

## HOUSE OF REPRESENTATIVES FINAL BILL ANALYSIS

<b>BILL #:</b>	CS/CS/HB 1083	<b>FINAL HOUSE FLOOR ACTION:</b>	
<b>SPONSOR(S):</b>	Appropriations Committee; Health & Human Services Committee; Renner and others	117 Y's	0 N's
<b>COMPANION BILLS:</b>	CS/SB 7054	<b>GOVERNOR'S ACTION:</b>	Pending

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### SUMMARY ANALYSIS

CS/CS/HB 1083 passed the House on March 2, 2016, and subsequently passed the Senate on March 9, 2016. The bill includes portions of CS/CS/CS/HB 919 and HB 4037.

Individuals with specified developmental disabilities meeting Medicaid eligibility requirements may receive services in the community through the state's Medicaid Home and Community-Based Services (HCBS) waiver (known as iBudget Florida). They may also live and receive services in an institutional setting known as an Intermediate Care Facility for the Developmentally Disabled (ICF/DD).

The bill adds Down syndrome to the definition of "developmental disability" in ch. 393, F.S.; individuals with this diagnosis are already eligible for the waiver and may also qualify due to intellectual disability.

CS/CS/HB 1083 amends s. 393.065(5), F.S., to make permanent the Fiscal Year (FY) 2015-16 implementing bill's temporary changes to waiver waiting list prioritization and enrollment provisions. The bill places individuals needing both waiver and extended foster care child welfare services in the second of seven prioritized categories, and allows enrollment without waiting for individuals previously on another state's HCBS waiver whose parent or guardian is an active-duty military servicemember transferred into the state. The bill revises other waiver prioritization and enrollment provisions.

The bill allows funding increases for waiver enrollees with significant needs for transportation to waiver-funded adult day training or employment services who lack other reasonable transportation options.

The bill requires contracted waiver services providers to use any Agency for Persons with Disabilities (APD) data management systems to document service provision to APD clients and to have required hardware and software for doing so; they must also comply with APD requirements for provider staff training and professional development. ICF/DD's must also cooperate with agency staff conducting utilization reviews.

The bill makes permanent the FY 2015-16 implementing bill's temporary provisions removing the requirement for APD to license and contract with existing comprehensive transitional education programs (CTEPs). CS/CS/HB 1083 also increases APD oversight of CTEPs and their compliance with federal regulations.

CS/CS/HB 1083 addresses a 2015 federal court ruling finding that s. 393.11, F.S., governing the involuntary admission of persons with intellectual disabilities or autism to residential services, is constitutionally infirm in not requiring a periodic review of continued involuntary admission by a decision-maker with the duty to consider and authority to order release. The bill requires such a review and provides a \$623,200 nonrecurring General Revenue Fund appropriation for implementation.

Subject to the Governor's veto powers, the effective date of this bill is July 1, 2016.

### I. SUBSTANTIVE INFORMATION

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

**STORAGE NAME:** h1083z.CFSS

**DATE:** March 23, 2016

## A. EFFECT OF CHANGES:

### Background

#### Agency for Persons with Disabilities

The Agency for Persons with Disabilities (APD) provides services to persons with developmental disabilities. A developmental disability is defined as a disorder or syndrome that is attributable to intellectual disability, cerebral palsy, autism, spina bifida, or Prader-Willi syndrome; that manifests before the age of 18; and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely.<sup>1</sup>

While Down syndrome is not among the disabilities included in the definition of “developmental disability”, it is specifically included as a qualifying disability for eligibility for Home and Community-Based (HCBS) waiver services provided by APD.<sup>2</sup> Down syndrome is a chromosomal condition that is associated with intellectual disability, a characteristic facial appearance, and weak muscle tone (hypotonia) in infancy. All affected individuals experience cognitive delays and so may qualify for APD services due to their intellectual disability (though the intellectual disability is usually mild to moderate).<sup>3</sup> Individuals with a primary diagnosis of Down syndrome comprise about 1% of APD’s clients.<sup>4</sup>

The HCBS waiver, known as iBudget Florida, offers 27 supports and services delivered by contracted service providers to assist individuals to live in their community. Examples of waiver services enabling children and adults to live in their own home, a family home, or in a licensed residential setting are residential habilitation, behavioral services, companion, adult day training, employment services, and physical therapy.<sup>5</sup>

While the majority of individuals served by APD live in the community, a small number live and receive services in Intermediate Care Facilities for the Developmentally Disabled (ICF/DD). ICF/DD’s are defined in s. 393.063(22), F.S., as residential facilities licensed and certified by the Agency for Health Care Administration (AHCA) pursuant to part VIII of ch. 400. ICF/DD’s are considered institutional placements.

#### Home- and Community-Based Services Waiver

##### *iBudget Florida Program*

APD administers iBudget Florida pursuant to s. 393.0662, F.S. iBudget Florida uses an algorithm, or formula, to set individuals’ funding allocations for waiver services. The statute authorizes APD to give individuals additional funding under certain conditions (such as a temporary or permanent change in need, or an extraordinary need that the algorithm does not address).<sup>6</sup> APD phased in the implementation of iBudget Florida, with the final areas transitioned from the previous tiered waiver system on July 1, 2013.<sup>7</sup>

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<sup>1</sup> S. 393.063(9), F.S.

<sup>2</sup> S. 393.0662(1) , F.S., provides eligibility for individuals with a diagnosis of Down syndrome.

<sup>3</sup> Rule 65G-4.014, F.A.C. requires that qualifying under an intellectual disability diagnosis requires “significantly subaverage general intellectual functioning evidenced by an Intelligence Quotient (IQ) two or more standard deviations below the mean on an individually administered standardized intelligence test, and significant deficits in adaptive functioning in one or more” domains such as communication skills, self-care and home living.

<sup>4</sup> *Overview of the Agency for Persons with Disabilities*, presentation at the House Children, Families, and Seniors Subcommittee, Jan. 7, 2015.

<sup>5</sup> Agency for Persons with Disabilities, Quarterly Report on Agency Services to Floridians with Developmental Disabilities and Their Costs: First Quarter Fiscal Year 2015-16, November 2015.

<sup>6</sup> S. 393.0662(1)(b), F.S.

<sup>7</sup> *Supra*, note 5.

However, the iBudget Florida program has been the subject of litigation. In September 2014, after a 1<sup>st</sup> District Court of Appeal ruling regarding the program's rules, APD reset approximately 14,000 individuals' budget allocations to higher amounts.<sup>8</sup> APD began rulemaking to adopt new rules to replace the previous ones.<sup>9</sup> APD, in collaboration with stakeholders, developed a revised algorithm. APD has filed to adopt rules including this revised algorithm and related funding calculation methods.<sup>10</sup>

iBudget statutes were amended by the FY 2015-16 General Appropriations Act implementing bill to permit additional funding beyond that allocated by the algorithm for transportation to a waiver-funded adult day training program or to employment under certain conditions.<sup>11</sup>

### *Waiver Enrollment Prioritization*

As of December 14, 2015, 31,665 individuals were enrolled on the iBudget Florida waiver.<sup>12</sup> The majority of waiver enrollees live in a family home with a parent, relative, or guardian.

The Legislature appropriated \$994,793,906 for Fiscal Year 2015-2016 to provide services through the HCBS waiver program, including federal match of \$601,153,957.<sup>13</sup> However, this funding is insufficient to serve all persons desiring waiver services. To enable APD to remain within legislative appropriations, waiver enrollment is limited. Accordingly, APD maintains a wait list for waiver services. Prioritization for the wait list is provided in s. 393.065(5), F.S., and also in the FY 15-16 implementing bill.<sup>14</sup>

As part of the wait list prioritization process, clients are assigned to one of seven categories. The underlying statute prioritizes need as follows:

- Category 1 – Clients deemed to be in crisis.
- Category 2 – Children from the child welfare system with an open case in the Department of Children and Families' statewide child welfare information system.
- Category 3 – Includes, but is not limited to, clients:
  - Whose caregiver has a documented condition that is expected to render the caregiver unable to provide care within the next 12 months and for whom a caregiver is required but no alternate caregiver is available;
  - Who are at substantial risk of incarceration or court commitment without supports;
  - Whose documented behaviors or physical needs place them or their caregiver at risk of serious harm and other supports are not currently available to alleviate the situation; or
  - Who are identified as ready for discharge within the next year from a state mental health hospital or skilled nursing facility and who require a caregiver but for whom no caregiver is available.
- Category 4 – Includes, but is not limited to, clients whose caregivers are 70 years of age or older and for whom a caregiver is required but no alternate caregiver is available;
- Category 5 – Includes, but is not limited to, clients who are expected to graduate within the next 12 months from secondary school and need support to obtain or maintain competitive employment, or to pursue an accredited program of postsecondary education to which they have been accepted.
- Category 6 – Clients 21 years of age or older who do not meet the criteria for categories 1-5.

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<sup>8</sup> Agency for Persons with Disabilities, iBudget Florida, <http://apd.myflorida.com/ibudget/> (last visited December 15, 2015).

<sup>9</sup> Department of State, Florida Administrative Register, Vol. 40, No. 207, Oct. 23, 2014, pg. 4703-4706.

<sup>10</sup> These rules have been challenged as well. *G. B.; Z. L., through his guardian K. L.; J. H.; and M. R. v. the Agency for Persons with Disabilities*, Case No. 15-005803RP (Fla. DOAH).

<sup>11</sup> S. 21, Ch. 2015-222, Laws of Florida.

<sup>12</sup> E-mail from Caleb Hawkes, Deputy Legislative Affairs Director, Agency for Persons with Disabilities. RE: Requested information for bill analysis for APD agency bill (Dec. 14, 2015). On file with Children, Families and Seniors Subcommittee.

<sup>13</sup> Line 251, Ch. 2015-221, Laws of Florida.

<sup>14</sup> S. 20, Ch. 2015-222, Laws of Florida.

- Category 7 – Clients younger than 21 years of age who do not meet the criteria for categories 1-4.<sup>15</sup>

As of November 1, 2015, there were 21,459 people on the wait list for HCBS waiver program services. A majority of people on the wait list have been on the list for more than 5 years, though some are children receiving services through the school system and others are individuals who have been offered waiver services previously but refused them and chose to remain on the wait list.<sup>16</sup>

APD HCBS Length of Wait		
Length of Wait	#	%
1 year or less	1,886	8.8
1+ to 2 years	1,534	7.1
2+ to 3 years	1,229	5.7
3+ to 4 years	1,460	6.8
4+ to 5 years	1,522	7.1
5+ to 6 years	1,617	7.5
6+ to 7 years	1,709	8.0
7+ to 8 years	1,634	7.6
8+ to 9 years	1,774	8.3
9+ to 10 years	1,797	8.4
10+ years	5,297	24.7

For several years, while APD experienced significant deficits, APD was limited to newly enrolling on the waiver only individuals determined to be in crisis. Only since FY 2013-14, when APD has remained within budget, has the Legislature provided funding to APD to serve individuals from the wait list who were not in crisis but had a high priority for service needs. Since July 1, 2013, APD has enrolled 2,392 such individuals<sup>17</sup>.

The statutory wait list prioritization has been changed in the past two legislative sessions via the implementing bill. The FY 2014-15 implementing bill allowed individuals who are receiving home and community-based waiver services in other states to be enrolled immediately on the waiver if their parent or guardian is on active military duty and transfers to Florida.<sup>18</sup> The FY 2015-16 implementing bill also allowed immediate waiver enrollment for servicemembers' dependents previously on a waiver. Since July 1, 2014, 10 such individuals have enrolled on the waiver.<sup>19</sup>

The FY 2014-15 implementing bill limited the individuals in Category 2 to children with an open case in the child welfare system who were at the time of finalization of an adoption with placement in a family home, reunification with family members with placement in a family home, or permanent placement with a relative in a family home. The FY 2015-16 implementing bill maintained the 2014-15 changes but added to Category 2 those youth with developmental disabilities who are in extended foster care to be served by both the waiver and the child welfare system. The FY 2015-16 implementing bill also specified the services that APD and the community-based care lead agencies providing foster care services must provide these enrollees. Since July 1, 2015, 30 individuals in extended foster care have enrolled on the waiver.

Both the FY 2014-15 and 2015-16 implementing bills also specified that:

<sup>15</sup> S. 393.065(5), F.S.

<sup>16</sup> Supra, note 5.

<sup>17</sup> *Id.*

<sup>18</sup> S. 9, Ch. 2014-58, L.O.F.

<sup>19</sup> Supra, note 12.

- After individuals formerly on the waiting list are enrolled on the waiver, those remaining on the waiting list are not substantially affected by agency action and not entitled to a hearing under s. 393.125, F.S., or administrative proceeding under chapter 120, F.S.
- APD must use a prioritization tool for prioritizing individuals for waiver enrollment within certain categories.

### *Client Data Management System*

APD must manage data to meet federal requirements for administering the iBudget HCBS waiver, such as tracking, measuring, reporting, and providing quality improvement processes for 32 specific program performance measures. However, APD relies heavily on manual processes and disparate systems to collect, analyze, and report data, which is inefficient and error-prone.

The Legislature appropriated funding in FY 2015-16 for APD to develop a client data management system for verifying service delivery by providers, billing waiver services, and processing claims.<sup>20</sup> This system will also be used for program quality improvement purposes. APD contracted with a vendor to configure a commercial off-the-shelf product to APD business processes, and anticipates providers will need to begin using the system during FY 2016-2017. Providers will need standard software and technology in order to log into the system.<sup>21</sup>

### *Provider Staff Training and Professional Development*

Pursuant to the waiver agreement with the federal government, APD must coordinate, develop, and provide specialized training for providers and their employees to promote health and well-being of individuals served.<sup>22</sup> These requirements are currently in the Developmental Disabilities Individual Budgeting Waiver Services Coverage and Limitations Handbook. For example, the handbook outlines required basic and in-service training and continuing education for direct service providers on topics such as person-centered planning, maintaining health and safety, reporting to the abuse hotline, and first aid. Providers of certain services such as supported employment or supported living must have additional pre-service certification training. Training is typically offered through several modalities, such as the internet, DVD, and live classroom training.<sup>23</sup>

