

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB HCS 10-02 Developmental Disabilities

SPONSOR(S): Health Care Services Policy Committee

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

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.:	Health Care Services Policy Committee		Schoolfield	Schoolfield
1)				
2)				
3)				
4)				
5)				

SUMMARY ANALYSIS

PCB HCS 10-02 provides changes to statutes affecting programs administered by the Agency for Persons with Disabilities. Specifically the bill makes the following changes:

- Provides a clarification to the definition of autism in s. 393.063, F.S.
- Implements waitlist prioritization for the first two categories of the APD Medicaid waiver waitlist. This includes category 1, (clients in crisis) and category 2, (children in the child welfare system). The bill delays prioritization of categories 3 through 7 until July 1, 2012.
- Provides clarification to language in statute regarding assignment to a Medicaid waiver tier.
- Provides authority for APD to receive information from the central abuse hotline and child abuse system for licensure purposes.
- Adds requirements for licensed facilities to train staff in reporting sexual abuse.
- Provides a statement of rights for persons with developmental disabilities to be free from abuse.
- Provides APD with increased authority to deny applications for licenses, revoke or suspend existing licenses and fine a current licensee of a residential facility.
- Provides conditions for requesting Medicaid program hearings at APD and requires these hearings to be provided by the Department of Children and Families.
- Allows the assessment of competency for staff administering medications involving topical, transdermal and otic routes to be conducted through simulation.

The bill is anticipated to achieve an overall fiscal savings through the requirement that Medicaid hearings for APD programs be provided at the Department of Children and Families.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

The Agency for Persons with Disabilities (APD) is responsible for providing services to persons with developmental disabilities.¹ A developmental disability is defined in chapter 393, F.S., as “a disorder or syndrome that is attributable to retardation, cerebral palsy, autism, spina bifida, or Prader-Willi syndrome and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely.”² Children who are at high risk of having a developmental disability and are between the ages of 3 and 5 are also eligible for services.³

Services to Persons with Developmental Disabilities

APD provides an array of home and community based services through contract providers, as well as services in Developmental Disabilities Centers and Forensic program services. APD administers home and community based services through 14 area offices that are responsible for day to day operations. As of January 2010, APD was serving 53,216 persons in all programs.⁴

Four-Tier Medicaid Waiver System

The 2007 Legislature directed APD to establish a four-tier waiver system to replace the current waiver program. APD currently serves 29,903⁵ people in the Medicaid waiver tier system and has a waitlist of over 18,800⁶ people for the program. Each of the tier waivers target a specific group of people with certain needs. Three of the four tier waivers have caps on annual expenditures per person and one of the tier waivers has no cap and is reserved for individuals with the most intense needs.⁷ The purpose of the tier system is to create a predictable spending model for the program and help control over utilization of services which has lead to significant program deficits in recent years. APD has had some success in controlling spending through the implementation of the Medicaid waiver tier legislation.

¹ s. 20.197(3), F.S.

² s. 393.063(9), F.S.

³ “High-risk child” is defined in s. 393.063(19) F.S.

⁴ Email from Susan Chen, APD, dated 2-5-10, on file with committee.

⁵ Tier Waiver Enrollment Summary by Year and Month, December 2009.

⁶ APD Quarterly Report to the Legislature on Agency Services, February 2010

⁷ s. 393.0661(3), F.S.

When the tier legislation was passed, APD was projecting a deficit of over \$150 million for FY 2007-2008. This deficit was reduced to \$12 million for FY 2007-2008, in part by the implementing tier caps and other legislative actions.⁸ Delays have occurred in fully implementing the tiers as a result of 5,500 people in the waiver program requesting a hearing on their tier assignment. This in affect freezes their current services and cost to the program until their hearing outcome is decided. This delay in assigning people to tiers has partially resulted in continued deficits in the waiver program including a \$26.7 million deficit for FY 2008-2009 and projected deficit of \$36 million for the current year.

Recent litigation has challenged elements of APD's implementation of the Medicaid waiver tier program as directed in statute. In August 2009, the 1st District Court of Appeals (DCA) disagreed with a previous ruling by an Administrative Law Judge at the Division of Administrative Hearings and found the APD rules for implementing the tier waivers invalid on three points.⁹ The ruling cited that APD failed to demonstrate adoption of a valid and reliable assessment instrument, improperly placed an age limit on client eligibility for tier 3 and improperly placed people in tier 4 without an assessment.

Medicaid Fair Hearings

State agencies administering the Medicaid program are required by federal and state law to grant an opportunity for a hearing to persons in the program under certain circumstances. This includes but is not limited to, applicants whose claim for services is denied or not acted upon promptly. Individuals may also request a hearing if they believe the state has taken erroneous action that affects them.¹⁰

The Department of Children and Families (DCF) is directed by statute to conduct fair hearings for public assistance programs.¹¹ This includes 20 programs including Medicaid benefits and all Medicaid waivers except those administered by APD. Fair hearings conducted by DCF for the Medicaid program are presided over by hearing officers who are impartial arbiters of the case. The fair hearing process is based on federal regulations and Chapter 120, F.S. Prior to August 2006, Medicaid fair hearings for participants in the APD Medicaid waiver programs were also conducted by the Department of Children and Families, Office of Fair Hearings. As a result of a 1st District Court of Appeals ruling¹² in 2007, the APD hearings were moved to the Division of Administrative Hearings (DOAH). The DOAH hearings use Administrative Law Judges and are a more formal process which are not required by federal law.¹³ The cost of APD hearings at DOAH performed during FY 2006-2007 was \$686,070 and the budgeted cost for hearings performed in FY 2007-2008 is \$728,683.¹⁴ DOAH estimates that hearing costs for 4,200 pending cases related to Medicaid waiver tier assignments would be \$2.3 million.¹⁵ In addition, the cost to APD for representation by the Office of the Attorney General for these hearings is estimated to be \$4 million.¹⁶ This is a total cost for APD hearings on pending cases of nearly \$6.3 million.

When an individual requests a hearing regarding a change or reduction to their service package, their current level of service is maintained until the hearing is conducted and a decision is rendered. APD does not realize any cost savings from decisions regarding service reductions or Medicaid tier assignments until hearings are completed. When hearings were conducted by the DCF Fair Hearings Office for APD cases prior to 2006, the average time until completion of the hearing was 76 days¹⁷. APD reports that hearings currently conducted through the DOAH process requires 6 to 8 months.¹⁸

⁸ APD Medicaid Expenditure ,Social Services Estimating Conference, , January 29, 2010

⁹ Moreland v. APD, Fla. 1st District Court of Appeals

¹⁰ 42 CFR 431.220, s. 409.285, F.S.

¹¹ s. 409.285, F.S

¹² J.M. v. Florida Agency for Persons with Disabilities, Case No. 1D06-0183.

¹³ Washington v. Debeaugrine, US District Court, N. District of Florida, Case no. 4:09cv189-RH/WCS, Order Granting Preliminary Injunction and Order Clarifying Preliminary Injunction.

¹⁴ APD report attached to email from Karen Fisher, APD, dated 2-5-10, on file with committee.

¹⁵ Email from Marilyn Lawrence, DOAH, dated 2-25-10 on file with committee

¹⁶ Email from K. Acuff, APD Senior Atty. Dated 2-8-10 on file with committee.

¹⁷ Email from John Pritchard, Chief, DCF Office of Appeals Hearings dated 2-18-10 on file with committee.

¹⁸ Email from Cathy Bedell, Deputy General Counsel, APD, dated 2-18-10, on file with committee.

APD estimates that \$50 million in additional cost to the waiver program is being incurred by the over 4,000 cases pending a hearing for a tier assignment.¹⁹

Waitlist Prioritization

APD maintains a waitlist of people seeking services from the Medicaid waiver program. As of February 2010, there were 18,883 people waiting for services.²⁰ The waitlist is organized by the individual's date of eligibility for the waiver program. However, individuals experiencing a crisis or children from the child welfare system receive priority consideration. Due to funding constraints in the program, no individuals from the waitlist were offered Medicaid waiver services during the last two years.²¹ The 2009 Legislature directed APD to organize individuals on the waitlist into seven priority categories.²² Within each priority category the individuals are to be numbered in accordance with the date in which they were determined eligible for services. APD was directed by the legislation to implement this priority order a year after the legislation was enacted which is July 1, 2010.

Autism

APD currently serves 5,694 people with a diagnosis of Autism.²³ Specifically, APD serves people with a diagnosis of Autistic disorder which is one of the pervasive developmental disorders included in the Diagnostic and Statistics Manual of the American Psychiatric Association.²⁴ Autistic disorder is also considered as one of the Autism Spectrum Disorders. The Autism Spectrum Disorders also includes Asperger's syndrome and pervasive developmental disorders not otherwise specified. Autistic disorder is considered to be the most severe of the Autism Spectrum Disorders.²⁵

Florida Statutes defines autism as a pervasive, neurologically based developmental disability of extended duration which causes severe learning, communication, and behavior disorders with age of onset during infancy or childhood. Individuals with autism exhibit impairment in reciprocal social interaction, impairment in verbal and nonverbal communication and imaginative ability, and a markedly restricted repertoire of activities and interests.²⁶

Licensure of Residential Facilities

APD is authorized in s. 393.067, F.S., to set standards and license group homes, foster homes, residential habilitation centers and comprehensive transitional education programs. Individuals can apply for a license to operate a home through an APD area office. The agency currently licenses 1,683 of these homes or centers and one comprehensive transitional education program. APD serves 7,364 people with developmental disabilities in licensed residential settings and most receive services in group homes. APD estimates that approximately 6 licenses are either revoked or not renewed each year.²⁷ As part of the licensure process, APD has statute authority to access the records of abuse, neglect and exploitation toward adults maintained by the Department of Children and Families. This information may be used by APD in the licensure review process which may include applicants and existing licenses holders.²⁸ APD does not have this authority for records related to child abuse, abandonment or neglect.

¹⁹ Email from Logan McFaddin, APD, dated 2-24-10 on file with committee.

²⁰ APD Quarterly Report to the Legislature on Agency Services, February 2010

²¹ Id.

²² s. 393.065(5), F.S.

²³ APD Active Consumers by Diagnosis, January 31, 2010.

²⁴ Application and Determination of Eligibility for Services from, the Agency for Persons with Disabilities, APD 04-007, 2006.

²⁵ Autism Spectrum Disorders, Pervasive Developmental Disorders, National Institute of Mental Health, 2008. located at

<http://www.nimh.nih.gov/health/publications/autism/nimhautismspectrum.pdf>.

²⁶ s. 393.063(3), F.S.

²⁷ Email from Logan McFaddin, APD, dated 2-5-10, on file with the committee.

²⁸ s.415.107(3)(a)

Abuse of Persons with Disabilities

APD launched the Zero Tolerance Initiative in September 2003 as a means to address sexual violence committed against persons with developmental disabilities. The Zero Tolerance Initiative has expanded to now serve as APD's approach to dealing with the problem of all forms of abuse, neglect, and exploitation committed against persons with developmental disabilities.²⁹ Florida Statutes defines sexual misconduct toward person with developmental disabilities and sets penalties for the crime (2nd degree felony) and mandatory reporting requirements of sexual abuse.³⁰ In addition, staff of facilities licensed by APD are required to receive training to detect and prevent sexual abuse of residents.³¹

Medication Administration

Florida Statutes provides authority for un-licensed direct service providers to administer medications to persons with developmental disabilities or to supervise the client performing self administration of medications. The administration of medications is limited to oral, transdermal, ophthalmic, otic, rectal, inhaled, enteral or topical prescription medications.³² Unlicensed providers who administer medications or supervise the self administration of medications must be assessed annually for competency in all allowed routes of administration before assisting with that route. Provider agencies such as group homes and Waiver Support Coordinators pay for these assessments by a registered nurse or medical doctor. When additional assessments/validations are needed to allow unlicensed providers to assist with medications the provider agency must bear the cost of the additional visits by the RN or MD. The topical, transdermal and otic routes are not used as often as some other routes. A client needing a medication by topical, transdermal or otic routes is less likely to be available at the same time a staff member needs initial validation or annual revalidation for competency in administration of these medications.³³

Effects of the Proposed Bill

- This bill provides a clarification to the definition of autism used in s. 393.063(3), F.S., that Autism means autistic disorder as defined by the Diagnostic and Statistical Reference Manual, fourth edition. This clarification is consistent with current APD practice as the agency uses Autistic disorder as the eligibility criteria for receiving services under the diagnosis of Autism. Autistic Disorder is the most severe of the autism spectrum disorders.
- The bill implements the waitlist prioritization required in s. 393.065(5), F.S., for the clients in crisis (category1) and children in child welfare system (category 2) effective July 1, 2010. Categories 1 and 2 were existing priorities in law prior to the changes to s. 393.065(5), F.S., in 2009. The bill also moves the implementation date for waitlist categories 3 through 7 to July 1, 2012. This will postpone adversely affecting an estimated 11,891 people on the waitlist who would see their place on the waitlist drop to a lower position by the new categorization.³⁴
- This bill provides clarifications to language in s. 393.0661, F.S., related to the assignment of persons to a tier in the four tier Medicaid waiver system. This includes specification in statute the two assessment instruments which shall be used by APD in the process of assigning individuals in the four-tier waiver system. In addition, the statute is made clear that the client characteristics which shall be used in the process of assigning clients to a tier includes but is not limited to "age of the client." Finally, the bill

²⁹ <http://apd.myflorida.com/zero-tolerance/index.htm#one>

³⁰ s. 393.135, F.S.

³¹ s. 393.067(7), F.S.

³² s. 393.506(1)

³³ Agency for Persons with Disabilities, 2010 Agency Proposal for On-site Validation of Competency.

³⁴ Email from Terri McGarrity, APD dated 2-16-10 on file with the committee provides a rough estimate that 63% of the people on the waitlist would be adversely affected.

provides clarification that individuals enrolled in the Family and Supported Living waiver on July 1, 2007, were to be included in tier four of the four- tier Medicaid waiver system without further assessment.

- The bill provides authority for APD to receive information from the Department of Children and Families central abuse hotline and abuse information system related to reports of child abuse, neglect or exploitation. APD is limited to use this information as part of the licensure process for residential facilities. APD already has authority to use similar information related to abuse of adults. The effect of this change is to provide access to information which will assist APD in making determinations about granting or renewing licenses to new applicants and existing license holders.
- The bill adds to the residential facility licensure requirements that staff are trained to report sexual abuse, abuse, neglect, exploitation and abandonment. APD is also directed to adopt rules to set standards for the new requirement and is granted authority to conduct unannounced inspections of certain licensed facilities to monitor compliance. Also, a clarification to statute is added to express that persons with developmental disabilities have the right to be free from abuse, neglect and exploitation.
- The bill increases APD's authority to deny applications for licensure, to revoke or suspend an existing license, and to fine a current licensee of a residential facility. The agency may exercise this authority when the agency determines that the applicant or licensee has committed one or more of the following violations:
 - Abused, sexually abused, neglected or abandoned a child;
 - Abused, sexually abused, neglected or exploited an adult;
 - Knowingly submitted false or inaccurate information in order to obtain payment for services;
 - Knowingly used the funds, property, or identity of a client for the purpose of self-gain;
 - Knowingly compromised the health, safety, or welfare of a client;
 - Knowingly violated the rights of a client as provided in s. 393.13; or
 - Denied access to clients by the client's guardian, a minor's parent, waiver support coordinator, an agency employee, or other authorized person.

The effect of this change is to grant the agency more specific authority and circumstances for denying, revoking or suspending a license and assessing fines to current license holders.

- The bill provides that requests for hearings for Medicaid programs administered by APD shall be in accordance with federal Medicaid law and rules and pursuant to specific sections of Florida's Administrative Procedures Act (ss.120.569 and 120.57, F.S.). The bill also requires that hearings under Medicaid programs administered by APD will be provided by the Department of Children and Families (DCF). The effect of this change is to restore a DCF process that existed prior to August 2006, when DCF provided these hearings for APD.³⁵ This change should provide an overall savings and significant cost avoidance to the state. It is estimated that the savings/cost avoidance would be \$4.3 million if the 4,200 pending Medicaid tier hearings were held at DCF Office of Appeal Hearings (see Fiscal Comments section).

³⁵ The location of the hearings was changed to the Division of Administrative Hearings (DOAH) in 2007, as a result of a 1st DCA ruling: J.M. v. Florida Agency for Persons with Disabilities, Case No. 1D06-0183

- The bill provides that the assessment and validation of competency in supervision of self administration of medications and administration of medications for topical, transdermal and otic routes may be conducted through simulation. This validation may be done through a required training course and is not required to be revalidated annually. The effect of this change is to provide a practical and less costly process for validating staff competency in these less complicated routes of medication administration.

B. SECTION DIRECTORY:

Section 1. amends s. 39.201, F.S., relating to mandatory reports of child abuse, abandonment or neglect.

Section 2. Amends s. 393.063, F.S., relating to definitions.

Section 3. Amends s. 393.065, F.S., relating to application and eligibility determination.

Section 4. Amends s. 393.0661, F.S., relating to home and community based service system.

Section 5. Amends s. 393.067, F.S., relating to facility licensure.

Section 6. Amends s. 393.0673, F.S., relating to denial, suspension or revocation of license.

Section 7. Amends s. 393.125, F.S., relating to hearing rights.

Section 8. Amends s. 393.13, F.S., relating to treatment of persons with developmental disabilities.

Section 9. Amends s. 393.506, F.S., relating to administration of medication.

Section 10. Provides the bill is effective upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None

2. Expenditures:

See Fiscal Comments below

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None

2. Expenditures:

None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None

D. FISCAL COMMENTS:

The fiscal impact in this bill is anticipated to be an overall net savings of \$4,494,214. This is primarily through cost avoidance by moving the APD Medicaid fair hearings from the Division of Administrative Hearings (DOAH) to the Department of Children and Families, Office of Appeal Hearings and APD providing legal representation. In the calculations below, 4200 hearings were used for comparison since this is the number of hearings pending for Medicaid tier waiver assignments.

- Comparison of Cost of Hearings at DOAH and DCF

Hearings at DOAH

APD and DOAH estimates the cost of conducting Medicaid hearings at DOAH and legal representation would be \$6.3 million for 4,200 hearings.

DOAH hearing costs estimate	\$2.3 million ³⁶
Legal Representation by Attorney General	<u>\$4.0 million</u> ³⁷
Total Estimated cost at DOAH venue	\$6.3 million

Hearings at DCF

DCF and APD estimate the cost of conducting hearings at the DCF Office of Appeal Hearings with legal representation by APD would be \$ 1,805,786 for 4,200 hearings.

DCF Office of Appeal Hearing cost estimate	\$1,251,993 ³⁸
APD estimated cost of legal representation	\$ <u>553,793</u> ³⁹
Total Estimated Cost at DCF venue.	\$1,805,786

- Also, an indeterminate savings in the APD program will occur by more timely decisions in Medicaid hearings when the pending decision reduces services and cost to the program. Currently, once a hearing request is filed by a consumer, the service reduction is pended and the current level of service is maintained until the outcome of the hearing is decided. APD estimates that hearings conducted at DOAH require 180 to 240 days to completion. DCF estimates that hearings conducted at the DCF Office of Appeal hearings would require 76 days on average. An example of the importance of timeliness in conducting hearings and the affect on the APD budget is evidenced by the current 4,200 hearings pending at DOAH. APD estimates that \$50 million in cost savings would be realized to the program when the hearings are completed (assuming the hearings are upheld in favor of APD).

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None

³⁶ Email from Marilyn Lawrence, DOAH, dated 2-25-10 on file with committee

³⁷ Email from K. Acuff, APD Senior Atty. Dated 2-8-10 on file with committee

³⁸ Department of Children and Families Fiscal Note, on file with committee

³⁹ Letter from Mike Palecki, APD General Council, Dated 2-25-10 on APD's needs for legal representation before the Department of Children and Families

B. RULE-MAKING AUTHORITY:

None

C. DRAFTING ISSUES OR OTHER COMMENTS:

None

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES