

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1163 Intermediate Care Facilities
SPONSOR(S): Health Market Reform Subcommittee, Burton
TIED BILLS: **IDEN./SIM. BILLS:** SB 1344

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health Market Reform Subcommittee	13 Y, 0 N, As CS	Guzzo	Calamas
2) Health Care Appropriations Subcommittee	10 Y, 0 N	Nobles	Clark
3) Health & Human Services Committee			

SUMMARY ANALYSIS

An intermediate care facility for the developmentally disabled (ICFDD) provides intensive care and rehabilitative services in a residential setting to individuals with developmental disabilities.

Medicaid is the only payer, so current law requires a need assessment and a certificate of need (CON) from the Agency for Health Care Administration (AHCA), to build a new ICFDD or add beds to an existing ICFDD. HB 1163 creates a CON exemption for a new ICFDD that meets specific criteria. It must have a total of 24 beds, comprising three eight-bed homes, for use by individuals exhibiting severe maladaptive behaviors and co-occurring psychiatric diagnoses requiring increased levels of behavioral, medical, and therapeutic oversight. To obtain an exemption, an applicant must not have had a license denied, revoked, or suspended within the 36 months preceding the request for exemption and must have at least 10 years of experience serving individuals with severe maladaptive behaviors in Florida.

The bill prohibits AHCA from granting an additional CON exemption to an applicant that has been granted an exemption under these provisions unless the facility has been licensed and operational for a period of at least two years.

The bill also establishes certain continued licensure requirements for an ICFDD that has been granted the CON exemption created by the bill.

The bill may have a significant, but indeterminate, negative fiscal impact on AHCA. The bill has no fiscal impact on local governments. The bill specifies that the exemption does not require a specific appropriation.

The bill provides an effective date of July 1, 2020.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Intermediate Care Facilities for the Developmentally Disabled

An intermediate care facility for the developmentally disabled (ICFDD) provides care and residence for individuals with developmental disabilities. A developmental disability is a disorder or syndrome that is attributable to intellectual disability, cerebral palsy, autism, spina bifida, Down syndrome, Phelan-McDermid syndrome, 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.¹

ICFDDs are licensed and regulated under Part VIII of ch. 400, F.S., and Chapter 59A-26, F.A.C. ICFDDs provide the following services: nursing services, activity services, dental services, dietary services, pharmacy services, physician services, rehabilitative care services, room/bed and maintenance services and social services.² ICFDD services are only covered by the Medicaid program. Individuals who have a developmental disability and who meet Medicaid eligibility requirements may receive services in an ICFDD.

While the majority of individuals who have a developmental disability live in the community, a small number live in ICFDDs. Currently, there are 88 privately owned ICF/DD facilities in Florida. As of January 2020, the ICFDDs were 95.7 percent occupied, with 1,971 individuals in 2,060 possible beds.³ There are also 11 ICFDDs that are operated by the state.

Prior to obtaining a license, the applicant must obtain certificate of need (CON) approval from the Agency for Health Care Administration (AHCA). Since Medicaid is the only payer, the CON requirement is used to manage the Medicaid provider network of ICFDD services.

ICFDDs are considered institutional placements and are reimbursed for two levels of care, which are based on the client's mobility:

- ICF Level of Reimbursement One- for recipients who are ambulatory or self-mobile using mechanical devices and are able to transfer themselves without human assistance, but may require assistance and oversight to ensure safe evacuation; and
- ICF Level of Reimbursement Two- for recipients who are capable of mobility only with human assistance or require human assistance to transfer to or from a mobility device or require continuous medical and nursing supervision.⁴

ICFDD providers in Florida have reported an increase in the number of recipients with severe maladaptive behaviors that require significant resources to provide appropriate care beyond what is currently provided through the level one and level two-reimbursement methodology.⁵ Maladaptive behaviors are those behaviors that are disruptive, destructive, aggressive, or significantly repetitive.⁶

¹ See s. 393.063(12), F.S.

