

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7137 PCB HHSC 12-05 Agency for Persons with Disabilities

SPONSOR(S): Health & Human Services Committee, Wood

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Health & Human Services Committee	12 Y, 6 N	Mathieson & Schoolfield	Gormley

SUMMARY ANALYSIS

The proposed committee bill provides revisions to Chapter 393 for programs administered by the Agency for Persons with Disabilities (APD): The bill makes the following changes:

- Directs APD to establish performance criteria in support coordinator service agreements for use in evaluating performance, providing sanctions or rewards and continuation of the agreement. The bill also adds a duty to the definition of support coordinators which requires them to locate or develop client employment opportunities.
- Revises a plan requirement to add models for managed care, community based care and managing entity options. The plan must be submitted if the waiver program continues to incur deficits during FY 2012-2013.
- Directs APD to determine the availability of a waiver slot prior to enrolling clients into any tier waiver.
- Provides authority to serve clients in different tiers if their service needs can be achieved within the tier cap. Removes a \$150,000 cap on expenditures in Tier One.
- Provides steps for determining the iBudget amount during FY 2012-2013. Also, provides clarification regarding the algorithm and determining additional client need.
- Provides clarification regarding client flexibility in using the iBudget amount within certain guidelines.
- Requires APD to submit a report by October 31, 2012, which evaluates the iBudget system.
- Directs APD to inspect licensed facilities every 2 years if the facility is accredited by specified organizations. Also provides APD with authority to continue inspections as needed for complaints, problems and other specific conditions.
- Authorizes APD to execute petitions to the court for involuntary admission to residential services.
- Provides APD with authority to issue final orders in Medicaid hearings related to the agency.
- Creates a new section of law to grant APD authority and direction to conduct food service and environmental health protection and inspection of licensed facilities and programs.

The bill does not appear to have a fiscal impact on the state.

The bill provides an effective date of July 1, 2012.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

The Agency for Persons with Disabilities (APD), serves Floridians with disabilities, as defined by s. 393.063, F.S., including;¹

- Mental retardation;
- Autism;
- Cerebral palsy;
- Spina bifida; and
- Prader-Willi syndrome.

Tier Waivers

APD administers the Home and Community-Based Services Medicaid waiver² for persons with developmental disabilities. The waiver offers 28 supports and services to assist individuals to live in their community.³ The system has four separate waivers called tier waivers (1-4) which provide caps on expenditures and are designed to capture individual need based on living situation, and intensity of service need.

- Tier one is limited to individuals with intensive medical or adaptive needs or who possess exceptional behavioral problems. Tier one has a \$150,000 per-client annual expenditure cap,⁴ unless the individual can show a documented medical necessity requiring intensive behavioral residential habilitation services, intensive behavioral residential habilitation services with medical needs, or special medical home care. Tier one is limited to persons with service needs that cannot be met in any of the other tiers.
- Tier two is for individuals who have high need for residential services and residential habilitation service needs or supported living needs that are greater than six hours per day. Tier two has a \$53,625 per-client annual expenditure cap.
- Tier three has a \$34,125 per-client annual expenditure cap and is for individuals who require lower residential services, live independent or in supported living situations, and persons who live in their family home.
- Tier four has a \$14,422 per-client annual expenditure cap and is for individuals who live in the family home or were formerly enrolled in the Family and Supported Living Waiver. This tier funds 12 services.⁵

Cost containment issues

During Fiscal Year 2011-12, APD anticipates serving approximately 30,000 people in the Medicaid waiver programs in either the tier waivers or the iBudget system.⁶ APD was appropriated \$810.4 million for waiver program services during this fiscal year. Each person enrolled in the waiver has a cost plan which represents their list of approved services and the cost for providing the services⁷. APD

¹ For Medicaid waiver programs, Down syndrome is also a qualified eligible diagnosis.

² The waiver programs are authorized under s.1915(c) of the Social Security Act and governed by Title 42, Code of Federal Regulations (C.F.R.), Parts 440 and 441. Section 409.906, F.S., and Chapter 59G, Florida Administrative Code (F.A.C.)

³ See, Agency for Persons with Disabilities, *HCBS Waiver Services*. <http://apd.myflorida.com/brochures/supports-and-services-brochure.pdf>, (site last visited on February 9, 2012).

⁴ This cap was never implemented.

⁵ See, Office of Program Policy Analysis & Government Accountability, the Florida Legislature, *Agency for Persons with Disabilities*. www.oppaga.state.fl.us/profiles/5060/ (site last visited February 16, 2012).

⁶ Email from Chris Coker, APD, "APD Spending", February 23, 2012.

