost of these

¹⁰³ Md. Code, Health-Gen. §§ 6-201-203 (2012) (medical decisionmaking and visitation); Md. Code, Real Prop. § 14-121.

¹⁰⁴ See COLO. REV. STAT. § 15-22-105 (2011).

¹⁰⁵ See generally ADVANCING EFFECTIVE COMMUNICATION, CULTURAL COMPETENCE, AND PATIENT- AND FAMILY-CENTERED CARE: A ROADMAP FOR HOSPITALS, JOINT COMM'N ON ACCREDITATION OF HEALTH CARE ORGS. (Apr. 2012) available at http://www.jointcommission.org/Advancing_Effective_Communication/.

services.¹⁰⁶ Medicaid affords a variety of protections for the spouse of a Medicaid recipient who receives coverage for long-term care to remedy this problem. The Defense of Marriage Act (DOMA), however, prohibits direct extension of these protections to the same-sex spouse of a Medicaid recipient. Moreover, the protections do not extend to same- or different-sex partners or caregivers who would benefit from them. *States, however, can expand upon the minimum protections set by federal Medicaid law. In June 2011, CMS issued guidance addressing how states can use this discretion to protect same-sex partners if one partner becomes Medicaid-eligible while securing long-term care.*¹⁰⁷

The “spousal impoverishment protections” entitle the spouse of the Medicaid LTC recipient (the “community” or “healthy” spouse) to a minimum \$2,841 share of the couple’s combined monthly income and at least half of the couple’s combined assets, up to a maximum of \$113,640.¹⁰⁸ In addition, as long as the community spouse remains in the home, that home is exempt from this asset calculation.¹⁰⁹ These protections aim to protect the community spouse of an institutionalized Medicaid recipient, but states can also extend these protections to spouses of Medicaid recipients receiving home and community-based services.¹¹⁰ Beginning in 2014, the Affordable Care Act makes the impoverishment protections mandatory for spouses of Medicaid recipients receiving long-term care through home and community-based services, as well as institutionalized recipients.¹¹¹

Other protections for the spouse of a Medicaid LTC recipient are exceptions that apply to spouses and certain family members as well as others at the state’s discretion. These protections include the transfer-of-asset rules; protection from lien imposition; and estate recovery protections. First, the transfer-of-asset provision ensures that where a Medicaid LTC recipient transfers assets to a spouse prior to applying for the program, the recipient is not subject to an ineligibility penalty that would otherwise apply. Second, while Medicaid law permits states to place liens on the property of Medicaid LTC recipients, a state may not impose a lien if the spouse of the Medicaid recipient is living in the home. Third, states may not seek to recoup costs of Medicaid spending from the estate of a Medicaid LTC recipient if the recipient’s surviving spouse is still alive.

¹⁰⁶ See generally U.S. DEP’T OF HEALTH & HUMAN SVCS., MEDICAID ELIGIBILITY FOR LONG-TERM CARE BENEFITS: POLICY BRIEF NO. 2, MEDICAID TREATMENT OF THE HOME: DETERMINING ELIGIBILITY AND REPAYMENT FOR LONG-TERM CARE (Apr. 2005), available at <http://aspe.hhs.gov/daltcp/reports/hometreat.pdf>.

¹⁰⁷ Letter from Cindy Mann, Director, Ctrs. for Medicare & Medicaid Svcs., to State Medicaid Directors, on Same Sex Partners and Medicaid Liens, Transfers of Assets, and Estate Recovery (June 10, 2011), available at <https://www.cms.gov/smdl/downloads/SMD11-006.pdf> [hereinafter CMS Letter].

¹⁰⁸ 42 U.S.C. § 1396r-5(d)(3), (e)(2) (2006). These are 2012 figures. See CTR. FOR LONG-TERM CARE REFORM, www.centerlrc.com (last visited Mar. 31, 2012).

¹⁰⁹ See U.S. DEP’T OF HEALTH & HUMAN SVCS., MEDICAID ELIGIBILITY FOR LONG-TERM CARE BENEFITS: POLICY BRIEF NO. 2, MEDICAID TREATMENT OF THE HOME: DETERMINING ELIGIBILITY AND REPAYMENT FOR LONG-TERM CARE 2 (Apr. 2005), available at <http://aspe.hhs.gov/daltcp/reports/hometreat.pdf> (last visited Mar. 31, 2012).

¹¹⁰ See 42 U.S.C. § 1396r-5(h)(1)(A). Many states have extended these protections to spouses of Medicaid LTC recipients receiving home- and community-based services. See LINA WALKER & JEAN ACCIUS, AARP PUBLIC POL’Y INST., ACCESS TO LONG-TERM SERVICES AND SUPPORTS: A 50-STATE SURVEY OF MEDICAID FINANCIAL ELIGIBILITY STANDARDS 12 (2011), available at http://assets.aarp.org/rgcenter/ppi/lrc/i44-access-ltss_revised.pdf.

¹¹¹ See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §2404, amending §1396r-5(h)(1)(A) (Mar. 23, 2010); see also Nat’l Senior Citizen’s Law Center, CMS Issues Guidance on Medicaid Rules for Same-Sex Partners 2 (July 2011), available at <http://www.nslc.org/wp-content/uploads/2011/08/Issue-Brief-CMS-on-Spousal-Impoverishment.pdf>.

The CMS guidance addresses these three financial and asset protections; it does not address spend-down and resource allocation rules, which are also subject to Medicaid impoverishment protections under federal law. The following sections explain the issues covered by the CMS guidance in general and how to extend the LTC protections in Florida.

A. Imposition of TEFRA Lien

Federal Medicaid law allows, but does not require, states to impose liens on the property of a Medicaid recipient under certain circumstances. In general, a lien establishes a right to take away someone else's property if that person fails to meet an obligation. Here, Medicaid funds spent on behalf of a Medicaid recipient are similar to a loan or line of credit that must be repaid at the time of death. At that time, Medicaid can recover funds it spent for the recipient's care to the extent a recipient has interest in assets. That asset will usually be the Medicaid recipient's home (because an individual may qualify for Medicaid despite owning a home). When certain family members live in the home, or under other circumstances, the State *cannot* place a lien on the Medicaid recipient's home and thereby use the value of that home to recover Medicaid spending.¹¹²

More specifically, the Tax Equity and Fiscal Responsibility Act (TEFRA), allows a state to impose a lien against the property of a living, permanently institutionalized Medicaid recipient.¹¹³ Pursuant to federal law, however, a state cannot place a lien on the recipient's home if the recipient's spouse; child under age 21; child of any age with a disability; or, under certain circumstances, sibling, resides in the home.¹¹⁴

These protections set the federal floor; a state can adopt a more protective policy. The 2011 CMS letter suggests, for example, that a state establish a rule not to pursue liens when the same-sex partner of the Medicaid recipient continues to lawfully reside in the home.¹¹⁵ States might also refrain from imposing liens if a caregiver or unmarried different-sex partner continues to live in the home.

As of 2007, twenty-three states had the authority to impose TEFRA liens.¹¹⁶ Currently, Florida is one of the many states that do *not* place TEFRA liens on Medicaid recipients. Because Florida does not place liens on the homes of living Medicaid recipients, it is not necessary to define which family members would be protected against the imposition of these liens

¹¹² See U.S. DEP'T OF HEALTH & HUMAN SVCS., MEDICAID ELIGIBILITY FOR LONG-TERM CARE BENEFITS: POLICY BRIEF NO. 4, MEDICAID LIENS 4—5 (Apr. 2005), *available at* <http://aspe.hhs.gov/daltcp/reports/liens.pdf>.

¹¹³ Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat 324 (Sept. 3, 1982) (codified at 42 U.S.C. § 1396p (2006)). Specifically, a state can impose a Tax Equity and Fiscal Responsibility Act (TEFRA) lien against real property when an inpatient at a nursing facility or other medical institution (a) is required to spend more than a minimal amount of his or her income for medical care, and (b) the state determines that the individual cannot reasonably be expected to be discharged from the institution and return home. *Id.* § 1396(p)(a)(1)(B).

¹¹⁴ CMS Letter, *supra* note 107, at 1. The sibling must have an equity interest in the home and have lived in the home for at least one year before the recipient was admitted to a medical institution. *See id.*

¹¹⁵ *See id.* at 2.

¹¹⁶ ERICA F. WOOD & ELLEN M. KLEM, AMERICAN BAR ASSOC. COMM'N ON LAW & AGING, AMERICAN ASSOC. FOR RETIRED PERSONS, PROTECTIONS IN MEDICAID ESTATE RECOVERY: FINDINGS, PROMISING PRACTICES, AND MODEL NOTICES 57 n.63 (May 2007), *available at* http://assets.aarp.org/rgcenter/il/2007_07_medicaid.pdf (listing states that have authority to impose TEFRA liens).

B. Transfer of Assets Penalties

The CMS letter next explains how states can protect same-sex partners with respect to asset transfers.¹¹⁷ Medicaid rules limit an elderly person's ability to rearrange their finances to qualify for Medicaid and then have the program pay for their long-term care. When a Medicaid applicant transfers assets within five years before applying for Medicaid, that transfer triggers a penalty period during which the applicant is ineligible for long-term care benefits.¹¹⁸ The Medicaid statute, however, creates exceptions to the general required period of ineligibility.¹¹⁹ *Asset transfers to a spouse or to another person for the sole benefit of the spouse, or the transfer of a home to a spouse, do not trigger an ineligibility period.*¹²⁰ Because of DOMA, same-sex spouses cannot take advantage of these exemptions.