### Residential Facilities

Persons with developmental disabilities live in various types of residential settings. Some individuals with developmental disabilities live with family, some live in their own homes, while others may live in community-based residential facilities.<sup>24</sup> Pursuant to s. 393.067, F.S., APD is charged with licensing community-based residential facilities that serve and assist individuals with developmental disabilities; these include foster care facilities, group home facilities, residential habilitation centers, and comprehensive transitional education programs.<sup>25</sup>

In addition to its regulatory duties, APD contracts with licensed community-based residential facilities to provide services under the Medicaid Home and Community-Based Waiver (waiver). Prior to enactment of the 2015 General Appropriations Act Implementing Bill (Chapter 2015-222, Laws of Florida), APD was statutorily required to contract for residential services with residential facilities licensed prior to October 1, 1989, if those facilities complied with all provisions of s. 393.067, F.S.<sup>26, 27</sup> This requirement

<sup>20</sup> SB 2500A, line 265.

<sup>21</sup> Agency for Persons with Disabilities, Agency Analysis of 2016 Act Relating to the Agency for Persons with Disabilities.

<sup>22</sup> *Id.*

<sup>23</sup> Rule 59G-13.070, F.A.C. The handbook may be accessed at <http://apd.myflorida.com/ibudget/>.

<sup>24</sup> S. 393.063(28) defines residential facility as a facility providing room and board and personal care for persons who have developmental disabilities.

<sup>25</sup> Agency for Persons with Disabilities, *Planning Resources*, accessible at: <http://apd.myflorida.com/planning-resources/> (last accessed 11/11/15).

<sup>26</sup> S. 393.067(15), F.S., (2014).

was placed in statute as a response to residential facilities that were concerned about their continued business with APD after the waiver was enacted.<sup>28</sup>

In order to implement Specific Appropriation 251 of the 2015-2016 General Appropriations Act, Chapter 2015-222, Laws of Florida, amended s. 393.067, F.S. to remove this statutory procurement requirement with an expiration and reversion clause set for July 1, 2016.

### *Comprehensive Transitional Education Programs*

A Comprehensive Transitional Education Program (CTEP) is a group of jointly operating centers or units that provide a sequential series of educational care, training, treatment, habilitation, and rehabilitation services to persons who have developmental disabilities and who have severe or moderate maladaptive behaviors.<sup>29</sup>

CTEPs serve individuals with developmental disabilities with the most intensive of behavioral needs.<sup>30</sup> A CTEP is designed to provide services to such individuals with the ultimate objective of allowing them to return to other less intensive settings within their own communities.<sup>31</sup> There are presently two CTEPs licensed in Florida, and both licenses are held by the same organization, Advoserv Inc., which operates the Carlton Palms Educational Center in Lake County.<sup>32,33</sup>

Previously, pursuant to s. 393.18, F.S., APD was authorized to license CTEPs that were already in operation by July 1, 1989, or owned real property zoned and registered with APD to operate a CTEP by July 1, 1989. Each residential unit within the CTEP could not exceed a capacity of 15 persons. The statute also authorized licensure of facilities that provided residential services for children if those children had developmental disabilities needing special behavioral services, and the residential facility served children with an open case in the child welfare system as of July 1, 2010. APD has interpreted this as a prohibition against licensing newer facilities.

In order to implement Specific Appropriation 251 of the 2015-2016 General Appropriations Act, Chapter 2015-222, Laws of Florida, amended s. 393.18, F.S., to delete the paragraphs detailing the licensing requirements that has restricted APD's ability to license new CTEP providers, and moved the 15 resident cap for residential units within a CTEP to s. 393.18(4), F.S. The amendment also includes an expiration and reversion clause for these amendments set for July 1, 2016.

### *Federal Home- and Community-Based Services Settings Regulations*

After several years of rulemaking, in January 2014 the federal Centers for Medicare and Medicaid Services published a final rule requiring all Medicaid-funded home- and community-based residential and non-residential settings to meet certain qualifications related to the nature and quality of individuals' experiences in them. The rule requires that such settings:

- Are integrated in and support full access to the greater community;

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<sup>27</sup> Ch. 89-308, Laws of Fla.

<sup>28</sup> Email from Caleb Hawkes, Deputy Legislative Affairs Director, Agency for Persons with Disabilities, RE: Residential Facility Contracting Language (Nov. 13, 2015) (on file with Health and Human Services Committee staff).

<sup>29</sup> S. 393.18, F.S.

<sup>30</sup> Agency for Persons with Disabilities, *2016 Agency Legislative Bill Analysis for HB 4037*, November 9, 2015 (on file with Children, Families, and Seniors Subcommittee staff).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Carlton Palms has an extensive history of complaints and regulatory action. APD has filed 4 administrative complaints against the facility since 2011, detailing inadequate training of staff, physical violence, inadequate care, and inadequate supervision of residents while in the care and custody of Carlton Palms. APD has twice sought moratoria on new admissions to the facility, once in 2012 and most recently in September of 2014. In this most recent administrative complaint, DOAH Case No: 14-004853, APD sought the maximum fine allowed by law, \$10,000, as well as a moratorium on new admissions. APD has settled each of these administrative complaints without the imposition of a moratorium. Due to the inability to license other providers, APD has no licensed facilities to place persons requiring this level of care if a moratorium were imposed or transfer residents if the facility were closed.

- Are selected by the individual from among setting options;
- Ensure individual rights of privacy, dignity and respect, and freedom from coercion and restraint;
- Optimize autonomy and independence in making life choices; and
- Facilitate choice regarding services and who provides them.

The final rule lists settings that are presumed to have institutional qualities and as such would not be considered home- and community-based settings, such as settings that are on the grounds of, or immediately adjacent to, a state institution, or that have the effect of isolating individuals receiving Medicaid-funded HCBS from the broader community.<sup>34</sup> An example cited by CMS of the latter is a residential school, where both the educational program and the residential program are in close proximity, and individuals do not travel into the broader community to live or attend school.<sup>35</sup> However, there is a process for states to demonstrate that such settings are home- and community-based rather than institutional. If a setting does not meet federal requirements, a state must either ensure it comes into compliance or offer individuals other settings that are compliant with the rule.<sup>36</sup>

### Involuntary Admission to Residential Services

Section 393.11, F.S., creates the statutory framework for the involuntary admission of persons with intellectual disabilities that require residential services. Residential services include the care, treatment, habilitation, and rehabilitation the person is alleged to need.

A petitioning commission may file a petition for involuntary admission to residential services.<sup>37</sup> The petitioning commission must file the petition in the circuit court of the developmentally disabled person's residence. Once this petition is filed, the circuit court appoints a committee to examine the person being considered for involuntary admission. This examining committee must file a report with the court, to include, but not limited to:

- The degree of the person's intellectual disability and whether the person is eligible for agency services;
- Whether the person either:
  - Lacks sufficient capacity to consent for services from APD and lacks basic survival and self-care skills to such a degree that close supervision and habilitation in a residential setting is necessary to avoid a real and present threat of substantial harm; or
  - Is likely to physically injure others if allowed to remain at liberty;
- Purpose to be served by the residential care;
- A recommendation on the type of residential placement that would be most appropriate and least restrictive; and
- The appropriate care, habilitation, and treatment.<sup>38</sup>

After this examining committee files their report with the court, the court holds a hearing to allow the person alleged to need involuntary admission to present evidence and cross-examine all witnesses.

<sup>34</sup> Centers for Medicare and Medicaid Services, Fact Sheet: Summary of Key Provisions of the Home and Community-Based Services (HCBS) Settings Final Rule (CMS 2249-F/2296-F), <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Long-Term-Services-and-Supports/Home-and-Community-Based-Services/Home-and-Community-Based-Services.html> (accessed March 16, 2016).

<sup>35</sup> Centers for Medicare and Medicaid Services, Guidance on Settings that have the Effect of Isolating Individuals Receiving HCBS from the Broader Community, <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Long-Term-Services-and-Supports/Home-and-Community-Based-Services/Home-and-Community-Based-Services.html> (accessed March 16, 2016).

<sup>36</sup> Centers for Medicare and Medicaid Services, Questions and Answers - 1915(i) State Plan Home and Community-Based Services, 5-Year Period for Waivers, Provider Payment Reassignment, Setting Requirements for Community First Choice, and 1915(c) Home and Community-Based Services Waivers - CMS 2249-F and 2296-F, <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Long-Term-Services-and-Supports/Home-and-Community-Based-Services/Home-and-Community-Based-Services.html> (accessed March 16, 2016).

<sup>37</sup> S. 393.11(2)(a) and (b), F.S., one of these persons must be a licensed physician in Florida.

<sup>38</sup> S. 393.11(5), F.S.

The person alleged to need involuntary admission is entitled to representation by counsel at all stages of this proceeding.<sup>39</sup>

The court may not enter an order for involuntary admission unless it finds, by clear and convincing evidence, that:

- The person alleged to need involuntary admission is intellectually disabled or autistic;
- Placement in a residential setting is the least restrictive and most appropriate alternative to meet the person's needs, and;
- Because of the person's intellectual disability or autism, the person either:
  - Lacks sufficient capacity to consent for services from APD and lacks basic survival and self-care skills to such a degree that close supervision and habilitation in a residential setting is necessary to avoid a real and present threat of substantial harm; or
  - Is likely to physically injure others if allowed to remain at liberty.<sup>40</sup>

This order for involuntary admission is of indeterminate duration and the person who has been involuntarily admitted to residential services may not be released from such order except by further order of the circuit court.<sup>41</sup> The statute does not provide for any review of orders entered for involuntary admission. However, the statute does provide that any person involuntarily admitted to residential services may file a petition for writ of habeas corpus to challenge their involuntary admittance.<sup>42</sup>

#### *Involuntary Admission for Those Found Incompetent to Proceed to Trial*

For individuals charged with a crime but found incompetent to proceed to trial due to an intellectual disability or autism, pursuant to s. 916.303, F.S., the process of involuntary admission is slightly different. If an individual remains incompetent for two years the charges shall be dismissed. If the charges have been dismissed, and the individual is considered to lack sufficient capacity to apply for services or lacks the basic survival and self-care skills to provide for his or her well-being or is likely to injure others if allowed to remain at liberty, a petition to involuntarily admit the individual to residential services, pursuant to s. 393.11, F.S., shall be filed.<sup>43</sup>

Once a petition for involuntary admission to residential services is filed, all of the same procedures under s. 393.11, F.S., are followed. However, because this person has been found incompetent by a criminal court, there is the added ability to place the individual in a secure facility if there is a substantial likelihood that the individual will injure another person or continues to present a danger of escape. If the committing court places the individual in a secure facility, that placement must be reviewed annually to determine whether the individual continues to meet the criteria for placement.<sup>44</sup>

#### *J.R. v. Palmer*

In 2004, J.R. was involuntarily admitted to nonsecure residential services under s. 393.11, F.S. The involuntary admission order did not include an end date for the involuntary admission.<sup>45</sup> In 2011, J.R. filed a federal lawsuit claiming his constitutional due process rights had been violated because s. 393.11, F.S., does not provide periodic review of his continued involuntary confinement by a decision-maker that has the authority to release him.<sup>46</sup> APD argued that within the annual review of the individual's support plan, under s. 393.0651, F.S., there is an implicit obligation to review the

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<sup>39</sup> S. 393.11(6), F.S.

<sup>40</sup> S. 393.11(8), F.S.

<sup>41</sup> S. 393.11(11), F.S.

<sup>42</sup> S. 39.11(13), F.S.

<sup>43</sup> S. 916.303(2), F.S.

<sup>44</sup> S. 916.303(3), F.S.

<sup>45</sup> *J.R. v. Palmer*, 175 So.3d 710 (2015).

<sup>46</sup> *Id.* at 712.



circumstances and petition the court if the circumstances have changed to the point that involuntary admission was no longer appropriate.<sup>47</sup>

In May 2015, the Supreme Court of Florida, in an answer to two certified questions from the U.S. Court of Appeals for the Eleventh Circuit, ruled that:

- The annual support plan review, pursuant to s. 393.0651, F.S., does not contain an implicit requirement for APD to consider the continued propriety of an involuntary admission, under s. 393.11, F.S.
- There is no implicit requirement for APD to petition the circuit court for a person's release from involuntary admission under ss. 393.11 or 393.0651, F.S.

In October 2015, the U.S. Court of Appeals for the Eleventh Circuit ruled that s. 393.11, F.S., is constitutionally infirm because it does not require periodic review of continued involuntary commitment by a decision-maker with the duty to consider and authority to order release, and that such a statutory scheme is unconstitutional on its face.<sup>48</sup>

### Guardians

Individuals with intellectual disabilities and autism may benefit from decisionmaking support due to the nature of those disabilities. Accordingly, chapter 393 provides authority for guardians to be involved in a variety of interactions APD has with clients. However, the term "guardian" is not expressly defined in ch. 393.

### Utilization Review of ICF/DD's

While most individuals served by APD live in the community, a small number live in ICF/DD's. ICF/DD's are defined in s. 393.063(22), F.S., as residential facilities licensed and certified by AHCA pursuant to part VIII of ch. 400. There are approximately 2,866 private and public ICF/DD beds in Florida.<sup>49</sup>

ICF/DD's are considered institutional placements rather than community placements. Accordingly, the federal government requires routine utilization reviews for individuals in ICF/DD's to ensure that they are not inappropriately institutionalized. Utilization reviews must be conducted by a group of professionals referred to as the Utilization Review Committee, which must include at least one physician and one individual knowledgeable in the treatment of intellectual disabilities.

The Medicaid state plan approved by the federal government states that APD will conduct utilization reviews. APD performs this function through an interagency agreement with AHCA.<sup>50</sup> There is no express statutory requirement or authorization for APD to conduct utilization reviews.

### Severe Self-Injurious Behavior Program

The Severe Self-Injurious Behavior (SIB) program was located at Tacachale, one of the APD developmental disabilities centers, beginning in 1986. The program was initially funded by a grant from National Institute of Health, then by the Florida Council on Developmental Disabilities and later by the Department of Children and Families. The program moved from Tacachale to other locations in 2008. The agency currently serves individuals with self-injurious behaviors in the community in licensed homes that are specifically for intensive behavior issues. These services are funded under the iBudget waiver program. Accordingly, there is no longer a need to define this program in Chapter 393.

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<sup>47</sup> Id. at 715.

<sup>48</sup> *J.R. v. Hansen*, 803 F.3d 1315 (11<sup>th</sup> Cir. Oct. 15, 2015).

<sup>49</sup> *Supra*, note 21.

<sup>50</sup> *Id.*

## Effect of Proposed Changes

### Home and Community-Based Services Waiver

#### *iBudget Florida Program*

CS/CS/HB 1083 clarifies the process for calculation of individual's iBudgets (their budget allocations) by defining the terms "algorithm" and "allocation methodology" and making conforming changes in s. 393.0662, F.S. The bill also deleted language regarding the transition to the iBudget system from the previous tiered waiver system which is obsolete now that the transition is complete.

The bill also makes permanent the Fiscal Year 2015-16 appropriations implementing bill language that adds transportation needs to the list of the circumstances that may qualify individuals to receive additional funding beyond that calculated through the algorithm. Specifically, APD may grant a funding increase to individuals whose iBudget allocations are insufficient to pay for transportation services to a waiver-funded adult day training program or employment services and who have no other reasonable transportation options. This would allow such individuals to purchase transportation services to attend adult day programs or access employment services.

The bill also adds Down syndrome to the definition of "developmental disability." APD already serves individuals with a diagnosis of Down syndrome due to their statutory eligibility under that diagnosis for HCBS waiver services. Individuals with Down syndrome currently may also qualify for APD services due to the presence of an intellectual disability.<sup>51</sup>

#### *Waiver Enrollment Prioritization*

CS/CS/HB 1083 makes permanent the FY 2015-16 implementing bill's temporary changes related to the waiver waiting list prioritization categories. The bill requires APD to prioritize, in Category 2, children in the child welfare system being reunified with their families or being placed permanently with an adoptive family or relatives and youth with developmental disabilities in extended foster care who must be served by both APD and the community-based care (CBC) organizations. The bill also delineates the responsibilities of the different entities providing services to these youth; specifically, APD must provide waiver services, including residential habilitation that supports individuals living in congregate settings, and the CBC lead agency must fund room and board at the prevailing foster care rate as well as provide case management and related services.

A second implementing bill changes made permanent by CS/CS/HB 1083 are allowing waiver enrollment without first being placed on the waiting list for individuals who were on an HCBS waiver in another state and whose parent or guardian is an active-duty military servicemember transferred into the state. This means active-duty servicemembers' dependents previously on a waiver are not placed in a waiting list category but are immediately enrolled on the waiver. Third, CS/CS/HB 1083 also specifies that after individuals formerly on the waiting list are enrolled on the waiver, those remaining on the waiting list are not substantially affected by agency action and not entitled to a hearing under s. 393.125, F.S., or administrative proceeding under chapter 120, F.S. Fourth, the bill permits rulemaking to specify tools for prioritizing waiver enrollment within categories.

The bill makes additional changes to provisions relating to the wait list that were not in the implementing bill. It adds to Category 3 individuals whose caregivers are unable to provide the care needed, and adds to Category 5 individuals who are graduating from secondary school and need support to obtain a meaningful day activity. It also requires APD to send a letter annually to individuals on the waiting list requesting updated information; this letter would be sent instead of the annual report required pursuant to s. 393.0651, F.S.

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<sup>51</sup> Rule 65G-4.014 F.A.C.

The bill requires APD service providers to use APD data management systems to document service provision to agency clients. Providers would need to have the hardware and software necessary to use these systems, as established by APD. The bill also requires providers to ensure any staff directly serving clients meet APD requirements for training and professional development.

### Residential Facilities

Effective June 30, 2016, or upon becoming law after that date and operating retroactively to June 30, 2016, CS/CS/HB 1083 repeals ss. 24 and 26 of chapter 2015-222, Laws of Florida (2015-16 General Appropriations Implementing Bill) that set the expiration and reversion of amendments to ss. 393.067(15) and 393.18, F.S., for July 1, 2016.

The bill reenacts s. 393.067(15), F.S., as amended in s. 23 of chapter 2015-222, Laws of Florida, which deletes obsolete language and specifies that APD is not required to contract with residential facilities it licenses under s. 393.067, F.S., including foster care facilities, group home facilities, residential habilitation centers, and CTEPs.

The bill reenacts and amends s. 393.18, F.S., as amended in s. 25 of chapter 2015-222, Laws of Florida, to delete the paragraphs restricting APD's ability to license new CTEP providers and to include the requirement that each unit within the component centers may not exceed 15 residents, unless authorized prior to July 1, 2015. The bill also:

- Revises the purpose of the CTEP to focus on individuals with severe maladaptive behaviors and co-occurring developmental disability and mental illness with the goal of returning them to the most-appropriate, least restrictive community living option of their choice,
- Deletes the alternative living center and independent living education center program components,
- Permits APD to approve and review admissions and readmissions to a CTEP, in an attempt to transition people into less restrictive, more home like settings faster when appropriate,
- Requires the supervisor of the clinical director of these programs to hold a doctoral degree with a focus in behavior analysis, be a certified behavior analyst, and have at least 1 year of experience,
- Requires integration of any educational component with the referring school district for school-aged residents, and
- Requires compliance with any settlement agreement entered into with APD.

This will increase APD oversight of CTEPs and facilitate their greater compliance with federal home- and community based setting regulations.

### Involuntary Admission to Residential Services

CS/CS/HB 1083 amends s. 393.11, F.S., to require annual reviews for persons involuntarily admitted to residential services. The bill requires APD to employ or contract with a "qualified evaluator" to conduct the reviews, unless otherwise ordered, to determine the propriety of the continued involuntary admission. The bill also defines a "qualified evaluator" as a licensed psychiatrist or psychologist who has demonstrated to the court an expertise in the diagnosis, evaluation, and treatment of persons who have intellectual disabilities. The bill requires APD to provide the completed annual review to the court.

The bill requires the court to conduct an annual review hearing, unless a shorter review period was ordered at a previous hearing. The court must review the report and determine whether the involuntary admission is still required and, if so, whether the person is receiving adequate care, treatment, habilitation, and rehabilitation in the residential setting.

The bill requires APD to provide a copy of the review and give reasonable notice of the hearing to the state's attorney, if applicable, the person's attorney and guardian or guardian advocate, if appointed.

The bill also addresses the statute's inconsistency in including autism as a qualifying diagnosis by making conforming changes to include autism as a qualifying diagnosis throughout the section.

### Guardians

CS/CS/HB 1083 defines the term "guardian" to have the same meaning as in s. 744.102, F.S. In that section, "guardian" means a person who has been appointed by the court to act on behalf of a ward's person or property, or both. The term is not currently defined in ch. 393.

### Utilization Review of Intermediate Care Facilities for the Developmentally Disabled

The bill requires APD to conduct utilization reviews for ICF/DD's and requires ICF/DD's to cooperate with these reviews, including requests for information, documentation, and inspection. This will ensure that Florida continues to meet federal requirements for conducting utilization reviews pursuant to the approved Medicaid state plan.

### Severe Self-Injurious Behavior program

The bill also repeals the statutory authority for the program for the prevention and treatment of severe self-injurious behavior. This program has been moved out of APD and now is operating independently in the community.<sup>52</sup>

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

None.

#### **2. Expenditures:**

See fiscal comments.

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

#### **1. Revenues:**

None.

#### **2. Expenditures:**

None.

### **C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The fiscal impact on the private sector is indeterminate. APD will have to establish requirements for training and career development of direct care provider staff and for hardware and software required for providers to use the new APD client data management system. If APD chooses to maintain the training

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<sup>52</sup> *Supra*, note 30.

and career development provisions that are presently required by the waiver program and requires hardware and software currently possessed by providers, the bill will have no direct economic impact on providers. It is unknown what training and career development requirements or hardware and software requirements APD will establish, or the extent to which providers will have to acquire hardware and software to meet those requirements.

**D. FISCAL COMMENTS:**

The Legislature determines the funding available for HCBS waiver services for individuals with developmental disabilities through the appropriations process. APD then serves individuals previously enrolled on the waiver and newly enrolls additional individuals to the extent that funding permits.

APD is currently administering the waiver program in accordance with the waiver enrollment and iBudget allocation requirements of CS/CS/HB 1083, since those provisions are current law through the FY 2015-16 implementing bill. CS/CS/HB 1083 will make these requirements permanent rather than reverting to the underlying statutory language.

APD estimates that it will cost \$623,200 to evaluate all persons currently involuntarily admitted to residential services. APD estimates there are 1,558 individuals that will need to be evaluated at a cost of \$400 per evaluation. The bill provides a \$623,200 nonrecurring appropriation from the General Revenue Fund to implement the provisions of the bill.