² Agency for Health Care Administration, *Intermediate Care Facility for Individuals with Intellectual Disabilities (ICF/DD) Services*, available at: https://ahca.myflorida.com/medicaid/Policy_and_Quality/Policy/behavioral_health_coverage/bhfu/Intermediate_Care.shtml (last visited February 2, 2020).

³ Florida Medicaid ICF/IID Rate Study Report, prepared by Navigant for the Florida Agency for Health Care Administration, January 27, 2020 (on file with Health Market Reform Subcommittee staff).

⁴ S. 408.038, F.S.

⁵ Supra note 3.

⁶ Fulton, Elizabeth et al. "Reducing maladaptive behaviors in preschool-aged children with autism spectrum disorder using the early start denver model." *Frontiers in pediatrics* vol. 2 40. available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4023017/> (last visited February 2, 2020).

The Agency for Persons with Disabilities (APD) developed a Global Behavioral Service Need Matrix (Matrix) to classify the severity of a person's maladaptive behavior for purposes of its home and community based waiver services, or iBudget, program, which is the Medicaid waiver program for persons with developmental disabilities.⁷ The Matrix categorizes symptoms of maladaptive behaviors such as behavior frequency, behavioral impact, physical aggression to others, police involvement, property destruction, and elopement/wandering, among others. Each symptom is ranked on a scale of one to six, with one being the least severe and six being the most severe. If a symptom is not present, it is ranked as a zero. Based on a person's behavior score, the person will be evaluated for services. The initial evaluation period is 12 months and then the frequency of evaluations afterwards depends on the severity of the person's score, with a need level of six being evaluated more frequently than a need level of one.⁸

According to APD, 661 people within its iBudget program have higher level Matrix scores of 4, 5 or 6. The table below shows the average annual cost for individuals at these levels within the APD home- and-community-based services program.⁹

Global Behavioral Service Need Matrix Level	Average Annual APD Cost
4	\$132,777.73
5	\$138,476.51
6	\$158,823.46

Certificates of Need (CON)

Florida's CON program has existed since 1973. From 1974 through 1986, the specifics of the program were largely dictated by the federal National Health Planning and Resources Development Act of 1974 ("the Act"), which established minimum requirements regarding the type of services subject to CON review, review procedures, and review criteria.¹⁰ Each state was required to have a CON program in compliance with the Act as a condition for obtaining federal funds for health programs. The Act was repealed in 1986.

In Florida, a CON is a written statement issued by AHCA evidencing community need for a new, converted, expanded, or otherwise significantly modified health care facility or health service. The Florida CON program has three levels of review: full, expedited, and exempt.¹¹

A CON is predicated on a determination of need. The future need for services and projects is known as the "fixed need pool"¹², which AHCA publishes for each batching cycle. A batching cycle is a means of grouping of, for comparative review, CON applications submitted for beds, services or programs having a like CON need methodology, or licensing category in the same planning horizon and the same applicable district or sub-district.¹³

Upon determining that a need exists, AHCA accepts applications for CON based on batching cycles for each district. Section 408.032(5), F.S., establishes the 11 district service areas in Florida.¹⁴

⁷ Available at <http://apdcares.org/news/news/2011/ib-matrix-instructions.pdf> (last visited February 2, 2020).

⁸ *Id.*

⁹ Agency for Persons with Disabilities, email from Jeff Ivey, Legislative Affairs Director, Feb. 3, 2020 (on file with staff of the Health Market Reform Subcommittee).

¹⁰ Pub. L. No. 93-641, 42 U.S.C. §§ 300k et seq.

¹¹ S. 408.036, F.S.

¹² Rule 59C-1.002(19), F.A.C., defines "fixed need pool" as the identified numerical need, as published in the Florida Administrative Register, for new beds or services for the applicable planning horizon established by AHCA in accordance with need methodologies which are in effect by rule at the time of publication of the fixed need pools for the applicable batching cycle.

¹³ Rule 59C-1.002(5), F.A.C.

