

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Children, Families, and Elder Affairs

BILL: CS/SB 472

INTRODUCER: Children, Families, and Elder Affairs Committee and Senator Bean

SUBJECT: Developmental Disabilities

DATE: April 1, 2013 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Peterson	Hendon	CF	Fav/CS
2.			BI	
3.			AHS	
4.			AP	
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

CS/SB 472 creates the Developmental Disabilities Savings Program (savings program) which is intended to assist families in paying for services for children with developmental disabilities who will become ineligible for services, such as exceptional education services, due to age.

The bill creates the Developmental Disabilities Savings Program Board (board) to administer the savings program. The board consists of seven members who are to serve on the board without compensation. The bill lists the powers and duties of the board and provides that the goals of the board are to provide all contributors and benefactors of the program with the most secure, well-diversified, and beneficially administered savings program possible, to allow all qualified firms interested in providing investment services equal consideration, and to provide such services to the state at no cost and to the contributors and benefactors at the lowest cost possible.

The bill has no immediate fiscal impact on the state, but will have an indeterminate cost to operate the board once it becomes operational, and has an effective date of July 1, 2013, or on the date the "Achieving a Better Life Experience Act," or similar legislation, becomes law, whichever occurs later.

This bill creates unnumbered sections of the Florida Statutes.

II. Present Situation:

Developmental Disabilities

The Agency for Persons with Disabilities (APD) is responsible for providing services to persons with developmental disabilities.¹ A developmental disability is defined as “a disorder or syndrome that is attributable to retardation, 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.”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 The primary purpose of APD is to develop and implement community-based services to ensure the safety, well-being, and self-sufficiency of people with developmental disabilities to help them live, learn, and work in their communities, and to provide assistance in identifying needs and funding to purchase supports and services.⁴

Currently, home and community-based services for Medicaid recipients with developmental disabilities are provided through a four-tier waiver system.⁵ The tier system was created by the 2007 Legislature to establish a predictable spending model for the program and to help control over-utilization of services which has led to significant program deficits. The program offers home and community-based services, including therapies, adult day training, behavioral services, residential habilitation services, respite, nursing services, employment, and supported living services, among others.⁶ Each of the tier waivers targets specific groups of people with certain service needs.

The 2010 Legislature directed APD, in consultation with AHCA, to develop and implement individual budgets (“ibudget”) as the basis for allocating funds to people enrolled in the Medicaid waiver programs. The ibudget system uses an algorithm to allocate funds to individuals based on client characteristics and acuity, which are reliable predictors of need. The ibudget caps each client’s funding for a 12-month period, subject to exceptions for extraordinary needs. AHCA received approval from the federal government to implement the ibudget system in March of 2011. The majority of individuals receiving waiver services have now been transited to the ibudget.⁷

¹ Section 20.197(3), F.S.

² Section 393.063(9), F.S.

³ “High-risk child” is defined in s. 393.063(20), F.S.

⁴ Section 393.062, F.S.

⁵ Section 393.0661, F.S.

⁶ Agency for Health Care Administration, *Developmental Disabilities Waiver Services Coverages and Limitations Handbook*, (Nov. 2010), available at http://portal.flmmis.com/FLPublic/Portals/0/StaticContent/Public/HANDBOOKS/DD_Waiver_Handbook_Final_Rule_Nov_2010.pdf (last visited Mar. 22, 2012).

⁷ Email from Jared Torres, Legislative Affairs Director, Agency for Persons with Disabilities (Mar. 25, 2013) (on file with the Senate Committee on Children, Families, and Elder Affairs).

Demand for services exceeds available funding, as a consequence APD maintains a waiting list. As of March 25, 2013, 28,979 individuals are receiving services through the waiver and 22,308 are on the waiting list.⁸ APD annually serves more than 50,000 persons with disabilities.⁹

Education for Persons with Developmental Disabilities

Prior to 1975, children with developmental disabilities often did not receive appropriate educational services, in part, because they were being excluded from public schools or because there was a lack of adequate resources in public schools. However, that changed with the passage of the Education for All Handicapped Children Act of 1975 (Act), which has been successful in ensuring children with disabilities, and the families of such children, access to a free appropriate public education and in improving educational results for children with disabilities.¹⁰ The Act defines “children with disabilities” as a child with:

- Intellectual disabilities, hearing impairments (including deafness) speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments; or specific learning disabilities
- and who, by reason, thereof, needs special education and related services.¹¹

The federal government provides grants to states through the Act in order to assist them in providing special education and related services to children with disabilities.¹² In order to be eligible for these funds, federal law requires each state to make free appropriate public education available to all children with disabilities residing in the state between the ages of three and 21, including children who have been suspended or expelled from school.¹³ The Act requires that schools develop an Individual Education Program for each child that details the specific special education and related services that will meet the child’s unique needs and prepare him or her for further education, employment, and independent living.¹⁴ The state educational agency must exercise general supervision over all educational programs for children with disabilities in the state, including all programs administered by other state or local agencies, and ensure that the programs meet the educational standards of the state educational agency.¹⁵

Exceptional Students in Florida

Florida law provides that special education services be available to persons with disabilities. The law defines “special education services” as specially designed instruction and related services that are necessary for an exceptional student to benefit from education. These services may include:

⁸ *Id.*

⁹The number reflects waiver and waitlist clients because individuals on the waitlist may receive some services or temporary supports that are not on the waiver. *Id.*

¹⁰ 20 U.S.C. s. 1400.

¹¹ 20 U.S.C.1401(3).

¹² 20 U.S.C. s. 1411.

¹³20 U.S.C. s. 1412.

¹⁴20 U.S.C. s. 1414(d).

¹⁵ 34 C.F.R. s. 300.149.

- Transportation;
- Diagnostic and evaluation services;
- Social services;
- Physical and occupational therapy;
- Speech and language pathology services;
- Job placement;
- Orientation and mobility training;
- Braille, typists, and readers for the blind;
- Interpreters and auditory amplification;
- Services provided by a certified listening and spoken language specialist;
- Rehabilitation counseling;
- Transition services;
- Mental health services;
- Guidance and career counseling;
- Specified materials, assistive technology devices, and other specialized equipment; and
- Other such services as approved by rules of the State Board of Education.¹⁶

An “exceptional student” is defined as:

[A]ny student who has been determined eligible for a special program in accordance with rules of the State Board of Education. The term includes students who are gifted and students with disabilities who have an intellectual disability; autism spectrum disorder; a speech impairment; a language impairment; an orthopedic impairment; [any] other health impairment; traumatic brain injury; a visual impairment; an emotional or behavioral disability; or a specific learning disability, including, but not limited to, dyslexia, dyscalculia, or developmental aphasia; students who are deaf or hard of hearing or dual sensory impaired; students who are hospitalized or homebound; children with developmental delays ages birth through 5 years, or children, ages birth through 2 years, with established conditions that are identified in State Board of Education rules pursuant to s. 1003.21(1)(e).¹⁷

Section 1003.57, F.S., ensures that all exceptional students are provided a public education with appropriate due process rights. Chapter 6A-6 of the Florida Administrative Code operationally defines the statute and establishes program eligibility and evaluation criteria for all exceptional students, including students identified as gifted.¹⁸ In the fall of 2012, there were nearly 350,000 exceptional students in the state, not including those designated as gifted students.¹⁹

¹⁶ Section 1003.01(3)(b), F.S.

¹⁷ Section 1003.01(3)(a), F.S.

¹⁸ Florida Department of Education, *Memorandum: Revised Exceptional Student Education Rules*, 2 (Oct. 15, 2004), available at <http://info.fldoe.org/docushare/dsweb/Get/Document-2533/ESE.pdf> (last visited Mar. 25, 2013).

¹⁹ Education Information and Accountability Services, Florida Department of Education, *Data Report: Membership in Programs for Exceptional Students, Fall 2010*, 2 (Feb. 2011), available at <http://www.fldoe.org/eias/eiaspubs/pubstudent.asp> (follow the “Membership in Programs for Exceptional Students” hyperlink) (last visited Mar. 25, 2013).

Prepaid Educational Plans

The Stanley G. Tate Florida Prepaid College Program allows purchasers to buy prepaid contracts to pay the registration fees, local fees, tuition differential fees, and dormitory expenses of beneficiaries at Florida community colleges and state universities, in advance of enrollment.²⁰ Beneficiaries of prepaid contracts are permitted to transfer the benefits of their contracts to any of the following institutions that qualify as an “eligible educational institution” under s. 529 of the Internal Revenue Code:

- An independent college or university located and chartered in Florida, that confers degrees and is accredited by the Southern Association of Colleges and Schools or the Accrediting Council for Independent Colleges and Schools and that confers degrees;
- Any out-of-state college or university that confers degrees, is not-for-profit, and is accredited by a regional accrediting association; and
- An applied technology diploma program or career certificate program operated by a Florida community college or a career center operated by a district school board.²¹

Prepaid Services for Parents of Children with Developmental Disabilities Study Group

Chapter 2009-56, Laws of Florida, created the Prepaid Services for Parents of Children with Developmental Disabilities Study Group (study group).²² The study group was charged with evaluating the feasibility of establishing a prepaid service plan for children with disabilities modeled after the Florida prepaid college plan. According to the legislation, the purpose of the program would be to allow funds to be paid into a plan to provide a voucher for purchasing services from willing providers once a child exits the exceptional student program. These services would assist with the transition into the workforce, if possible. The Legislature directed the study group to evaluate and develop findings regarding:

- Services for which a voucher could be used;
- Financial requirements for such a system;
- Qualifications of service providers; and
- Steps necessary to qualify prepaid service plan funds for a federal waiver match program or other federal funding, and the likelihood of obtaining a waiver or other federal funding.²³

The study group met six times in 2009, with the bill drafting subcommittee meeting three additional times. In its final report, the study group concluded that “the years after a student with a developmental disability ages out of the educational system are critical for learning and transition.” To provide families with adequate resources to access services, the study group recommended pursuing legislation to establish the Florida Developmental Disabilities Prepaid Savings Account Trust fund consisting of a prepaid contract fund and an investment fund.²⁴

²⁰Section 1009.98, F.S.

²¹*Id.*

²²At s. 4.

²³*Id.*

²⁴*Prepaid Services Savings Program for Parents of Children with Developmental Disabilities Study Group Final Report 2010, available at <http://www.apd.myflorida.com/publications/reports/docs/dd-prepaid-2010-access-ver.pdf> (last visited Mar. 25, 2013).*

Achieving a Better Life Experience Act (ABLE Act)

The ABLE Act, which has been filed in Congress, proposes to amend Section 529 of the Internal Revenue Service Code to create tax-free savings accounts for individuals with disabilities. First introduced in 2006, the bill would authorize these accounts to cover qualified expenses, such as education, housing, and transportation services. The accounts would be a financial resource that augments, but does not supplant, benefits provided through private insurance, Medicaid, the supplemental security income (SSI) program, wages, or other sources.²⁵

III. Effect of Proposed Changes:

Section 1 names the act the “C.V. Clay Ford/Gabriela Poole Developmental Disabilities Savings Plan.

Section 2

Developmental Disabilities Savings Program

This bill creates the Developmental Disabilities Savings Program which is intended to assist families in paying for services for children with developmental disabilities who will become ineligible for services due to age.

The bill defines the following terms:

- “Benefactor” means any person making a deposit, payment, contribution, gift, or other expenditure into the investment plan for a qualified beneficiary, and may include a noncustodial parent who is obligated to make payments into the plan for his or her child.
- “Contributor” means a Florida resident who is a parent or grandparent of a qualified beneficiary and who opens a savings account.
- “Developmental disability” means a disorder or syndrome attributable to retardation, cerebral palsy, autism, spina bifida, or Prader-Willi syndrome, that manifests before the age of 18, and that can reasonably be expected to continue indefinitely.²⁶
- “Eligible services” include health-related, housing-related, education-related, employment-related, or other specific services.
- “Qualified beneficiary” means an individual with a developmental disability who is a resident of the state and who is under 22 years of age at the time a contributor opens a savings account on his or her behalf.
- “Savings program” means the Developmental Disabilities Savings Program.