⁷ As the iBudget system is implemented, an iBudget amount will be given to persons enrolled which represents a total amount for services.

projects the average annual cost per person on the waiver is \$29,100.⁸ The agency has struggled to keep waiver spending within appropriations for several years. For the two previous fiscal years, the Legislature has provided \$220.6 million in funding to cover deficits in the waiver program.⁹ The agency is currently projecting a \$98.5 million total funds deficit for FY 2011-2012. In December 2011, there were more than 20,000 people on the waiting list for waiver services.

The agency has attempted a number of strategies in recent years to contain costs, including:

- A standardized rate structure;
- Utilization reviews;
- Prior service authorization; and
- Cost caps in Tier waivers

Individual Budgets (iBudget)

In 2010, the Legislature directed the agency to pursue the development of an Individual Budget system (iBudget) to provide more flexibility for client spending and an equitable allocation method for distributing waiver funds to enrollees.¹⁰ This methodology was developed in conjunction with much input from industry stakeholders and clients. The iBudget system has three basic components:

- an algorithm which is a statistically valid formula for allocating funds;
- a methodology for clients to access additional funds for specific needs; and,
- increased flexibility for clients in deciding how to use the funds in their iBudget amount.

Two significant factors provided the basis for moving toward the iBudget system. APD found that similar clients around the state did not always receive similar cost plans of services. Secondly, the program persistently operates in a deficit and the iBudget model was intended to provide predictable spending.

The algorithm is a statistical regression model that produces a funding amount for each client. Each client is interviewed with the Questionnaire for Situational Information (QSI), a validated intake tool, which measures a client's needs. The variables used in the algorithm include:

- Age
 - Age 21 or younger
 - Age 22 or older
- QSI assessment
 - Functional score
 - Behavioral score
 - Ability to transfer, self protect and maintain hygiene
- Living Setting
 - Supported or independent living
 - APD-licensed foster or group home
 - Non-APD licensed congregate home
 - Residential Habilitation Center.¹¹

The algorithm model predicts 67.6% of the client cost for the iBudget.

If a client has additional needs beyond the amount provide by the algorithm allocation the iBudget system provides for three categories of need:

- Extraordinary need that would place the health and safety of the client, client's caregiver, or the public, in immediate, serious jeopardy if a funding increase was not approved.
 - This includes, but is not limited to:

⁸ Email from Chris Coker, APD, "APD Spending", February 23,2012.

⁹ Ch 2011-69 Laws of Florida, section 25, pg 379.

¹⁰ See, s. 393.0662, F.S.

¹¹ See, Agency for Persons with Disabilities, *Report to the Legislature on the Agency's Plan for Implementing Individual Budgeting, iBudget Florida*, February 10, 2010. On file with Health and Human Services Committee Staff, February 16, 2012.

- A documented history of significant, potentially life-threatening behaviors, including arson, assault, nonconsensual sexual behavior; or
 - A complex medical condition that requires ongoing intervention by a licensed nurse, and that cannot be delegated to an unlicensed person; or
 - A chronic comorbid condition; or
 - A need for total physical assistance with daily activities, such as eating, bathing, and personal hygiene.
- A significant need for a one time increase in funding that if not met would place the health and safety of the client, client's caregiver, or the public, in immediate, serious jeopardy. This is time limited to less than 12 months.
 - A significant increase in the need for services after the beginning of the service plan year, that if not met would place the health and safety of the client, client's caregiver, or the public in serious jeopardy, because of substantial changes in the client's circumstances.

Greater flexibility is provided in the iBudget system by providing clients with the ability to change types and frequency of certain services without obtaining prior approvals.

During the Fall of 2011, APD officials testified in House committees and identified several concerns about the iBudget algorithm. APD found that the algorithm was unlikely to achieve budget predictability for the waiver program without significantly impacting many clients. In December, 2011, APD held a public hearing that outlined an alternative approach to both implementation of the iBudget, and allocation of funding.¹²

Monitoring of Licensed Facilities

APD licenses residential facilities in the community to provide housing and services to clients. The facilities include foster care facilities, group home facilities, residential habilitation centers, and comprehensive transitional education programs.¹³ APD provides annual licensure inspections for these programs and more routine inspections to ensure quality services.

In addition, the Agency for Health Care Administration contracts with the Delmarva Foundation, a nonprofit organization, to conduct quality assurance monitoring activities that includes licensed residential facilities who receive Medicaid waiver funding.¹⁴

There are approximately 1,600 APD licensed residential facilities in the state, covering a broad range of needs.