¹⁴ District 1.—Escambia, Santa Rosa, Okaloosa, and Walton Counties; District 2.—Holmes, Washington, Bay, Jackson, Franklin, Gulf, Gadsden, Liberty, Calhoun, Leon, Wakulla, Jefferson, Madison, and Taylor Counties; District 3.—Hamilton, Suwannee, Lafayette, Dixie, Columbia, Gilchrist, Levy, Union, Bradford, Putnam, Alachua, Marion, Citrus, Hernando, Sumter, and Lake Counties; District 4.—Baker, Nassau, Duval, Clay, St. Johns, Flagler, and Volusia Counties; District 5.—Pasco and Pinellas Counties; District 6.—Hillsborough, Manatee, Polk, Hardee, and Highlands Counties;

The CON review process consists of two batching cycles each year for ICFDDs, nursing homes, hospice programs, and hospice inpatient facilities.

At least 30 days prior to the application deadline for a batch cycle, an applicant must file a letter of intent with AHCA.¹⁵ A letter of intent must describe the proposal, specify the number of beds sought, and identify the services to be provided and the location of the project.¹⁶ Applications for CON review must be submitted by the specified deadline for the particular batch cycle.¹⁷ AHCA must review the application within 15 days of the filing deadline and, if necessary, request additional information for an incomplete application.¹⁸ The applicant then has 21 days to complete the application or it is deemed withdrawn from consideration.¹⁹

Within 60 days of receipt of the completed applications for that batch, AHCA must issue a State Agency Action Report and Notice of Intent to Award a CON for a project in its entirety, to award a CON for identifiable portions of a project, or to deny a CON for a project.²⁰ AHCA must then publish the decision, within 14 days, in the Florida Administrative Weekly.²¹ If no administrative hearing is requested within 21 days of the publication, the State Agency Action Report and the Notice of Intent to Award the CON become a final order of AHCA.²²

An applicant for CON review must pay a fee to AHCA when the application is submitted. The minimum CON application filing fee is \$10,000.²³ In addition to the base fee, an applicant must pay a fee of 1.5 percent of each dollar of the proposed expenditure; however, the total fee may not exceed \$50,000.²⁴ A request for a CON exemption must be accompanied by a \$250 fee payable to AHCA.²⁵

CON for ICFDDs

In 2019, the legislature eliminated CON review for general hospitals, complex medical rehabilitation beds and tertiary hospital services.²⁶ CON is still required for new ICFDDs, and for adding beds to existing ICFDDs.²⁷

Rule 59C-1.034, F.A.C., requires the proposal of a CON applicant for a new ICFDD to:

- Be justified in context with current legislative Medicaid appropriations for ICFDD placements;
- Be determined by AHCA to be justified in context with the applicable review criteria; and
- Have not more than 60 beds divided into living units of not more than 15 beds.

Since 2010, there have been six ICFDD CON applications, of which, five were to replace an existing facility. The one CON application for a new ICFDD project was submitted by Sunrise Community, Inc., to establish a new 24-bed facility in Hardee County. AHCA denied the application, finding:²⁸

District 7.—Seminole, Orange, Osceola, and Brevard Counties; District 8.—Sarasota, DeSoto, Charlotte, Lee, Glades, Hendry, and Collier Counties; District 9.—Indian River, Okeechobee, St. Lucie, Martin, and Palm Beach Counties.

District 10.—Broward County; District 11.—Miami-Dade and Monroe Counties.

¹⁵ S. 408.039(2)(a), F.S.

¹⁶ S. 408.039(2)(c), F.S.

¹⁷ Rule 59C-1.008(1)(g), F.A.C.

¹⁸ S. 408.039(3)(a), F.S.

¹⁹ *Id.*

²⁰ S. 408.039(4)(b), F.S.

²¹ S. 408.039(4)(c), F.S.

²² S. 408.039(4)(d), F.S.

²³ S. 408.038, F.S.

²⁴ *Id.*

²⁵ S. 408.036(4), F.S., and Rule 59C-1.005(2)(g), F.A.C.

²⁶ Ch. 2019-136, Laws of Fla.

²⁷ S. 408.036(1)(a), F.S.

²⁸ AHCA, State Agency Action Report on Application for Certificate of Need, Sunrise Community, Inc./CON #10541, available at https://ahca.myflorida.com/MCHQ/CON_FA/Batching/pdf/10541.pdf (last visited February 2, 2020).