The bill provides that the savings program must inform the purchaser of the potential impact of plan participation on eligibility for Medicaid or other state or federally-funded programs. Also, the bill requires that information and training concerning the program and its benefits for a qualified beneficiary to advance his or her goals and become a contributing member of society be provided.

²⁵ Press Release, Congress of the United States, *Achieving a Better Life Experience Act*, (Feb. 13, 2013) (on file with the Senate Children, Families and Elder Affairs Committee).

²⁶ This is the definition of “developmental disability” found in s. 393.063(9), F.S, which is cross-referenced in the bill.

Before the savings program may be implemented, the following must be obtained by the Developmental Disabilities Savings Program Board:

- A written opinion of a qualified attorney specializing in federal securities law that the savings program does not violate federal securities law; and
- A private letter ruling from the federal Internal Revenue Service (IRS) indicating that under the savings program taxes on any payments made, money deposited, investments made, and resulting earnings may be deferred under the Internal Revenue Code.

If the IRS declines to issue a private letter ruling, the bill provides that the program may rely on the legal opinion of a qualified attorney specializing in tax law.

The bill provides that the savings program is not a promise or guarantee that a qualified beneficiary will become eligible for Medicaid, receive permanent services, be enrolled in the Medicaid waiver program, or receive any other state or federal assistance. Likewise, the state does not make assurances regarding the performance of the program.

Developmental Disabilities Savings Program Board

The bill creates the Developmental Disabilities Savings Program Board (board), which has all of the powers of a body corporate, and is to administer the savings program.

The board consists of seven members:

- The Chief Financial Officer or the director of the Division of Treasury.
- The director of the Agency for Persons with Disabilities.
- The executive director of The Arc of Florida.
- The president of The Family Care Council of Florida, or designee.
- Three members, appointed by the Governor, who possess knowledge, skill, and experience in the areas of accounting, actuary, risk management, or investment management. These members are appointed for three-year terms.

A chair and vice chair shall be elected annually and the board shall designate a secretary-treasurer who does not need to be a member of the board. The board shall meet on a quarterly basis. Members of the board are to serve without compensation and must file a full and public disclosure of their financial interests.

The bill provides that the board shall have the following powers and duties:

- Appointing an executive director to serve as the chief administrative and operational officer of the program and to perform other duties assigned to him or her by the board.
- Delegating responsibility for administration of the savings program to persons the board determines are qualified.
- Adopting an official seal and rules.
- Making and executing contracts and other necessary instruments.
- Establishing agreements or other transactions with federal, state, and local agencies.

- Forming strategic alliances with public and private entities to provide benefits to the savings program.
- Appearing in its own behalf before boards, commissions, or other government agencies.
- Procuring and contracting for goods and services, employing personnel, and engaging the services of private consultants, actuaries, managers, legal counsel, and auditors in a manner determined to be necessary and appropriate by the board.
- Adopting procedures to govern contract dispute proceedings between the board and its vendors.
- Soliciting proposals and contracting for the marketing of the savings program.²⁷
- Investing funds not required for immediate disbursement.
- Holding, buying, and selling any instruments, obligations, securities, and property determined appropriate by the board.
- Soliciting and accepting gifts, grants, loans, and other aids from any source or participating in any other way in any government program to carry out the purposes of the savings program.
- Requiring and collecting administrative fees and charges in connection with any transaction.
- Suing and being sued.
- Endorsing insurance coverage written exclusively for the purpose of protecting the investment plan, and the purchasers, benefactors, and beneficiaries thereof.
- Procuring insurance against any loss in connection with the property, assets, and activities of the savings program or the board.
- Providing for the receipt of contributions.
- Imposing reasonable time limits on use of the benefits provided by the savings program.
- Delineating the terms and conditions under which contributions may be withdrawn from the investment plan and imposing reasonable fees and charges for such withdrawal.
- Establishing other policies, procedures, and criteria to implement and administer the savings program.
- Additionally, the bill provides that the board shall solicit proposals and contract for investment managers, investment consultants, trustee services firms, and records administrators.

The board may adopt procedures necessary for the savings program to qualify for or retain its status as a qualified tax-deferred program or other similar status of the program, purchasers, and qualified beneficiaries under the Internal Revenue Code.

The act expires June 30, 2016.

Section 3 provides that the bill takes effect July 1, 2013, or on the date the “Achieving a Better Life Experience Act,” or similar legislation, becomes law, whichever occurs later.

²⁷ The bill provides that all marketing materials must be approved by the board and that neither the state nor the board is liable for misrepresentation of the savings program by a marketing agent.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

This bill provides that neither the state nor the Developmental Disabilities Savings Program Board (board) is liable for the misrepresentation of the savings program by a marketing agent. This bill possibly implicates the right of access to the courts under article I, section 21 of the Florida Constitution by eliminating or circumscribing an individual's right of action. Article I, section 21 of the Florida Constitution provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." The Florida Constitution protects "only rights that existed at common law or by statute prior to the enactment of the Declaration of Rights of the Florida Constitution."²⁸ Constitutional limitations were placed on the Legislature's right to abolish a cause of action in the Florida Supreme Court case *Kluger v. White*, 281 So. 2d 1 (Fla. 1973). The Court held:

[W]here a right of access ... has been provided ... the Legislature is without power to abolish such a right without providing a reasonable alternative ... unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.²⁹

To the extent that this bill is seen as depriving a person of the right to go to court to pursue a claim against the state or the board for a misrepresentation of the savings program, the bill may face constitutional scrutiny.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

²⁸ 10A FLA. JUR 2D *Constitutional Law* s. 360. When analyzing an access to courts issue, the Florida Supreme Court clarified that 1968 is the relevant year in deciding whether a common law cause of action existed. *Eller v. Shova*, 630 So. 2d 537, 542 n. 4 (Fla. 1993).

²⁹ *Kluger*, 281 So. 2d at 4.

B. Private Sector Impact:

Parents or grandparents of children with developmental disabilities may be able to use the savings program to plan for their children or grandchildren's future educational and health related services.

C. Government Sector Impact:

According to the Agency for Persons with Disabilities, the bill should not have a direct financial impact on the agency.³⁰

The bill authorizes a public board to run the program. The administrative costs of the board and the operational costs of the program are indeterminate. The bill authorizes the board to collect transaction fees, but does not provide detail regarding the amounts or authorized uses.

VI. Technical Deficiencies:

The bill prescribes the powers and duties of the board, such as procuring and contracting for goods and services, employing personnel, and engaging the services of private consultants, actuaries, managers, legal counsel, and auditors. However, the bill does not provide a funding source for the board to pay for these services or for the operations of the board.³¹

VII. Related Issues:

While the bill is modeled after the Florida Prepaid Program, it lacks the direction that law provides with respect to the structure and operation of the program.

The bill appears to create a public entity that would be subject to the open records and meetings laws of the state. The Legislature may wish to give consideration to any exemptions from ch. 119, F.S. and article 1, section 24 of the Florida Constitution as may be necessary or prudent to ensure the success of the savings program.³²

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Children, Families, and Elder Affairs on April 1, 2013:

- The CS removed provisions that described a program that would allow prepayment of eligible services at a fixed price.

³⁰Agency for Persons with Disabilities, *2013 Bill Analysis SB 472* (Feb. 14, 2013) (on file with the Senate Committee on Children, Families, and Elder Affairs).

³¹ The bill authorizes the board to collect transaction fees, but does not provide detail regarding the amounts or authorized uses.

³² See e.g. s. 1009.981(6), F.S., which creates a public records exemption for information that identifies the benefactors or beneficiaries of Florida College Savings Program accounts.

- The CS corrected technical deficiencies in the original bill related to the definition of “developmental disability,” and inconsistent or undefined terminology.
- The CS changed the Board composition to remove the director of the Division of Vocational Rehabilitation and to substitute in his or her place the Chief Financial Officer of the director of the Division of Treasury.
- The CS names the act the “C.V. Clay Ford/Gabriela Poole Developmental Disabilities Savings Plan.”

B. Amendments:

None.