Involuntary Commitment

The circuit court, after a hearing and in accordance with the procedures in s. 393.11, F.S., may involuntarily admit a person with a diagnosis of mental retardation or autism to an APD residential facility for care and treatment.¹⁵ A petition must be filed in circuit court and allege that the person lacks sufficient capacity to give express and informed consent to a voluntary application for services and lacks the basic survival and self-care skills to provide for the person's well-being or is likely to physically injure others if allowed to remain at liberty.¹⁶

After APD receives the court order for involuntary commitment, they must provide the court with the person's family or individual support plan and copies of all examinations and evaluations, outlining the treatment and rehabilitative programs.¹⁷ In addition, APD must document that the person has been

¹² See, <http://apd.myflorida.com/publications/legal/docs/annual-ibudget-meeting.htm> (site last visited February 16, 2012).

¹³ S. 393.067(1), F.S.

¹⁴ See: <http://www.dfmc-florida.org/> (last viewed February 18, 2012).

¹⁵ S. 393.11, (8)(b)1, F.S.

¹⁶ S.393.11(2), F.S.

¹⁷ S. 393.11(8)(e), F.S.

placed in the most appropriate, least restrictive and cost-beneficial residential setting.¹⁸ The court which issues the initial order for involuntary admission to residential services has continuing jurisdiction to ensure that the person is receiving adequate care. Upon request, the court may transfer the jurisdiction to the court where a client resides if it is different from where the original involuntary admission order was issued.¹⁹

Current law provides that a petition to civilly commit must be brought to a circuit court by a petitioning commission. The commission must contain a physician licensed under ch. 458, F.S., or an osteopathic physician licensed under ch. 459, F.S. The agency does not have the ability to petition a court for a commitment hearing.

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.²⁰ When an individual requests a hearing regarding a change or reduction to their service package, their current level of service is often maintained until the hearing is conducted and a decision is rendered.

Prior to August 2006, Medicaid fair hearings for participants in the APD Medicaid waiver programs were conducted by the Department of Children and Families, Office of Fair Hearings. DCF Fair hearings 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. As a result of a 1st District Court of Appeals ruling²¹ in 2007, the APD hearings were moved to the Division of Administrative Hearings (DOAH). Under this process, DOAH issued recommended orders on the outcome of hearings and final orders were issued by APD. The 2010 Legislature moved the fair hearings process for APD back to DCF which in essence restored the pre-August 2006 process.²²

Effect of proposed changes

Section One – Definitions

Section 393.063, F.S., relating to definitions is amended, to clarify that a support coordinator is to be contracted by the agency, and is to include as a duty, locating or developing employment opportunities for clients.

Section Two – Home and Community Based Services

The bill provides that neither a determination of client eligibility nor enrollment into any tier waiver can be made until a waiver slot is available. The effect of this change is that clients may not be moved to a higher tier or lower tier until a waiver slot is available for that tier. The bill also provides a clarification that APD may serve clients in a lower tier than originally assigned if the cap on expenditures in the lower tier is sufficient to meet their needs.

The bill also amends the description of Tier one to eliminate the cap of \$150,000 per client each year and prohibits the waiver from duplicating or having higher coverage limits than comparable Medicaid state plan services. APD advises that the cap on this tier waiver is prohibited by federal law.²³

¹⁸ *Id.*

¹⁹ S. 393.11(11), F.S.

²⁰ 42 CFR 431.220, s. 409.285, F.S.

²¹ J.M. v. Florida Agency for Persons with Disabilities, Case No. 1D06-0183.

²² Ch. 2010-157, L.O.F.

²³ Email from Jared Torres, APD, "Follow up question", February 23, 2012.

The bill directs the agency to evaluate waiver support coordinator performance based on criteria in service agreements. This evaluation is to be used when determining whether such a contract should be continued. The agency is also given authority to establish rewards and sanctions for support coordinator performance.

The bill amends current statute which directs APD in conjunction with AHCA to develop and submit a plan to the Legislature if waiver program deficits continue during FY 2012-2013. The new language requires the plans to include a model that ensures budget predictability and flexibility. Models must include at least the following:

- Community-based care system
- Managed care models with health maintenance organizations and provider service networks, and
- Managing entities administering regional block grants.

The bill clarifies that the agency may use either the Questionnaire for Situational Information, or another reliable or valid assessment instrument. The bill also removes outdated language related to a legislative direction to redesign the home and community based system, implement the tier waiver program, conduct cost plan rebasing and supplemental cost plan reviews.

Section Three – Individual Budgets (iBudgets)

The bill makes several changes to s.393.0662, F.S., relating to Individual Budgets system as follows:

By June 30 2013, all Medicaid waiver clients will be provided an iBudget amount. The following procedure is to be used to determine the iBudget amount for FY 2012-2013:

1. The agency shall calculate an allocation algorithm amount for each client and compare the result to the cost plan for each client. If the cost plan amount is the lesser of these two amounts then the cost plan amount shall be the client's iBudget amount.²⁴
2. If the client has additional needs which the agency determines cannot be met within the allocation algorithm amount, then the agency shall assess the scope of need and estimate the cost of services required to meet the additional needs. Based on the estimated costs and the availability of funds reserved for additional needs, the agency shall adjust the allocation algorithm amount to determine the iBudget amount.
3. The client's iBudget amount shall not be less than 50 percent of that client's current cost plan amount.
4. During the 2012-2013 fiscal year, increases to an client's iBudget amount may be granted only if a significant change in circumstances has occurred.

The bill also provides that clients will have flexibility on spending their iBudget amounts as long as health and safety needs and Medicaid waiver guidelines are met.

The bill directs APD to provide an evaluation of the iBudget system by October 2012. The evaluation will advise the Legislature on needed changes to the program and the advantages and disadvantages of continuing the iBudget system.

The bill provides clarification in statute that the allocation algorithm is to calculate each client's share of available waiver funding. Available funding is the APD waiver appropriation less any set asides for additional needs and other purposes.

²⁴ APD estimates that approximately 38 percent of enrollees in the waiver will receive an iBudget amount that is less than their current cost plan.

Section Four –Facility Licensure.

The bill amends s.393.067, F.S, which directs the agency to conduct annual inspections and reviews of licensed facilities and programs. The bill provides an exemption from the annual inspection for facilities that are accredited by:

- The Joint Commission;
- The Commission on Accreditation of Rehabilitation Facilities; or
- The Council on Accreditation.

The exemption allows inspection to occur every two years, if the programs and services offered are those for which the facility is accredited.

The bill provides that the agency may still continue to monitor programs and facilities with respect to:

- Ensuring that services the agency is funding are being provided;
- Investigating complaints, and facility reviews; and
- Compliance reviews with state and federal law and regulations.

Section Five –Involuntary Admission to Residential Services.

The bill amends s. 393.11, F.S., to provide APD with authority to submit petitions to the court for involuntary commitment to residential services for persons served by the agency. Current law requires the petition must allege that the person lacks sufficient capacity to give express and informed consent to a voluntary application for services and lacks the basic survival and self-care skills to provide for the person's well-being or is likely to physically injure others if allowed to remain at liberty. Currently, APD does not have authority to petition the court. However, APD is often the most knowledgeable source regarding an individual and their need for involuntary commitment.

Section Six –Review of Agency Decisions.

The bill amends s. 393.125, F.S., providing the agency with final order authority for recommendations made by hearing officers in the Medicaid fair hearing process. The hearings are conducted by hearing officers at the Department of Children and Families. This change will provide the agency with the ability to override or affirm the DCF recommendations and clarify in law APD's authority to issue final orders. Prior to 2010, these hearings were conducted at the Division of Administrative Hearings (DOAH) and DOAH made recommendations and APD issued final orders.

Section Seven –Food Service and Environmental Health Inspection.

The bill creates a new section of Florida Statutes,(s.393.28, F.S.) providing the agency with the authority to adopt and enforce sanitation standards related to food borne illness and environmental sanitation for facilities licensed under s. 393.067, F.S. These facilities include foster care facilities, group home facilities, residential habilitation centers, and comprehensive transitional education programs that serve agency clients. These duties were performed by the Department of Health, before the 2010 Legislature removed authority for inspecting these facilities.²⁵

The bill provides that in the absence of an agency rule, APD may defer to preexisting standards related to environmental requirements contained in ss. 381.006 and 381.0072, F.S. The bill also authorizes the agency to contract with another entity to undertake this duty.

B. SECTION DIRECTORY:

Section 1: Amends s. 393.063, F.S., relating to definitions.

Section 2: Amends s. 393.0661, F.S., relating to home and community based services delivery system; Medicaid waiver.

²⁵ HB 5311.

- Section 3:** Amends s. 393.0662, F.S., relating to individual budgets for delivery of home and community based services; iBudget system established.
- Section 4:** Amends s. 393.067, F.S., relating to facility licensure.
- Section 5:** Amends s. 393.11, F.S., relating to involuntary admission to residential services.
- Section 6:** Amends s. 393.125, F.S., relating to review of agency decisions.
- Section 7:** Creates s. 393.28, F.S., relating to food service and environmental health protection and inspection.
- Section 8:** Provides for an effective date of July 1, 2012.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

By inspecting an accredited program or facility, the agency may experience a reduction in inspection costs.

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. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill contains sufficient rule-making authority for the agency to implement the provisions.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES