

STATE OF FLORIDA
BOARD OF MEDICINE

IN RE: PETITION FOR DECLARATORY STATEMENT

FLORIDA HOSPICES AND PALLIATIVE
CARE, INC.

FINAL ORDER

This matter came before the Board of Medicine (hereinafter the "Board") on August 5, 2011, in Jacksonville, Florida, for consideration of the referenced Petition for Declaratory Statement. The Notice of Petition for Declaratory Statement was published on July 22, 2011, in the Vol. 37, No. 29, in the Florida Administrative Weekly.

The petition filed by Florida Hospice and Palliative Care, Inc. (hereinafter the "Petitioner") inquires as to whether the provisions of Section 456.44 (Ch. 2011-141, § 3, Laws of Fla.) are applicable to the prescribing of controlled substances by physicians licensed under Chapter 458, Florida Statutes, in connection with the provision of palliative care to patients that are served by a hospice or an entity that is controlled by or is under common control with a hospice.

FINDINGS OF FACTS

1. The Petitioner is a not-for-profit, IRS Section 501(c)(3) organization representing Florida's hospice programs.
2. A hospice is defined under Florida law as a centrally administered corporation providing a continuum of palliative and supportive care for the terminally ill patient and his or her family. § 400.601(3), Fla. Stat. (2010).
3. "Palliative Care" is defined under Florida law as services or interventions which are not curative but are provided for the reduction or abatement of pain and human suffering.

§ 400.601(7), Fla. Stat. (2010).

4. A hospice patient is a terminally ill individual receiving hospice services. § 400.601(8), Fla. Stat. (2010).

5. A patient is considered terminally ill if such patient has a medical prognosis that his or her life expectancy is one year or less if the illness runs its normal course. § 400.601(10), Fla. Stat. (2010).

6. The hospice services include the administration of and the prescribing of controlled substance for the treatment of terminally ill hospice patients.

7. Hospices employ medical directors licensed pursuant to Chapters 458 or 459, who shall have the responsibility for directing the medical care and treatment of hospice patients and may appoint additional hospice physicians who shall perform all duties prescribed by law. All appointed hospice physicians, licensed pursuant to Chapters 458 or 459, who are subject to the same licensing qualifications as the hospice medical director. § 400.6105(1), Fla. Stat. (2010).

8. Physicians not employed by a hospice may provide hospice services to hospice patients.

CONCLUSIONS OF LAW

9. The Board of Medicine has authority to issue this Final Order pursuant to Section 120.565, Florida Statutes, and Rule 28-105, Florida Administrative Code.

10. The Petition filed in this cause is in substantial compliance with the provisions of 120.565, Florida Statutes, and Rule 28-105.002, Florida Administrative Code.

11. The 2011 Florida Legislature enacted CS/CS/HB 7095 which was signed into law by the Governor and is now referenced as Chapter 2011-141, Laws of Florida. Section

456.44(1)(d), (Ch. 2011-141, § 3, Laws of Fla.), requires among other things that physicians licensed pursuant to Chapter 458 who prescribe any controlled substance for the treatment of chronic nonmalignant pain designate themselves as controlled substance prescribing practitioners on their practitioner profiles; require such registered physicians to meet certain standards of practice, including requiring all patients undergo a physical examination and enter into a written controlled substance agreement, a written protocol, an assessment of risk for aberrant behavior, a treatment plan, specified informed consent, consultation and referral in certain circumstances, and medical records meeting certain criteria.

12. More specifically, Section 456.44(2), (Ch. 2011-141, § 3, Laws of Fla.) reads as follows:

(2) REGISTRATION. - Effective January 1, 2012, a physician licensed under chapter 458, chapter 459, chapter 461, or chapter 466 who prescribes any controlled substance, as defined in s. 893.03, for the treatment of chronic nonmalignant pain, must:

- (a) Designate himself or herself as a controlled substance prescribing practitioner on the physician's practitioner profile.
- (b) Comply with the requirements of this section and applicable board rules.

13. In turn, Section 456.44(3), (Ch. 2011-141, § 3, Laws of Fla.), provides for specific Standards of Practice that must be followed by all registrants subject to the provisions of that section.

14. If a physician subject to Section 456.44(2) and (3) fails to comply with the requirements of Section 456.44, he or she may be disciplined by the Board of Medicine pursuant to Section 456.072(2), Florida Statutes.

15. Petitioner has inquired as to whether physicians licensed pursuant to Chapter 458, Florida Statutes, who provide palliative care through the prescribing of controlled

substances to patients that are served by a hospice or an entity that is controlled by or is under common control with a hospice, must comply with Section 456.44(2) and (3) as currently found in Chapter 2011, § 3, Laws of Florida.

16. The answer to the Petitioner's inquiry turns on the definition of the term "chronic nonmalignant pain" as set forth in Section 456.44(1)(d), (Ch. 2011-141, § 3, Laws of Fla.) .

Section 456.44(1)(d), defines the term as:

pain unrelated to cancer or rheumatoid arthritis ***which persists beyond the usual course of disease*** or the injury that is the cause of the pain or more than 90 days after surgery.
(emphasis supplied.)

17. Under the clear terms of Section 456.44(2), (Ch. 2011-141, § 3, Laws of Fla.), only those physicians who prescribe patients controlled substances for the treatment of chronic nonmalignant pain, must designate themselves as controlled substance prescribing practitioner on their practitioner profile and must comply with the standards of practice set forth in Section 456.44(3), (Ch. 2011-141, § 3, Laws of Fla.).

18. The Board is of the opinion that when a physician provides palliative care through the prescribing of controlled substances to a patient served by a hospice or an entity controlled by or under common control with a hospice, the patient is being treated for pain that is **within** the usual course of his or her disease and comorbidities, including related secondary conditions. This being the case, such patient is not being treated for chronic nonmalignant pain, and therefore, the treating physician, under such circumstances, is not subject to the provisions of Section 456.44(2) and (3), (Ch. 2011-141, § 3, Laws of Fla.).

19. This Final Order is issued in response to the question propounded by the Petitioner as set forth in its Petition For Declaratory Statement. The Board's conclusion is based

solely on the Board's application of the factual circumstances outlined in the Petition to the pertinent statutory and rule provisions set forth above.

This Final Order shall become effective upon filing with the Clerk of the Department of Health.

DONE AND ORDERED this _____ day of _____, 2011.

BOARD OF MEDICINE

Joy A. Tootle, Executive Director
for George Thomas, M.D., Chair

NOTICE OF APPEAL RIGHTS

Pursuant to Section 120.569, Florida Statutes, Respondents are hereby notified that they may appeal this Final Order by filing one copy of a notice of appeal with the Clerk of the Department of Health and the filing fee and one copy of a notice of appeal with the District Court of Appeal within 30 days of the date this Final Order is filed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via email to: R. Terry Rigsby, Pennington, Moore, Wilkinson, Bell & Dunbar, P.A., Post Office Box 10095, 215 South Monroe Street, 2nd Floor (32301), Tallahassee, Florida 32302-2095, trigsby@penningtonlaw.com; and by interoffice mail to Edward A. Tellechea, Senior Assistant Attorney General, PL-01 The Capitol, Tallahassee, Florida 3239-1050; and Nicholas Romanello, General Counsel, Department of Health, 4052 Bald Cypress Way, BIN A02, Tallahassee, Florida 32399-1703, on this _____ day of _____, 2011.