*The Medicaid statute also provides that applicants should not be penalized if imposing the ineligibility period would create an undue hardship or if the assets were transferred exclusively for a purpose other than to qualify for Medicaid.*¹²¹ States have considerable flexibility in determining when undue hardship exists and thus the circumstances under which the state will not impose penalties (i.e. trigger a period of Medicaid ineligibility). The CMS letter encourages states to adopt criteria, or presumptions, recognizing that a transfer of asset penalty would constitute an undue hardship where a Medicaid applicant transfers ownership interest in a shared home to a same-sex partner.¹²²

This transfer-of-asset protection is especially relevant to protect the home—usually the most valuable asset a Medicaid recipient will have. Federal Medicaid law exempts the home of an institutionalized Medicaid recipient from the Medicaid financial eligibility calculations if his or her spouse (as defined under DOMA) lives in the home.¹²³ If no recognized spouse lives in the home, however, the Medicaid recipient may be forced to sell their home to preserve Medicaid eligibility.¹²⁴ When the Medicaid recipient sells their home, a partner or same-sex spouse residing in the home could lose their residence. To avoid this loss, the Medicaid recipient might transfer the home to the partner or spouse. Such a transfer, though, would trigger a penalty resulting in ineligibility for Medicaid LTC benefits.¹²⁵ This is one illustration of what CMS therefore suggests states recognize as an undue hardship and for which the state should *not* impose the penalty.

i. Florida: Transfer of Assets Relief Based on Undue Hardship

Florida statutes do not define what constitutes undue hardship sufficient to excuse the transfer-of-asset penalty. Florida regulations provide that the state will not impose the transfer

¹¹⁷ CMS Letter, *supra* note 107, at 2.

¹¹⁸ See 42 U.S.C. § 1396p(c).

¹¹⁹ See *id.*

¹²⁰ See *id.* § 1396p(c)(2).

¹²¹ See *id.* § 1396p(c)(2)(C)-(D).

¹²² CMS Letter, *supra* note 107, at 2–3.

¹²³ See U.S. DEP'T OF HEALTH & HUMAN SVCS., MEDICAID ELIGIBILITY FOR LONG-TERM CARE BENEFITS: POLICY BRIEF NO. 2, MEDICAID TREATMENT OF THE HOME: DETERMINING ELIGIBILITY AND REPAYMENT FOR LONG-TERM CARE 2 (Apr. 2005), available at <http://aspe.hhs.gov/daltcp/reports/hometreat.pdf>.

¹²⁴ See Nat'l Senior Citizen's Law Ctr., CMS Issues Guidance on Medicaid Rules for Same-Sex Partners 5 (July 2011), available at <http://www.nslc.org/wp-content/uploads/2011/08/Issue-Brief-CMS-on-Spousal-Impoverishment.pdf>.

¹²⁵ *Id.*

penalty if the Department of Children and Families (DCF) determines that the ineligibility period would create an undue hardship on the individual. According to the regulations, “undue hardship” exists when the ineligibility period “would deprive an individual of medical care such that their life or health would be endangered” or when it “would deprive the individual of food, clothing, shelter or other necessities of life.”¹²⁶ It also requires that “[a]ll efforts to access the resources or income must be exhausted before this exception applies.”¹²⁷ The Florida ACCESS Program Policy Manual further specifies that “[e]ndangerment exists when the absence of medical care, shelter, food, or clothing will cause acute symptoms of such severity that will result in serious jeopardy to the health of the individual or serious impairment of bodily functions or serious dysfunction of a bodily organ or part” and that “[e]ndangerment must be documented by a medical doctor with knowledge of the applicant/recipient’s medical condition at the time of the potential application of the penalty period.”¹²⁸

→ **Suggested Change:** Because Florida statutes do not limit how DCF should design the hardship waiver, DCF could amend its current regulations to ensure that hardship sufficient to justify a waiver may be found when a transfer is made to a caregiver or mutually-dependent partner. Below are sample definitions of “caregiver” and “mutually dependent partner.”¹²⁹

1. *Mutually-Dependent Partner Hardship*

Florida state law does not formally recognize relationships between same-sex partners, so changes to the Medicaid impoverishment provisions in the state must include a way to identify couples eligible for protection. States like Florida that lack broad relationship recognition laws may adopt policies that extend these “spousal impoverishment” protections to unmarried partners.¹³⁰ In other words, even if Florida does not provide further statewide recognition, it could still recognize relationships for the limited purpose of the Medicaid impoverishment protections being discussed here.

Couples can be identified by demonstrating that they meet criteria that prove the existence of a financially-interdependent relationship. We have adapted from the Williams Institute at the UCLA School of Law the “mutually-dependent partnership” model outlined below.

¹²⁶ FLA. ADMIN. CODE r. 65A-1.712(3)(c)(5) (2011).

¹²⁷ *Id.*

¹²⁸ Florida Dep’t of Children & Families, ACCESS Florida Program Policy Manual § 1640.0617 [hereinafter Florida Program Manual], available at <http://www.dcf.state.fl.us/programs/access/docs/esspolicymanual/1630.pdf>.

¹²⁹ We are grateful to SAGE (Services and Advocacy for Gay, Lesbian, Bisexual, and Transgender Elders) and the Williams Institute at the UCLA School of Law for supplying these frameworks.

¹³⁰ Some states that do not recognize marriages of same-sex couples nevertheless extend certain benefits to unmarried couples. Colorado, for example, prohibits recognition of same-sex couples’ marriages, but allows unmarried partners to register as designated beneficiaries, a status that entitles registrants to certain enumerated rights and benefits. See COLO. REV. STAT. § 15-22-105 (2011). Federal government agencies, too, have extended health and other benefits to employees with same-sex partners. See *generally* Memorandum from President Barack Obama to Heads of Executive Departments and Agencies on Extension of Benefits to Same-Sex Domestic Partners of Federal Employees (June 2, 2010), available at <http://www.whitehouse.gov/the-press-office/presidential-memorandum-extension-benefits-same-sex-domestic-partners-federal-emplo>. Extending the Medicaid impoverishment protections to same-sex partners fits this pattern.

Mutually Dependent Partner:

(a) Definition: “Mutually dependent partners” are two adults who have chosen to share one another's lives in a committed domestic relationship of mutual caring for whom all of the following are true:¹³¹

- (1) The partners have a common residence, are interdependent, and consider each other to be immediate family.
- (2) Neither partner is married to or in a civil union or registered domestic partnership with, or has claimed a mutually dependent partnership with, any other person that has not been ended by separation, termination, dissolution or adjudication to be a nullity.
- (3) The two partners are not related by blood in a way that would prevent them from being married to each other in their state of residence.
- (4) Both persons are at least 18 years of age.
- (5) Both persons are capable of attesting that the above criteria are satisfied.

(b) Demonstrating that two persons are mutually dependent partners: The fact that two adults are mutually dependent partners may be demonstrated by the following:

- (1) The partners have executed a document attesting to the elements listed in (a)(1)-(5) above; or
- (2) The partners have entered into a legal status such as a civil union, domestic partnership, or similar status under the laws of any state or the District of Columbia.
- (iii) “Have a common residence” means that both partners share a common residence. It is not necessary that the legal right to possess the common residence be in both of their names. Two people have a common residence even if one or both have additional residences. “Mutually dependent partners” do not cease to have a common residence if one leaves the common residence but intends to return.
- (iv) “Interdependent” means that either or both of the partners depend on financial or other contributions from the other for common necessities of life, such as food, clothing, shelter and medical care.¹³²

¹³¹ One change to the Williams Institute definition eliminates the requirement that the partners be of the same sex. If politically feasible, defining “mutually-dependent partner” without regard to sex more inclusive. Couples marry or choose not to marry for a complex range of reasons. Different-sex couples should not be deprived of benefits available to same-sex couples if Florida extends its Medicaid impoverishment protections merely because they are not married. Further, conferring these limited impoverishment protections to different-sex couples is unlikely to convince couples not to marry.

¹³² Another change we have made to the Williams Institute framework is to the “interdependency” criterion. We have defined interdependency to include “financial or other contributions,” rather than financial dependency alone. Interdependence might exist where one partner is the sole earner or asset holder and the other partner provides for the household in non-financial ways. The definition of interdependency here more clearly includes a partner’s dependence on these non-financial contributions.

2. Care or Support Provider Hardship

An alternative model to the “mutually-dependent partnership” is the care or support provider model outlined by the Williams Institute and is in place in Pennsylvania.¹³³ The caregiver need not be the Medicaid recipient’s intimate partner or other family member. This model provides as follows:

Hardship sufficient to justify waiver may be found when the primary residence of the Medicaid LTC recipient is occupied by a person who satisfies the following criteria:¹³⁴

1. The person [claiming undue hardship] has continuously lived in the primary residence of the decedent for at least 2 years immediately preceding the decedent’s receipt of nursing facility services, or, for at least 2 years during the period of time in which Medicaid-funded home and community based services were received;
2. The person has no other alternative permanent residence; and
3. The person has provided care or support to the decedent for at least 2 years during the period of time that Medicaid-funded home and community based services were received by the decedent, or for at least 2 years prior to the decedent’s receipt of nursing home services during which time the decedent needed care or support to remain at home.”

Under an amended policy, DCF would waive a transfer of assets made to a person who meets the definition of “mutually dependent partner” or a “caregiver” in a similar way that it does not “count” transfers to a spouse for purposes of triggering a period of Medicaid LTC ineligibility.

ii. Florida: Transfer of Assets Relief Based on Purpose Other than Long-Term Care Qualification

Florida regulations provide that the State will not penalize a Medicaid recipient for transferring an asset if the transfer was “for some purpose unrelated to establishing eligibility.”¹³⁵ The Florida Program Manual further specifies that one or more of the following factors may rebut the presumption that the transfer was made for the purpose of becoming Medicaid-eligible: the total included assets were below the asset limit at all times from the month of transfer through the present month even if the transferred asset had been retained; a court ordered the transfer; or exploitation (e.g., another person stole the funds of the individual).¹³⁶ While this list is not exhaustive, if the individual had some other purpose for transferring the asset but establishing eligibility was a factor in the decision to transfer the asset, the presumption remains un rebutted.

¹³³ See 55 PA. CODE § 258.10(b) (2011).

¹³⁴ We provide the Pennsylvania framework as it is, but note that the two-year requirement could be changed to one year. In other words, there is nothing in the federal Medicaid statute that requires that the term of caregiving be two years.

¹³⁵ FLA. ADMIN. CODE r. 65A-1.712(3)(c)(4) (2011).

¹³⁶ Florida Program Manual, *supra* note 128, at § 1640.0616.

→ **Suggested Change:** This guidance could be amended to specify that the existence of pooled resources or mutual financial-interdependence is sufficient reason to rebut the presumption that the transfer was made for a reason unrelated to becoming Medicaid-eligible.

C. Non-TEFRA (Post-Death) Liens and Estate Recovery

States must recover Medicaid long-term care expenses from the estates of individuals who received Medicaid services (1) when a lien has been imposed under the State’s lien authority or (2) for recipients age 55 and over who received nursing facility services, home and community-based services, or related hospital and prescription drug services. Due to Medicaid’s low financial eligibility threshold, the family home is generally the most valuable asset a Medicaid recipient will still retain as part of his or her estate. While Medicaid rules typically ignore an applicant’s home for purposes of determining whether a Medicaid applicant falls within the specified eligibility limits, a State must pursue the recipient’s estate—including the home—to recoup Medicaid spending except in limited circumstances.

Medicaid estate recovery is prohibited (and the home protected) when there is a surviving spouse, surviving child under age 21, or a disabled child of any age.¹³⁷ When estate recovery occurs pursuant to a lien, protections are afforded for siblings still lawfully residing in the home, as well as for sons or daughters who provided care to their parents and who continue to lawfully reside in the home. *States must also have procedures to waive estate recovery where it would create an undue hardship for the deceased Medicaid recipient’s heirs.*

States have flexibility to design criteria to determine what constitutes an “undue hardship.” The 2011 CMS letter encourages states to adopt criteria to protect a surviving same-sex partner from estate recovery.

i. Florida: Homestead Protection

Upon an individual’s death, the Florida Constitution protects against the forced sale of a homestead to meet the demands of creditors—including Medicaid—if a spouse or “heirs” survive the individual.¹³⁸ In addition, no Medicaid lien will be enforced against any property that is exempt from claims of creditors under the laws or constitution of Florida.¹³⁹ These protections apply regardless of the value of the home or the marital or familial status of the

¹³⁷ See 42 U.S.C. § 1396p(b) (2006). Estate recovery is prohibited during the lifetime of the surviving spouse, *no matter where he or she lives*. See also U.S. DEP’T OF HEALTH & HUMAN SVCS., MEDICAID ELIGIBILITY FOR LONG-TERM CARE BENEFITS: POLICY BRIEF NO. 1, MEDICAID TREATMENT OF THE HOME: DETERMINING ELIGIBILITY AND REPAYMENT FOR LONG-TERM CARE 6 (Apr. 2005), available at <http://aspe.hhs.gov/daltcp/reports/estaterec.pdf>.

¹³⁸ See FLA. CONST. art. X, § 4(a)(1). (“There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person: a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner’s consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or the owner’s family.”). Further, “[t]hese exemptions shall inure to the surviving spouse or heirs of the owner.” *Id.* § 4(b). See also FLA. STAT. § 409.9101(7) (2011) (“No debt under this section [of the Medicaid Estate Recovery Act] shall be enforced against any property that is determined to be exempt from the claims of creditors under the constitution or laws of this state.”).

¹³⁹ See FLA. STAT. § 409.9101(7).

homeowner. State case law, however, interprets this constitutional protection to extend only to “heirs” as defined through state intestate law. Intestate law applies to heirs who inherit from a decedent who dies *without* a valid will. These heirs include, for example, a legally-recognized spouse, child, or other categories of relatives by blood, marriage, or adoption.¹⁴⁰ In other words, the fact that someone has been designated as an heir by a valid will does not likely enable them to use this robust homestead protection against Medicaid claims.¹⁴¹

Because Florida intestate law does not recognize a same-sex spouse or partner, expanding the Medicaid impoverishment protections through the “undue hardship” waiver with respect to estate recovery therefore remains important. The next section explains current Florida Medicaid law (as opposed to Florida’s constitutional law) on estate recovery.

ii. Florida: Post-Death Lien Imposition and Estate Recovery Under the Hardship Clause

Florida’s Estate Recovery Act prohibits estate recovery “if doing so would cause undue hardship for the qualified heirs [as defined by Florida law].”¹⁴² “Qualified heirs” are those people who are entitled under the state’s inheritance laws to the decedent’s property.¹⁴³ The statute provides that the agency will consider the following criteria when determining if “undue hardship” for those qualified heirs exists:

- whether the heir currently resides in the decedent’s residence; resided there at the time of the decedent’s death; has made the residence his or her primary residence for the 12 months immediately preceding the decedent’s death; and owns no other residence;
- the heir would be deprived of food, clothing, shelter, or medical care necessary for the maintenance of life or health;
- the heir can document that he or she provided full time care to the Medicaid recipient which delayed the recipient’s entry into a nursing home, if the heir is the decedent’s sibling or the son or daughter of the recipient and resided with the recipient for at least 1 year prior to the recipient’s death; or
- the cost involved in the sale of the property would be equal to or greater than the value of the property.¹⁴⁴

Florida regulations do not expand on these criteria. The undue hardship provisions apply only with respect to a “qualified heir,” as defined by the state’s intestate law—which, as noted above, do not include a partner or same-sex spouse.

→ **Suggested Change:** Because the undue hardship criteria with respect to estate recovery are set by state *statute*, the Medicaid Estate Recovery Act would need to be amended to expand the applicability of these criteria beyond “qualified heir.” The “mutually-dependent partner” or “caregiver” models described in the transfer-of-asset section above work equally well for

¹⁴⁰ Florida’s intestate law provides which family members are entitled to inherit from the estate. If there is no surviving spouse (as defined by Florida law), the estate will pass, in the following order, to: the decedent’s children; parents; siblings and children of deceased siblings; grandparents; aunts and uncles of the deceased and their descendants; and to the family of the deceased spouse of the decedent. FLA. STAT. §§ 732.102-103.

¹⁴¹ See Dep’t of Health & Rehabilitative Svcs. v. Trammell, 508 So. 2d 422 (Fla. Dist. Ct. App. 1987) (holding in the case of an unmarried man who devised his estate to a “good friend,” only those who can inherit under the state intestacy statute are “heirs” within the meaning of the constitutional homestead exemption).

¹⁴² FLA. STAT. § 409.9101(8) (2011).

¹⁴³ See *id.* § 731.201(20).

¹⁴⁴ See *id.* § 409.9101(8).

defining the undue hardship waiver criteria for estate recovery. Here, however, the legislature would likely have to act—because the undue hardship criteria currently apply to only “qualified heirs.” The statute could be amended to reference “qualified heir” and “mutually-dependent partner” or “caregiver.”

IV. RIGHTS AND PROTECTIONS FOR LGBT VETERANS

Veterans receive important health and other benefits from both the federal and state governments. This section outlines the state and federal benefits available to veterans in Florida and how Equality Florida can ensure they are available to LGBT seniors. In general, veterans with other-than-honorable dismissals can have their benefits eligibility restricted. Dismissals under a various military policies that have been in place in past years could result in other-than-honorable dismissals. These dismissals include pre-1947 “blue discharges”;¹⁴⁵ “general” or “undesirable” discharges;¹⁴⁶ and, most recently, discharges under Don’t Ask Don’t Tell. Veterans discharged for “homosexual conduct” can apply for discharge review.¹⁴⁷

A. Federal Benefits

The Department of Veterans Affairs (VA) is a federal agency that provides benefits to veterans and their families. The VA administers programs that provide benefits to veterans and surviving spouses and children, including: disability compensation, pension, and health care. Recently, the VA issued a directive requiring VA health care facilities not to discriminate against transgender veterans.

Federal VA benefits are available only to surviving different-sex spouses and often require that the spouse has not remarried.¹⁴⁸ Children of the veteran may generally receive benefits if they are under age 18 or up to age 23 if enrolled in school or not married. Benefits particularly relevant for elderly veterans include:¹⁴⁹

¹⁴⁵ See Fred L. Borch III, *The History of “Don’t Ask, Don’t Tell” in the Army: How We Got To It and Why It Is What It Is*, 203 MIL. L. REV. 189, 194 (2010), available at http://dont.stanford.edu/commentary/History_of_Dont_Ask_Dont_Tell.pdf.

¹⁴⁶ Discharges designated “undesirable” or “general” are neither dishonorable, nor honorable. See *id.* at 197.

¹⁴⁷ For example, soldiers discharged in the last fifteen years can apply to the Army Discharge Review Board (ADRB) for a discharge review; if discharged more than 15 years ago, soldiers can apply to the Army Board of Correction of Military Records (ABCM) for discharge review. See ARMY REV. BDS. AGENCY, *Don’t Ask Don’t Tell*, <http://arba.army.pentagon.mil/dadt.cfm> (last visited Mar. 31, 2012).

¹⁴⁸ In February 2012, the Southern Poverty Law Center filed a lawsuit against the Department of Veterans Affairs on behalf of an army veteran and her partner arguing that the restriction discriminates against married same-sex couples. It also charges that the Defense of Marriage Act (DOMA) is unconstitutional because it bans federal agencies from recognizing same-sex couples’ marriages. See *Tracey Cooper-Harris, et al. v. United States of America, et al.*, SOUTHERN POVERTY LAW CENTER, available at <http://www.splcenter.org/get-informed/case-docket/tracey-cooper-harris-et-al-v-united-states-of-america-et-al> (last visited May 7, 2012).

¹⁴⁹ See NAT’L CTR. FOR LESBIAN RIGHTS, CALIFORNIA PUBLIC BENEFITS ISSUES FOR LESBIAN, GAY, BISEXUAL, AND TRANSGENDER CLIENTS: A GUIDE FOR ATTORNEYS AND ADVOCATES 34–36, available at http://www.nclrights.org/site/DocServer/LGBT_Public_benefits_advocates_guide.pdf?docID=8741; see also NAT’L CTR. FOR LESBIAN RIGHTS, NAVIGATING THE SYSTEM: A KNOW-YOUR-RIGHTS GUIDE FOR LESBIAN, GAY, BISEXUAL, AND TRANSGENDER ELDERLY IN CALIFORNIA 45–47, available at http://www.nclrights.org/site/DocServer/LGBT_ElderLawPublication_Final_.pdf?docID=9121.

- **Disability Compensation:** a benefit paid to a veteran because of injuries or diseases resulting from active duty or made worse by active military service or paid to certain veterans disabled from VA health care. Disability compensation benefits are tax-free. A veteran may be eligible for disability compensation if the veteran has a service-related disability and was discharged under other-than-dishonorable conditions. For spousal and child-related benefits, the veteran must prove relationships by attaching dependency records (including marriage certificate and children’s birth certificates) to the application.
- **Death Pension Benefits:** payments available to a surviving spouse who has not remarried or an unmarried child (under age 18 or under age 23 if in school) of a deceased veteran.
- **VA Health Care:** reimbursement for medical expenses available to certain dependents and survivors of veterans. Eligible individuals include: a spouse or child of a veteran whom the VA has determined to be permanently and totally disabled due to a service-connected disability; a surviving spouse or child of a veteran who died as a result of a VA-rated service-connected disability, or who, at the time of death was rated permanently and totally disabled; or a surviving spouse or child of a veteran who died on active duty service and in the line of duty (not as a result of misconduct). These benefits are available through the Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA), although many of the listed family members will be eligible for the primary VA health care system, TRICARE.

Veteran’s health care is a particularly valuable benefit. In June 2011, the Veterans Health Administration of the VA issued a directive requiring prohibiting its facilities from discriminating in the treatment of transgender veterans.¹⁵⁰ Specifically, VA personnel must provide care to transgender veterans “without discrimination in a manner consistent with care and management of all Veteran patients.”¹⁵¹ The VA will provide all medically necessary transition-related health care needs for transgender patients—*except* sex reassignment surgery.¹⁵² Available care includes hormonal therapy, mental health care, pre-operative evaluation, and post-operative and long-term care following sex reassignment surgery, in addition to routine health screenings (e.g. breast, prostate, or cervical cancer screenings).¹⁵³ A diagnosis of GID, or other gender dysphoria diagnoses, is not a pre-condition for receiving care consistent with the Veteran’s self-identified gender.¹⁵⁴

Documented sex should be consistent with the patient’s self-identified gender.¹⁵⁵ VA personnel must also refer to patients based on the patient’s self-identified gender. Room assignments and access to facilities, such as restrooms, that for gender is generally a consideration will give preference to the individual’s self-identified gender, regardless of the

¹⁵⁰ Dep’t of Veterans Aff., Providing Health Care for Transgender and Intersex Veterans, Veterans Health Administration Directive 2011-024 (June 9, 2011), available at www.va.gov/vhapublications/ViewPublication.asp?pub_ID=2416. The Directive expires on November 30, 2012.

¹⁵¹ *Id.* at ¶ 3.

¹⁵² *Id.* at ¶ 2(a)-(b).

¹⁵³ *Id.* at ¶ 4(b)(1)(e).

¹⁵⁴ *Id.* at ¶ 4(b)(1)(f).

¹⁵⁵ *Id.* at ¶ 4(b)(1)(a).

appearance and/or surgical history of the individual.¹⁵⁶ Should questions or concerns related to room assignments arise, an individual may request an ethics consultation.¹⁵⁷

All staff must treat as confidential information about a patient's transgender status or treatment related to a patient's transition, unless the patient has given permission to share this information.¹⁵⁸ VA personnel must participate in diversity awareness and comply with the VA's "zero-tolerance standard for harassment of any kind."¹⁵⁹

B. Florida State Benefits

Florida provides veterans with additional state benefits, including housing, employment, and education benefits, as well as programs for elderly veterans.¹⁶⁰

- Florida Veteran Housing Programs: provide nursing home and domiciliary care for Florida veterans
- Homestead Exemption: a veteran's homestead may be exempt from certain property taxes. The homestead of an honorably discharge veteran with a certified service-connected permanent disability and total disability is exempt from taxation. Eligible veterans with service-connected disabilities rated 10% or more (but not permanent) are entitled to a \$5,000 property tax exemption.
- Florida Employment Benefits: veterans may be given preference in employment.
- Florida Education Benefits: ability to obtain a high school diploma for veterans for WW II, the Korean War, or the Vietnam War; scholarships for dependent children of certain Florida veterans or service member who died in action or from a service-connected disease or disability

Florida veterans' homes provide generous visitation policies, which could be amended to specifically address the needs of LGBT elderly veterans. These veterans' homes, their policies, and suggestions for change are outlined below.

i. Veterans' Nursing Home of Florida

Florida State veterans' nursing homes provide skilled or immediate type nursing care in VA or private nursing homes for an individual recovering from an illness or an individual not in need of hospital care.¹⁶¹ Veterans eligible for veterans' nursing home care must meet the following criteria:¹⁶²

- in need of nursing home care;

¹⁵⁶ *Id.* at ¶ 4(b)(1)(a).

¹⁵⁷ *Id.* at ¶ 4(b)(1)(b).

¹⁵⁸ *Id.* at ¶ 4(b)(1)(f)(3).

¹⁵⁹ *Id.* at ¶ 4(b)(1)(f)(4).

¹⁶⁰ See *Benefits*, FLORIDA DEP'T OF VETERANS AFF., <http://www.floridavets.org/benefits/benefits.asp> (last visited Mar. 31, 2012).

¹⁶¹ Veterans nursing homes are available in Daytona Beach (Volusia County), Land O' Lakes (Pasco County), Pembroke Pines (Broward County), and Springfield (Bay County). See *Florida State Veterans Benefits*, MILITARY.COM, <http://www.military.com/benefits/content/veteran-state-benefits/florida-state-veterans-benefits.html> (last visited Mar. 31, 2012).

¹⁶² FLA. STAT. § 296.36(1) (2011).

- have been a resident of the state for 1 year immediate preceding, and at the time of application for, admission to the veteran’s nursing home;
- not owe money to the Florida Department of Veterans Affairs for any previous stay at a Department facility;
- have applied for all financial assistance reasonable available through government sources; and
- have been approved as eligible for care and treatment by the U.S. Department of Veterans Affairs

The facility must admit eligible veterans in the following order of priority: an eligible veteran who is a resident of the State of Florida; an eligible veteran with a service-connected disability (as determined by the U.S Department of Veterans Affairs) or was discharged or released from service for disability incurred or aggravated in the line of duty and the disability requires nursing home care; and an eligible veteran with a non-service connected disability and is unable to defray the cost of nursing home care and states under oath.¹⁶³

Florida law sets the nondiscrimination policy of state veterans’ nursing homes. State veteran’s nursing homes must admit residents “without regard to race, age sex, religion, national origin, *or any other reason that would thereby create a practice of discrimination.*”¹⁶⁴ Florida statutes and regulations do not further define this last clause; in fact, the relevant regulation essentially restates the language of the statute.¹⁶⁵ Denying admission to residents based on their actual or perceived sexual orientation, gender identity, or gender expression, should fall within the prohibited “practice of discrimination.”

→ **Suggested Change:** To ensure that facilities do not deny admission to veterans that identify as or are perceived to be LGBT, the Department of Veterans Affairs could amend its regulation to include “sexual orientation, gender identity, or gender expression.” Further, the rule might specify that facilities must adopt visitation policies that reflect this nondiscrimination policy. Specifically, a facility’s visitation policy must allow a veteran to designate visitors of his or her choice and that the policy must not discriminate on the above protected bases, in addition to sexual orientation, gender identity, or gender expression, of either the resident or visitor.

Eligible veterans who receive income from any source, including pension or compensation from the U.S. government, in excess of \$35 per month, must contribute to paying for their support in the nursing home.¹⁶⁶ State regulations clarify that the relevant pension or compensation is that which the U.S. government pays to the individual; “[a]dditional amounts paid for the support of a spouse or other dependents are not considered.”¹⁶⁷ The rules here do not further define “other dependents.”

→ **Suggested Change:** The Department could amend the regulation to make clear that a same-sex partner is one such dependent and that funds received by that person should not be considered when determining whether the eligible veteran must contribute to the payment for nursing home care.

¹⁶³ *Id.* § 296.36(3)

¹⁶⁴ *Id.* § 296.35 (emphasis added). Consideration of an applicant’s veteran status does not constitute discrimination.

See id.

¹⁶⁵ *See* FLA. ADMIN. CODE r. 55-12.002(1) (201). The regulation uses “gender” rather than “sex.” *Id.*

¹⁶⁶ FLA. STAT. § 296.37 (2011); FLA. ADMIN. CODE r. 55-12.006(1).

¹⁶⁷ FLA. ADMIN. CODE r. 55-12.006(1)(b).

ii. Veterans' Domiciliary Home of Florida

Similar protections and avenues for expansion exist with regard to veterans' domiciliary care.¹⁶⁸ "Domiciliary care" includes "shelter, sustenance, and incidental medical care" available on a self-care or temporary basis to eligible veterans who are disabled by age or disease, but who do not need hospital or nursing home care services.¹⁶⁹ It is intended as rehabilitative care for veterans who suffer from disability, disease, or other difficulty that incapacitates them but does not require hospitalization or nursing home care.¹⁷⁰ The Florida veterans' domiciliary home also provides extended congregate care for eligible veterans.¹⁷¹

Veterans eligible for admission to a domiciliary home must meet the same basic requirements outlined in the section above, and not be mentally ill, habitually inebriated, or addicted to drugs.¹⁷² Eligible veterans must also require extended congregate care or be ambulatory; substantially able to attend to personal needs, including dressing and grooming; and able to attend a general dining facility.¹⁷³

Like veterans' nursing homes, domiciliary homes must admit residents "without regard to race, age sex, religion, national origin, or any other reason that would thereby create a practice of discrimination."¹⁷⁴ Again, the regulation repeats, but does not elaborate, this requirement.¹⁷⁵

→ **Suggested Change:** The Department of Veterans Affairs could amend this regulation as outlined above for veterans' nursing homes to make clear that facilities must make admissions decisions without regard to sexual orientation, gender identity, and gender expression. In addition, the regulation could specify that visitation policies, too, must comply with this nondiscrimination mandate.

Similar to the nursing home contribution-to-care requirement, eligible veterans who receive income in excess of \$100 per month must contribute to their maintenance and support while a resident at a domiciliary home.¹⁷⁶ The relevant pension or compensation from the U.S. government is what the individual receives; "[a]dditional amounts paid for a spouse or other dependents are not considered."¹⁷⁷ The rules here do not further define "other dependents."

→ **Suggested Change:** The Department could amend the regulation to make clear that a same-sex partner is one such dependent and that funds received by that person should not be

¹⁶⁸ The Robert Jenkins, Jr. Assisted Living/Domiciliary Home is a 150-bed Assisted Living Facility (ALF) that provides domiciliary care to veterans in Florida. It is located in Lake City, Florida. See *Florida State Veterans Benefits*, MILITARY.COM, <http://www.military.com/benefits/content/veteran-state-benefits/florida-state-veterans-benefits.html> (last visited Mar. 31, 2012).

¹⁶⁹ FLA. STAT. § 296.02(4) (2011).

¹⁷⁰ FLA. ADMIN. CODE r. 55-11.002(1) (2011).

¹⁷¹ *Id.*

¹⁷² FLA. STAT. § 296.06(2).

¹⁷³ FLA. ADMIN. CODE r. 55-11.005.

¹⁷⁴ FLA. STAT. § 296.06(1) (2011). Consideration of an applicant's veteran status does not constitute discrimination. See FLA. ADMIN. CODE r. 55-11.002(2).

¹⁷⁵ See FLA. ADMIN. CODE r. 55-11.002(2).

¹⁷⁶ See FLA. STAT. § 296.10(1).

¹⁷⁷ FLA. ADMIN. CODE r. 55-11.008(1)(b) (2011).

considered when determining whether the eligible veteran must contribute to the payment for domiciliary care.

V. CONCLUSION

Policy changes and increased cultural competency by caregivers, hospital personnel, and congregate home staff can help address the discrimination, mistreatment, and social isolation LGBT seniors face. This report provides a roadmap for improving LGBT seniors' access to and financing of caregiving, housing, and hospital care. Leveraging federal policy changes, engaging both state legislative and administrative agencies, and the elder care community, can both draw attention to these issues and advance policy that improves the lives of LGBT seniors.

APPENDIX: FLORIDA STATE SEXUAL ORIENTATION LAWS

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NONDISCRIMINATION PROVISIONS

Hospice Programs: Patient Admission and Services Available

Fla. Stat. § 400.6095

(1) Each hospice shall make its services available to all terminally ill persons and their families without regard to age, gender, national origin, sexual orientation, disability, diagnosis, cost of therapy, ability to pay, or life circumstances. A hospice shall not impose any value or belief system on its patients or their families and shall respect the values and belief systems of its patients and their families.

(2) Admission to a hospice program shall be made upon a diagnosis and prognosis of terminal illness by a physician licensed pursuant to chapter 458 or chapter 459 and shall be dependent on the expressed request and informed consent of the patient.

(3) At the time of admission, the hospice shall inquire whether advance directives have been executed pursuant to chapter 765, and if not, provide information to the patient concerning the provisions of that chapter. The hospice shall also provide the patient with information concerning patient rights and responsibilities pursuant to s. 381.026.

(4) The admission process shall include a professional assessment of the physical, social, psychological, spiritual, and financial needs of the patient. This assessment shall serve as the basis for the development of a plan of care.

(5) Each hospice, in collaboration with the patient and the patient's primary or attending physician, shall prepare and maintain a plan of care for each patient, and the care provided to a patient must be in accordance with the plan of care. The plan of care shall be made a part of the patient's medical record and shall include, at a minimum:

(a) Identification of the primary caregiver, or an alternative plan of care in the absence of a primary caregiver, to ensure that the patient's needs will be met.

(b) The patient's diagnosis, prognosis, and preferences for care.

(c) Assessment of patient and family needs, identification of the services required to meet those needs, and plans for providing those services through the hospice care team, volunteers, contractual providers, and community resources.

- (d) Plans for instructing the patient and family in patient care.
- (e) Identification of the nurse designated to coordinate the overall plan of care for each patient and family.
- (f) A description of how needed care and services will be provided in the event of an emergency.
- (6) The hospice shall provide an ongoing assessment of the patient and family needs, update the plan of care to meet changing needs, coordinate the care provided with the patient's primary or attending physician, and document the services provided.
- (7) In the event a hospice patient chooses to be discharged or transferred to another hospice, the hospice shall arrange for continuing care and services and complete a comprehensive discharge summary for the receiving provider.
- (8) The hospice care team may withhold or withdraw cardiopulmonary resuscitation if presented with an order not to resuscitate executed pursuant to s. 401.45. The department shall adopt rules providing for the implementation of such orders. Hospice staff shall not be subject to criminal prosecution or civil liability, nor be considered to have engaged in negligent or unprofessional conduct, for withholding or withdrawing cardiopulmonary resuscitation pursuant to such an order and applicable rules. The absence of an order to resuscitate executed pursuant to s. 401.45 does not preclude a physician from withholding or withdrawing cardiopulmonary resuscitation as otherwise permitted by law.
- (9) The death of a person enrolled as a hospice patient shall be considered an attended death for the purposes of s. 406.11(1)(a) 5. However, a hospice shall report the death to the medical examiner if any unusual or unexpected circumstances are present.

Regulation of Hospice Programs

Fla. Admin. Code r. 59C-1.0355

(1) Agency Intent. This rule implements the provisions of Sections 408.034(3), 408.036(1)(d), and 408.043(2), F.S. It is the intent of the agency to ensure the availability of hospice programs as defined in this rule to all persons requesting and eligible for hospice services, regardless of ability to pay. This rule regulates the establishment of new hospice programs, the construction of freestanding inpatient hospice facilities as defined in this rule, and a change in licensed bed capacity of a freestanding inpatient hospice facility. A separate certificate of need application shall be submitted for each service area defined in this rule.

(2) Definitions.

(a) "Agency." The Agency for Health Care Administration.

(b) "Approved Hospice Program." A hospice program for which the agency has issued an intent to grant a certificate of need, or has issued a certificate of need, and that is not yet licensed as of 3 weeks prior to publication of the fixed need pool.

(c) "Contractual Arrangement." An arrangement for contractual services, as described in Section 400.6085, F.S.

(d) "Fixed Need Pool." The fixed need pool defined in subsection 59C-1.002(19), F.A.C. The agency shall publish a fixed need pool for hospice programs twice a year.

(e) "Freestanding Inpatient Hospice Facility." For purposes of this rule, a facility that houses inpatient beds licensed exclusively to the hospice program but does not house any inpatient beds licensed to a hospital or nursing home.

(f) "Hospice Program." A program described in Sections 400.601(3), 400.602(1), 400.609, and 400.6095(1), F.S., that provides a continuum of palliative and supportive care for the

terminally ill patient and his family. Hospice services must be available 24 hours a day, 7 days a week, and must be available to all terminally ill persons and their families without regard to age, gender, national origin, sexual orientation, disability, diagnosis, cost of therapy, ability to pay, or life circumstances.

(g) "Inpatient Bed." Inpatient beds located in a freestanding inpatient hospice facility, a hospital, or a nursing home and available for hospice inpatient care.

(h) "Local Health Council." The council referenced in Section 408.033(1), F.S.

(i) "Planning Horizon." The date by which a proposed new hospice program is expected to be licensed. For purposes of this rule, the planning horizon for applications submitted between January 1 and June 30 is July 1 of the year 1 year subsequent to the year the application is submitted; the planning horizon for applications submitted between July 1 and December 31 is January 1 of the year 2 years subsequent to the year the application is submitted.

(j) "Residential Facility." For purposes of this rule, a facility operated by a licensed hospice program to provide a residence for hospice patients, as defined in Section 400.601(5), F.S. A residential facility is not subject to regulation under this rule. Provided, however, that a proposal to convert such a residence to a freestanding inpatient hospice facility is subject to regulation under this rule.

(k) "Service Area." The geographic area consisting of a specified county or counties, as follows:

1. Service Area 1 consists of Escambia, Okaloosa, Santa Rosa, and Walton Counties.
2. Service Area 2A consists of Bay, Calhoun, Gulf, Holmes, Jackson, and Washington Counties.
3. Service Area 2B consists of Franklin, Gadsden, Jefferson, Leon, Liberty, Madison, Taylor, and Wakulla Counties.
4. Service Area 3A consists of Alachua, Bradford, Columbia, Dixie, Gilchrist, Hamilton, Lafayette, Levy, Putnam, Suwannee, and Union Counties.
5. Service Area 3B consists of Marion County.
6. Service Area 3C consists of Citrus County.
7. Service Area 3D consists of Hernando County.
8. Service Area 3E consists of Lake and Sumter Counties.
9. Service Area 4A consists of Baker, Clay, Duval, Nassau, and St. Johns Counties.
10. Service Area 4B consists of Flagler and Volusia Counties.
11. Service Area 5A consists of Pasco County.
12. Service Area 5B consists of Pinellas County.
13. Service Area 6A consists of Hillsborough County.
14. Service Area 6B consists of Hardee, Highlands, and Polk Counties.
15. Service Area 6C consists of Manatee County.
16. Service Area 7A consists of Brevard County.
17. Service Area 7B consists of Orange and Osceola Counties.
18. Service Area 7C consists of Seminole County.
19. Service Area 8A consists of Charlotte and DeSoto Counties.
20. Service Area 8B consists of Collier County.
21. Service Area 8C consists of Glades, Hendry and Lee Counties.
22. Service Area 8D consists of Sarasota County.
23. Service Area 9A consists of Indian River County.
24. Service Area 9B consists of Martin, Okeechobee, and St. Lucie Counties.
25. Service Area 9C consists of Palm Beach County.
26. Service Area 10 consists of Broward County.
27. Service Area 11 consists of Dade and Monroe Counties.

(l) "Terminally Ill." As defined in Section 400.601(10), F.S., terminally ill refers to a medical prognosis that a patient's life expectancy is 1 year or less if the illness runs its normal course.

(3) General Provisions.

(a) Quality of Care. Hospice programs shall comply with the standards for program licensure described in Chapter 400, Part IV, F.S., and Chapter 58A-2, F.A.C. Applicants proposing to establish a new hospice program shall demonstrate how they will meet the standards.

(b) Conformance with Statutory Review Criteria. A certificate of need for the establishment of a new hospice program, construction of a freestanding inpatient hospice facility, or change in licensed bed capacity of a freestanding inpatient hospice facility, shall not be approved unless the applicant meets the applicable review criteria in Sections 408.035 and 408.043(2), F.S., and the standards and need determination criteria set forth in this rule. Applications to establish a new hospice program shall not be approved in the absence of a numeric need indicated by the formula in paragraph (4)(a) of this rule, unless other criteria in this rule and in Sections 408.035 and 408.043(2), F.S., outweigh the lack of a numeric need.

(4) Criteria for Determination of Need for a New Hospice Program. [* * * *]

Health Maintenance Organizations: HIV and AIDS for Contract Purposes

Fla. Stat. § 641.3007

(1) Purpose.--The purpose of this section is to prohibit unfair practices in a health maintenance organization contract with respect to exposure to the human immunodeficiency virus infection and related matters, and thereby reduce the possibility that a health maintenance organization subscriber or applicant may suffer unfair discrimination when subscribing to or applying for the contractual services of a health maintenance organization.

(2) Scope.--This section applies to all health maintenance contracts which are issued in this state or which are issued outside this state but cover residents of this state. This section shall not prohibit a health maintenance organization from contesting a contract or claim to the extent allowed by law.

(3) Definitions.--As used in this section:

(a) "AIDS" means acquired immune deficiency syndrome.

(b) "ARC" means AIDS-related complex.

(c) "HIV" means human immunodeficiency virus identified as the causative agent of AIDS.

(4) Utilization of medical tests.--

(a) With respect to the issuance of or the underwriting of a health maintenance organization contract regarding exposure to the HIV infection and sickness or medical conditions derived from such infection, a health maintenance organization shall only utilize medical tests which are reliable predictors of risk. A test which is recommended by the Centers for Disease Control and Prevention or by the federal Food and Drug Administration is deemed to be reliable for the purposes of this section. A test which is rejected or not recommended by the Centers for Disease Control and Prevention or the federal Food and Drug Administration is a test which is deemed to be not reliable for the purposes of this section. If a specific Centers for Disease Control and Prevention or federal Food and Drug Administration recommended test indicates the existence or potential existence of exposure by the HIV infection or a sickness or medical condition related to the HIV infection, before relying on a single test result to deny or limit coverage or to rate the coverage, the health maintenance organization shall follow the applicable Centers for Disease Control and Prevention or federal Food and Drug Administration

recommended test protocol and shall utilize any applicable Centers for Disease Control and Prevention or federal Food and Drug Administration recommended followup tests or series of tests to confirm the indication.

(b) Prior to testing, the health maintenance organization must disclose its intent to test the person for the HIV infection or for a specific sickness or medical condition derived therefrom and must obtain the person's written informed consent to administer the test. Written informed consent shall include a fair explanation of the test, including its purpose, potential uses, and limitations, and the meaning of its results and the right to confidential treatment of information. Use of a form approved by the office shall raise a conclusive presumption of informed consent.

(c) An applicant shall be notified of a positive test result by a physician designated by the applicant or, in the absence of such designation, by the Department of Health. Such notification must include:

1. Face-to-face posttest counseling on the meaning of the test results; the possible need for additional testing; and the need to eliminate behavior which might spread the disease to others;
2. The availability in the geographic area of any appropriate health care services, including mental health care, and appropriate social and support services;
3. The benefits of locating and counseling any individual by whom the infected individual may have been exposed to human immunodeficiency virus and any individual whom the infected individual may have exposed to the virus; and
4. The availability, if any, of the services of public health authorities with respect to locating and counseling any individual described in subparagraph 3.

(d) A medical test for exposure to the HIV infection or for a sickness or medical condition derived from such infection shall only be required of or given to a person if the test is required or given to all subscribers or applicants or if the decision to require the test is based on the person's medical history. Sexual orientation shall not be used in the underwriting process or in the determination of which subscribers or applicants for enrollment shall be tested for exposure to the HIV infection. Neither the marital status, the living arrangements, the occupation, the gender, the beneficiary designation, nor the zip code or other territorial classification of an applicant shall be used to establish the applicant's sexual orientation.

(e) A health maintenance organization may inquire whether a person has been tested positive for exposure to the HIV infection or been diagnosed as having AIDS or ARC caused by the HIV infection or other sickness or medical condition derived from such infection. A health maintenance organization shall not inquire whether a person has been tested for or has received a negative result from a specific test for exposure to the HIV infection or for a sickness or medical condition derived from such infection.

(f) A health maintenance organization shall maintain strict confidentiality regarding medical test results with respect to the HIV infection or a specific sickness or medical condition derived from such infection. Information regarding specific test results shall not be disclosed outside the health maintenance organization, its employees, its marketing representatives, or its insurance affiliates, except to the person tested and to persons designated in writing by the person tested. Specific test results shall not be furnished to an insurance industry or health maintenance organization data bank if a review of the information would identify the individual and the specific test results.

(g) No laboratory may be used by an insurer or insurance support organization for the processing of HIV-related tests unless it is certified by the United States Department of Health and Human Services under the Clinical Laboratories Improvement Act of 1967, permitting testing of specimens obtained in interstate commerce, and subjects itself to ongoing proficiency testing by the College of American Pathologists, the American Association of Bio Analysts, or an

equivalent program approved by the Centers for Disease Control and Prevention of the United States Department of Health and Human Services.

(5) Restrictions on contract exclusions and limitations.--

(a) A health maintenance organization contract shall not exclude coverage of a member of a subscriber group because of a positive test result for exposure to the HIV infection or a specific sickness or medical condition derived from such infection, either as a condition for or subsequent to the issuance of the contract, provided that this prohibition shall not apply to persons applying for enrollment where individual underwriting is otherwise allowed by law.

(b) No health maintenance organization contract shall exclude or limit coverage for exposure to the HIV infection or a specific sickness or medical condition derived from such infection, except as provided in a preexisting condition clause.

Health Insurance: Medical Tests for HIV and AIDS for Insurance Purposes

Fla. Stat. § 627.429

(1) Purpose.--The purpose of this section is to prohibit unfair practices in the underwriting of insurance with respect to exposure to the human immunodeficiency virus infection and related matters, and thereby to reduce the possibility that a person may suffer unfair discrimination when purchasing insurance.

(2) Scope.--

(a) This section applies to all insurance policies, and the underwriting thereof, which are issued in this state or are issued outside this state pursuant to s. 627.5515 or s. 627.6515 covering residents of this state; to prepaid limited health organizations; and to multiple-employer welfare arrangements defined in s. 624.437. For the purposes of this section, "insurer" includes authorized multiple-employer welfare arrangements.

(b) This section does not prohibit an insurer from contesting a policy or claim to the extent allowed by law.

(3) Definitions.--As used in this section:

(a) "AIDS" means acquired immune deficiency syndrome.

(b) "ARC" means AIDS-related complex.

(c) "HIV" means the human immunodeficiency virus identified as the causative agent of AIDS.

(4) Use of medical tests for underwriting.--

(a) With respect to the issuance of or the underwriting of a policy regarding exposure to the HIV infection and sickness or medical conditions derived from HIV infection, the insurer may use only medical tests that are reliable predictors of risk. A test which is recommended by the Centers for Disease Control and Prevention or by the federal Food and Drug Administration is reliable for the purposes of this section. A test which is rejected or not recommended by the Centers for Disease Control and Prevention or the federal Food and Drug Administration is not reliable for the purposes of this section. If a specific test recommended by the Centers for Disease Control and Prevention or the federal Food and Drug Administration indicates the existence or potential existence of exposure to the HIV infection or a sickness or medical condition related to the HIV infection, the insurer shall, before relying on a single test result to deny or limit coverage or to rate the coverage, follow the applicable Centers for Disease Control and Prevention or federal Food and Drug Administration recommended test protocol and shall

use any applicable follow up tests or series of tests recommended by the Centers for Disease Control and Prevention or federal Food and Drug Administration to confirm the indication.

(b) Prior to testing, the insurer shall disclose its intent to test the person for the HIV infection or for a specific sickness or medical condition derived therefrom and shall obtain the person's written informed consent to administer the test. The written informed consent required by this paragraph shall include a fair explanation of the test, including its purpose, potential uses, and limitations, and the meaning of its results and the right to confidential treatment of information. Use of a form approved by the office raises a conclusive presumption of informed consent.

(c) An applicant shall be notified of a positive test result by a physician designated by the applicant or, in the absence of such designation, by the Department of Health. Notification must include all of the following:

1. Face-to-face posttest counseling on the meaning of the test results, the possible need for additional testing, and the need to eliminate behavior which might spread the disease to others.
2. The availability in the person's geographic area of any appropriate health care services, including mental health care, and appropriate social and support services.
3. The benefits of locating and counseling any individual by whom the infected individual may have been exposed to human immunodeficiency virus and any individual whom the infected individual may have exposed to the virus.
4. The availability, if any, of the services of public health authorities with respect to locating and counseling any individual described in subparagraph 3.

(d) A medical test for exposure to the HIV infection or for a sickness or medical condition derived from such infection may be required of or given to a person only if the test is based on the person's current medical condition or medical history or if the test is triggered by threshold coverage amounts which apply to all persons within the risk class. Sexual orientation may not be used in the underwriting process or in the determination of which applicants shall be tested for exposure to the HIV infection. The marital status, living arrangements, occupation, gender, beneficiary designation, or zip code or other territorial classification of an applicant may not be used to establish the applicant's sexual orientation.

(e) An insurer may inquire whether a person has been tested positive for exposure to the HIV infection or been diagnosed as having ARC or AIDS caused by the HIV infection or other sickness or condition derived from such infection. An insurer may not inquire whether the person has been tested for or has received a negative result from a specific test for exposure to the HIV infection or for a sickness or a medical condition derived from such infection.

(f) Insurers shall maintain strict confidentiality regarding medical test results with respect to exposure to the HIV infection or a specific sickness or medical condition derived from such exposure. The insurer may not disclose information regarding specific test results outside of the insurance company or its employees, insurance affiliates, agents, or reinsurers, except to the person tested and to persons designated in writing by the person tested. The insurer may not furnish specific test results for exposure to the HIV infection to an insurer industry data bank if a review of the information would identify the individual and the specific test results.

(g) A laboratory may be used by an insurer or insurance support organization for the processing of HIV-related tests only if it is certified by the United States Department of Health and Human Services under the Clinical Laboratories Improvement Act of 1967, permitting testing of specimens obtained in interstate commerce, and only if the laboratory subjects itself to ongoing proficiency testing by the College of American Pathologists, the American Association of Bio Analysts, or an equivalent program approved by the Centers for Disease Control and Prevention of the United States Department of Health and Human Services.

(5) Restrictions on coverage exclusions and limitations.--

(a) An insurer of a group policy may not exclude coverage of an eligible individual because of a positive test result for exposure to the HIV infection or a specific sickness or medical condition derived from such exposure, either as a condition for or subsequent to the issuance of the policy. This paragraph does not apply to individuals applying for coverage where individual underwriting is otherwise allowed by law.

(b) Subject to the total benefits limits in a health insurance policy, no health insurance policy shall contain an exclusion or limitation with respect to coverage for exposure to the HIV infection or a specific sickness or medical condition derived from such infection, except as provided in a preexisting condition clause. This paragraph does not prohibit the issuance of accident-only or specified disease health policies.

(c) Except for preexisting conditions specifically applying to a sickness or medical condition of the insured, benefits under a life insurance policy shall not be denied or limited based on the fact that the insured's death was caused, directly or indirectly, by exposure to the HIV infection or a specific sickness or medical condition derived from such infection. This paragraph does not prohibit the issuance of accidental death only or specified disease policies.

(d) Any major medical or comprehensive accident and health policy for which individual underwriting is authorized by law may contain a provision excluding coverage for expenses related to AIDS or ARC if, in the opinion of a legally qualified physician, the insured, prior to the first anniversary of the insured's coverage under the policy, first exhibited objective manifestations of AIDS or ARC, as defined by the Centers for Disease Control and Prevention, which objective manifestations are attributable to no other cause or was diagnosed as having AIDS or ARC if all of the following apply:

1. The applicant for the policy is not required to submit to any medical test for HIV infection.
2. The policy provision:
 - a. Is set forth separately from the other exclusion and limitation provisions of the policy.
 - b. Has an appropriate caption or heading.
 - c. Is disclosed and referenced in a conspicuous manner on the policy data page.
 - d. Contains a statement that the exclusion will not apply to any person if the insurer does not assert the defense before the person has been insured under the policy for 2 years.
3. The insurer must notify the insured in writing of a determination that the insured would be subject to the effect of the exclusion within 90 days after the insurer first determines that an insured would be subject to the effect of the exclusion, even if there are no claims for AIDS or ARC. Failure to provide timely written notice under this subparagraph bars the insurer from using the exclusion.
4. Objective manifestations of AIDS or ARC first exhibited after the 12-month manifestation period must be covered the same as any other illness.

Principles of Professional Conduct for the Education Profession in Florida.

Fla. Admin. Code r. 6B-1.006

(1) The following disciplinary rule shall constitute the Principles of Professional Conduct for the Education Profession in Florida.

(2) Violation of any of these principles shall subject the individual to revocation or suspension of the individual educator's certificate, or the other penalties as provided by law.

(3) Obligation to the student requires that the individual:

(a) Shall make reasonable effort to protect the student from conditions harmful to learning and/or to the student's mental and/or physical health and/or safety.

(b) Shall not unreasonably restrain a student from independent action in pursuit of learning.

(c) Shall not unreasonably deny a student access to diverse points of view.

(d) Shall not intentionally suppress or distort subject matter relevant to a student's academic program.

(e) Shall not intentionally expose a student to unnecessary embarrassment or disparagement.

(f) Shall not intentionally violate or deny a student's legal rights.

(g) Shall not harass or discriminate against any student on the basis of race, color, religion, sex, age, national or ethnic origin, political beliefs, marital status, handicapping condition, sexual orientation, or social and family background and shall make reasonable effort to assure that each student is protected from harassment or discrimination.

(h) Shall not exploit a relationship with a student for personal gain or advantage.

(i) Shall keep in confidence personally identifiable information obtained in the course of professional service, unless disclosure serves professional purposes or is required by law.

(4) Obligation to the public requires that the individual:

(a) Shall take reasonable precautions to distinguish between personal views and those of any educational institution or organization with which the individual is affiliated.

(b) Shall not intentionally distort or misrepresent facts concerning an educational matter in direct or indirect public expression.

(c) Shall not use institutional privileges for personal gain or advantage.

(d) Shall accept no gratuity, gift, or favor that might influence professional judgment.

(e) Shall offer no gratuity, gift, or favor to obtain special advantages.

(5) Obligation to the profession of education requires that the individual:

(a) Shall maintain honesty in all professional dealings.

(b) Shall not on the basis of race, color, religion, sex, age, national or ethnic origin, political beliefs, marital status, handicapping condition if otherwise qualified, or social and family background deny to a colleague professional benefits or advantages or participation in any professional organization.

(c) Shall not interfere with a colleague's exercise of political or civil rights and responsibilities.

(d) Shall not engage in harassment or discriminatory conduct which unreasonably interferes with an individual's performance of professional or work responsibilities or with the orderly processes of education or which creates a hostile, intimidating, abusive, offensive, or oppressive environment; and, further, shall make reasonable effort to assure that each individual is protected from such harassment or discrimination.

(e) Shall not make malicious or intentionally false statements about a colleague.

(f) Shall not use coercive means or promise special treatment to influence professional judgments of colleagues.

- (g) Shall not misrepresent one's own professional qualifications.
- (h) Shall not submit fraudulent information on any document in connection with professional activities.
- (i) Shall not make any fraudulent statement or fail to disclose a material fact in one's own or another's application for a professional position.
- (j) Shall not withhold information regarding a position from an applicant or misrepresent an assignment or conditions of employment.
- (k) Shall provide upon the request of the certificated individual a written statement of specific reason for recommendations that lead to the denial of increments, significant changes in employment, or termination of employment.
- (l) Shall not assist entry into or continuance in the profession of any person known to be unqualified in accordance with these Principles of Professional Conduct for the Education Profession in Florida and other applicable Florida Statutes and State Board of Education Rules.
- (m) Shall self-report within 48 hours to appropriate authorities (as determined by district) any arrests/charges involving the abuse of a child or the sale and/or possession of a controlled substance. Such notice shall not be considered an admission of guilt nor shall such notice be admissible for any purpose in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory. In addition, shall self-report any conviction, finding of guilt, withholding of adjudication, commitment to a pretrial diversion program, or entering of a plea of guilty or Nolo Contendere for any criminal offense other than a minor traffic violation within 48 hours after the final judgment. When handling sealed and expunged records disclosed under this rule, school districts shall comply with the confidentiality provisions of Sections 943.0585(4)(c) and 943.059(4)(c), F.S.
- (n) Shall report to appropriate authorities any known allegation of a violation of the Florida School Code or State Board of Education Rules as defined in Section 231.28(1), F.S.
- (o) Shall seek no reprisal against any individual who has reported any allegation of a violation of the Florida School Code or State Board of Education Rules as defined in Section 231.28(1), F.S.
- (p) Shall comply with the conditions of an order of the Education Practices Commission imposing probation, imposing a fine, or restricting the authorized scope of practice.
- (q) Shall, as the supervising administrator, cooperate with the Education Practices Commission in monitoring the probation of a subordinate.

Mental Health Counselors: Course Content Requirements

Fla. Admin. Code r. 64B4-31.010

The course requirements set forth in Section 491.005(4), F.S., shall contain the following content:

- (1) Counseling Theories and Practice:** Counseling and personality theories including both individual and systems perspectives as well as coverage of relevant research and factors considered in applications of these theories.
- (2) Human Growth and Development:** Theories of individual and family development and transitions across the life span (including theories of learning and personality development) and strategies for facilitating development over the life span.

(3) Diagnosis and Treatment of Psychopathology: General principles of etiology, diagnosis, treatment, and prevention of mental and emotional disorders and dysfunctional behavior, and general principles and practices for the promotion of optimal mental health.

(4) Human Sexuality: Research and theories of human sexual development (including research and theories of normal and abnormal sexual functioning) and general principles and practices for the treatment of sexual dysfunctions and the promotion of optimal sexual health.

(5) Group Theories and Practice: Principles of group dynamics, group counseling, and group leadership including group process components, developmental stage theories, and group member roles and behavior.

(6) Individual Evaluation and Assessment: Strategies for selecting, administering, interpreting, and using valid and reliable individual and group assessment and evaluation instruments and techniques in counseling and psychotherapy.

(7) Career and Lifestyle Assessment: Principles and practices of career lifestyle counseling (including career and lifestyle assessment instruments and techniques, career development theories, and career decision-making models) and career information dissemination (including computer based career development applications and strategies).

(8) Research and Program Evaluation: Principles, practices, and applications of basic types of research methods (including qualitative and quantitative research designs), needs assessment, and program evaluation, and ethical and legal considerations in research.

(9) Social and Cultural Foundations: **Multicultural and pluralistic trends including characteristics and concerns of diverse groups based on such factors as age, race, religious preference, physical disability, sexual orientation, ethnicity and culture, family patterns, gender, socioeconomic status, and intellectual ability.**

(10) Counseling in Community Settings: Principles, theories, and practices of community needs assessment and community intervention, including the design and utilization of programs and facilities for inpatient, outpatient, partial treatment, and aftercare, and the utilization of the health and human services public and private networks in local communities.

(11) Substance Abuse: Research and theories of substance use and abuse, and principles and practices for the treatment of substance abuse and dependency and the promotion of responsible behavior.

(12) Legal, Ethical, and Professional Standards Issues: Goals, objectives, and practices of professional counseling organizations, codes of ethics, legal considerations, standards of preparation, certifications, and licensing, and the role identity and professional obligations of mental health counselors.

Certification in Social Work: Exam Content

Fla. Admin. Code r. 64B25-28.015

- (1) An applicant for examination for certification must apply to the Department and submit supporting documentation necessary to determine eligibility no later than 60 days prior to the examination date. The application fee and the examination fee must accompany the application.
- (2) An applicant who has completed all requirements for the examination and has been certified eligible by the Department will be admitted to the examination for certification.

(3) In order to be eligible for certification, the candidate must receive a passing score on the written theory examination. The written theory examination for certified social work administered by the Department shall be the Intermediate Level examination developed by the American Association of State Social Work Boards (AASSWB). This is an objective multiple choice examination. The minimum passing score is the recommended cut-off score provided by the national vendor established according to a generally accepted standard-setting method. Candidates' raw scores are converted to a scaled-score ranging from a minimum of 0 to a maximum of 100. The scale is constructed in such a manner that the passing score is set at 75.

(4) The content areas of the written theory examination shall include:

(a) Human development and behavior (16%).

(b) Effects of culture, race, ethnicity, sexual orientation, and gender (2%).

(c) Assessment and diagnosis in social work practice (20%).

(d) Social work practice with individuals, couples, families, groups, and communities (32%).

(e) Interpersonal communication (3%).

(f) Professional social worker/client relationship (4%).

(g) Professional values and ethics (4%).

(h) Supervision in social work (6%).

(i) Practice evaluation and the utilization of research (3%).

(j) Policies and procedures governing service delivery (3%).

(k) Social work administration (7%).

(5)(a) All candidates for certification, whether by examination or by endorsement, are required to pass the laws and rules examination developed by the Department, an objective multiple choice examination containing 30 questions which test knowledge of Florida Statutes and rules which have been determined relevant to the practice of persons licensed or certified under Chapter 491, Florida Statutes. All items shall be weighted equally in scoring the examination. A raw score of 24 correct answers (80%) shall be necessary in order to pass this examination.

HATE CRIMES PROVISIONS

Hate Crimes: Reclassification of Offense

Fla. Stat. § 775.085

(1)(a) The penalty for any felony or misdemeanor shall be reclassified as provided in this subsection if the commission of such felony or misdemeanor evidences prejudice based on the race, color, ancestry, ethnicity, religion, sexual orientation, national origin, homeless status, mental or physical disability, or advanced age of the victim:

1. A misdemeanor of the second degree is reclassified to a misdemeanor of the first degree.

2. A misdemeanor of the first degree is reclassified to a felony of the third degree.

3. A felony of the third degree is reclassified to a felony of the second degree.

4. A felony of the second degree is reclassified to a felony of the first degree.

5. A felony of the first degree is reclassified to a life felony.

(b) As used in paragraph (a), the term:

1. "Mental or physical disability" means that the victim suffers from a condition of physical or mental incapacitation due to a developmental disability, organic brain damage, or mental

illness, and has one or more physical or mental limitations that restrict the victim's ability to perform the normal activities of daily living.

2. "Advanced age" means that the victim is older than 65 years of age.

3. "Homeless status" means that the victim:

a. Lacks a fixed, regular, and adequate nighttime residence; or

b. Has a primary nighttime residence that is:

(I) A supervised publicly or privately operated shelter designed to provide temporary living accommodations; or

(II) A public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.

(2) A person or organization that establishes by clear and convincing evidence that it has been coerced, intimidated, or threatened in violation of this section has a civil cause of action for treble damages, an injunction, or any other appropriate relief in law or in equity. Upon prevailing in such civil action, the plaintiff may recover reasonable attorney's fees and costs.

(3) It is an essential element of this section that the record reflect that the defendant perceived, knew, or had reasonable grounds to know or perceive that the victim was within the class delineated in this section.

Hate Crimes: Reporting Requirement

Fla. Stat. § 877.19

(1) Short title.--This section may be cited as the "Hate Crimes Reporting Act."

(2) Acquisition and publication of data.--**The Governor, through the Florida Department of Law Enforcement, shall collect and disseminate data on incidents of criminal acts that evidence prejudice based on race, religion, ethnicity, color, ancestry, sexual orientation, or national origin. All law enforcement agencies shall report monthly to the Florida Department of Law Enforcement concerning such offenses in such form and in such manner as prescribed by rules adopted by the department. Such information shall be compiled by the department and disseminated upon request to any local law enforcement agency, unit of local government, or state agency.**

(3) Limitation on use and content of data.--Such information is confidential and exempt from s. 119.07(1). Data required pursuant to this section shall be used only for research or statistical purposes and shall not include any information that may reveal the identity of an individual victim of a crime.

(4) Annual summary.--The Attorney General shall publish an annual summary of the data required pursuant to this section.