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- The applicant failed to demonstrate the new ICFDD project would work in harmony with APD's efforts to meet the needs of APD's clients;
- The applicant failed to demonstrate the stated need could be met by the proposed new ICFDD beds on the timeline of the stated need; and
- Funding for the new ICFDD is doubtful and awarding a CON cannot be justified in the context of legislative appropriations.

Effect of the Bill

The bill amends s. 408.036, F.S., to create a CON exemption for a new ICFDD which has a total of 24 beds, comprising three eight-bed homes, for use by individuals exhibiting severe maladaptive behaviors and co-occurring psychiatric diagnoses requiring increased levels of behavioral, medical, and therapeutic oversight.

To obtain the exemption, the applicant must not have had a license denied, revoked, or suspended within the 36 months preceding the request for exemption and must have at least 10 years of experience serving individuals with severe maladaptive behaviors in this state. It is unknown how many providers would meet these two criteria, and be eligible to apply for a CON exemption under the bill. The bill prohibits AHCA from granting an additional exemption to an applicant that has been granted an exemption under these provisions unless the facility has been licensed and operational for a period of at least two years. This prevents multiple concurrent, or subsequent applications from a single provider.

The bill also amends s. 400.962, F.S., to establish additional licensure and application requirements for an ICFDD that has been granted the CON exemption, including:

- The total number of beds per home within the facility may not exceed eight, with each resident having his or her own bedroom and bathroom. Each eight-bed home must be co-located on the same property with two other eight-bed homes and must serve individuals with severe maladaptive behaviors and co-occurring psychiatric diagnoses.
- A minimum of 16 beds within the facility must be designated for individuals with severe maladaptive behaviors who have been assessed using the Matrix with a score of at least Level 4 through Level 6, or assessed using criteria deemed appropriate by the AHCA regarding the need for a specialized placement in an ICFDD.
- The applicant must implement a state-approved staff training curriculum and monitoring requirements specific to the individuals whose behaviors require higher intensity, frequency, and duration of services.
- The applicant must make available medical and nursing services 24 hours per day, 7 days per week.
- The applicant must demonstrate a history of using interventions that are least restrictive and that follow a behavioral hierarchy.
- The applicant must maintain a policy prohibiting the use of mechanical restraints.

The bill specifies that the exemption does not require a specific appropriation. This overrides the AHCA rule requirement that a CON for an ICFDD be issued only if AHCA can justify the new CON in light of legislative Medicaid appropriations for ICFDD services; that is, a determination that Medicaid has the funds to cover services in the new ICFDD beds.

Finally, the bill provides an effective date of July 1, 2020.

B. SECTION DIRECTORY:

Section 1: Amends s. 400.962, F.S., relating to license required; license application.

Section 2: Amends s. 408.036, F.S., relating to projects subject to review; exemptions.

Section 3: Provides an effective date of July 1, 2020.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill may have a significant, but indeterminate, negative fiscal impact on AHCA. It is unknown how many providers will apply for the CON exemption, or how many CONs will be issued. Up to 661 people in the current APD iBudget program would qualify for placement in the new ICFDDs under the bill. Medicaid ICFDD services cost more than home and community based services. Assuming new ICFDD facilities and beds will be utilized by APD iBudget clients currently living in the community, the Medicaid program will experience costs for their care, rather than APD, and will experience greater costs than APD currently incurs. The bill specifies that the exemption does not require a specific appropriation.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

AHCA has sufficient rule-making authority in existent law to implement the provisions of the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 4, 2020, the Health Market Reform Subcommittee adopted two amendments and reported the bill favorably as a committee substitute. The amendments:

- Change the APD maladaptive behavior Global Behavioral Service Need Matrix score threshold for the minimum designated beds required by the bill for new CON recipients, from 3 to 6, to 4 through 6; and
- Replace the term “facility” with the term “applicant” as it relates to qualifying criteria established for the CON exemption.

The analysis is drafted to the committee substitute as passed by the Health Market Reform Subcommittee.