

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 Judiciary

BILL: SB 522

INTRODUCER: Senator Bean

SUBJECT: Incarcerated Parents

DATE: January 17, 2018

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Preston</u>	<u>Hendon</u>	<u>CF</u>	Favorable
2.	<u>Tulloch</u>	<u>Cibula</u>	<u>JU</u>	Favorable
3.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 522 requires that the Department of Children and Families include incarcerated parents of dependent children in the case planning process. The case planning process is the statutory process requiring that DCF meet with and obtain input from all parties involved in a child dependency case in order to determine the ultimate goal for the child's permanent living arrangement (permanency goal) and the steps the parties must take (complete certain tasks or receive certain services) by certain dates to achieve the child's permanency goal. Based on input from all parties involved, DCF prepares a written document called a case plan reflecting the permanency goal and the steps to achieve the permanency goal.

Specifically, the bill requires that:

- DCF must develop case plans with incarcerated parents, giving consideration to limitations posed by the correctional facility where the parent is incarcerated;
- DCF must determine what services and resources may be available to incarcerated parents and, if reunification with a child is the goal, proactively assist the parent in arranging for services from within jail or prison. If reunification is not the goal, DCF must still attach a list of services available from within jail or prison to the parent's case plan; and
- DCF must amend case plans if appropriate when parents either become incarcerated or are released from incarceration.
- The incarcerated parent is responsible for complying with case plan requirements and the requirements of their correctional facilities.

II. Present Situation:

Overview

Although the number of children and youth placed in foster care nationally as a result of the incarceration of a parent is not clearly identified through current data collection systems,

estimates suggest that tens of thousands of children in foster care may have incarcerated parents.¹ In Florida, legal complications have arisen when an incarcerated parent's parental rights have been terminated for non-compliance with a case plan, even though he or she has been given no meaningful opportunity to participate in the case planning process. The result of these legal complications is a delay in the permanent placement of a child.

Harmonizing the Goals for Dependent Children with the Rights of Parents

The purpose of Florida's dependency system (foster care) is to protect children from abuse, neglect, and abandonment, while simultaneously working with parents to keep families intact when possible.² Once a child is deemed dependent and comes under the supervision of the Department of Children and Families, the goal is to achieve "permanency" or a stable living arrangement for the child (i.e., "permanency goal")³ as soon as possible.⁴ The preferred permanency goals for the child are either reunification with the parent(s) or adoption.⁵ When removal of the child from the home is necessary, the permanency goal also aims to ensure the child is not "in foster care longer than 1 year."⁶ The Florida Statutes affirm that "[t]ime is of the essence for permanency of children in the dependency system."⁷

For parents, courts recognize a constitutional, fundamental liberty interest in being a parent to a child which is not dependent on the parent's behavior (including criminal behavior leading to incarceration) or loss of custody of the child.⁸ Although a parent's fundamental right to be a parent is not unlimited, the parent's rights are *not automatically terminated* if a parent is incarcerated and loses custody of a child.⁹ In recognition of a parent's fundamental liberty

¹ U.S. Department of Health and Human Services, Children's Bureau, Child Welfare Information Gateway: Child Welfare Practice With Families Affected by Parental Incarceration (Oct. 2015), https://www.childwelfare.gov/pubPDFs/parental_incarceration.pdf.

² Section 39.001(1)(a), (b), (e), (f), F.S.

³ Section 39.01(53), F.S. (defining "permanency goal" as "the living arrangement identified for the child to return to or identified as the permanent living arrangement of the child.").

⁴ Section 39.001(1) (h), F.S.

⁵ *Id.*

⁶ Section 39.001(1)(f)-(h), F.S.

⁷ Section 39.806(1)(e)1., F.S.

⁸ See *Santosky v. Kramer*, 455 U.S. 745, 753, 787, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs."); *S.M. v. Florida Dept. of Children & Families*, 202 So. 3d 769, 777-78 (Fla. 2016) ("Likewise, this fundamental right is equally as strong, if not stronger, under the Florida Constitution. This Court, in *Padgett*, explained: 'Florida courts have long recognized this fundamental parental right ... to enjoy the custody, fellowship and companionship of [their] offspring. This rule is older than the common law itself.'" (quoting *Dep't of Health and Rehab. Serv's v. Padgett*, 577 So. 2d 565, 570 (Fla. 1991), citing *Santosky*, 455 U.S. at 753, 102 S.Ct. 1388. 577 So.2d at 570)).

⁹ *Id.* See also s. 39.806(d), F.S. (setting out circumstances when parental rights may be terminated due to incarceration: 1. Incarceration period is significant portion of child's minority; 2. Parent is a violent career criminal, habitual violent felony offender, committed a capitol felony, etc.; or 3. The court determines by clear and convincing evidence that relationship with incarcerated parent will harm the child considering several factors).

interest in being a parent, the strict procedures set forth in chapter 39, F.S., affording the parent due process must be followed before the parent's rights can be terminated without consent.¹⁰

Case Planning

Under both Florida and federal law, the tool DCF is required to use to determine the permanency goal for the child is the case plan.¹¹ DCF is required to develop a case plan in every dependency case in Florida with the input of all parties involved.¹² The ultimate goal of the case plan is to set out in writing the specific steps to be taken by all parties involved, including the parents, to reach the child's permanency goal.¹³ If the permanency goal is reunification for example, the case plan must be designed with specific tasks to be completed and services to be rendered to the child or parent (such as counseling or rehabilitative services¹⁴) to ensure the child's safe return home.¹⁵

DCF is also required to follow certain procedures in the case planning process:

- Meet face-to-face with a parent to develop the case plan and determine the permanency goal for the child;¹⁶
- When a parent is not available or unable to participate, document these circumstances in the case plan, along with the efforts made to find or include the parent.¹⁷
- Ensure the case plan is written in clear language and signed by all parties (except that the child's signature may be waived).¹⁸
- Ensure that copies of the case plan are provided to all parties.¹⁹

¹⁰ *Id.* See also *Fahey v. Fahey*, 213 So. 3d 999, 1001 (Fla. 1st DCA 2016) (“Under Florida law, parental rights may only be terminated through adoption or the strict procedures set forth in chapter 39, Florida Statutes”).

¹¹ Section 39.01(11), F.S. (“‘Case plan’ means a document, as described in s. 39.6011, prepared by the department with input from all parties.”). Sections 39.6011 & .6012, F.S.; 42 U.S.C. s. 671(a)(16) (requiring development of case plan where child removed from home); 45 C.F.R. s. 1356.21(g)(2).

¹² Sections 39.01(11) and 39.6011, F.S.

¹³ Section 39.01(53), F.S. (“The permanency goal is also the case plan goal.”) See also *Case Planning to Support Family Change, 5-1. Purpose*, Family Assessment and Case Planning, Department of Children and Families Operating Procedure No. 170-9, Ch. 5, p. 5-1 (May 11, 2016), <http://eww.dcf.state.fl.us/asg/pdf/r170-9c5.pdf>.

¹⁴ Section 39.01(68), F.S. (“‘Reunification services’ means social services and other supportive and rehabilitative services provided to the parent of the child, to the child, and, where appropriate, to the relative placement, nonrelative placement, or foster parents of the child, for the purpose of enabling a child who has been placed in out-of-home care to safely return to his or her parent at the earliest possible time. The health and safety of the child shall be the paramount goal of social services and other supportive and rehabilitative services. The services shall promote the child's need for physical, developmental, mental, and emotional health and a safe, stable, living environment; shall promote family autonomy; and shall strengthen family life, whenever possible.”).

¹⁵ *Id.*; s. 39.6012(1)(a), F.S. See also *Case Planning to Support Family Change, 5-1. Purpose*, Family Assessment and Case Planning, Department of Children and Families Operating Procedure No. 170-9, Ch. 5, p. 5-1 (May 11, 2016), <http://eww.dcf.state.fl.us/asg/pdf/r170-9c5.pdf>.

¹⁶ Section 39.6011(1)(a), F.S. This meeting may also include the guardian ad litem if appointed, and the custodian of the child and even the child if appropriate. *Id.* The parent may also receive assistance from any person, including an attorney or social service agency, in developing the case plan. s. 39.6011(1)(c), F.S.

¹⁷ Section 39.6011(1)(d), F.S.

¹⁸ Section 39.6011(2), F.S.

¹⁹ See n. 16, *supra*.

Because incarcerated parents are *not* automatically unavailable nor are their rights automatically terminated by virtue of incarceration,²⁰ the procedural case planning requirements DCF must follow also apply to incarcerated parents.²¹ In some cases, however, an incarcerated parent has been overlooked in the case planning process.

Legal Consequences of Overlooking the Incarcerated Parent in the Case Planning Process

Under chapter 39, F.S., when DCF seeks to terminate a parent's rights for substantial non-compliance with the parent's case plan, the parent's rights can be terminated only if DCF has made "reasonable efforts to reunify the parent and the child."²² Likewise, several appellate court decisions have held that, in recognition of a parent's fundamental right to parent his or her child, when an incarcerated parent of a dependent child²³ has not been given any assistance by DCF or given a meaningful chance to participate in the case planning process from prison, the incarcerated parent's parental rights *cannot* later be terminated for case plan non-compliance without violating the parent's right of due process.²⁴ In those cases, the trial courts' decisions terminating the incarcerated parents' rights were reversed and presumably remanded so that the incarcerated parent could be given the opportunity to go through the case planning process.²⁵

²⁰ "[A] parent's incarceration alone does not constitute abuse, neglect, or abandonment. Incarceration is merely a factor that the circuit court may consider in determining whether a child has been abandoned." *In re C.N.*, 51 So. 3d 1224, 1231–32 (Fla. 2d DCA 2011). *See also In re J.L.*, 15 So. 3d 866, 870 (Fla. 2d DCA 2009) (Altenbernd, J., concurring). ("[T]here sometimes seems to be a presumption in the trial courts that, merely because a parent is unlikely to become an adequate custodial parent, the parent's rights should be terminated[.]"). *See also n. 9, supra.*

²¹ *See* Dep't of Children & Families, *Agency Legislative Bill Analysis* (Nov. 10, 2017).

²² Section 39.806(1)(e)1.-3., F.S. (setting out circumstances when parental rights may be terminated for failure to substantially comply with a case plan: 1. Within 12 months if the child also continues to be abused, neglected, or abandoned, unless the parent did not have the financial resources or DCF failed to make reasonable reunification efforts; 2. The parent(s) have materially breached the case plan and DCF can show the parent(s) are unlikely or unable to substantially comply before the case plan expires; or 3. The child has been in foster care for any 12 of the last 22 months and parents have not substantially complied with the case plan so as to permit reunification unless the parent did not have the financial resources or DCF failed to make reasonable reunification efforts). In *J.L.*, although the trial court reasoned that the incarcerated parent breached his case plan under s. 39.806(1)(e)2., F.S., and that provision does not require DCF to have made a reasonable effort like subparagraph (1)(e)1. or subparagraph (1)(e)3., the Second District rejected this reasoning, concluding that "[g]iven [DCF's] failure to take any meaningful steps to assist the Father in complying with his case plan, we find [DCF] did not establish by clear and convincing evidence that the Father materially breached his case plan." 15 So. 3d at 869.

²³ Generally, a dependent child is a child under the supervision of DCF.

²⁴ "Where a court is terminating parental rights based on a parent's failure to comply with a case plan or a performance agreement, it is axiomatic that the parent must have the substantial ability to comply with the plan or agreement." *In re J.L.*, 15 So. 3d at 868–69 (quoting *Hutson v. State*, 687 So. 2d 924, 925 (Fla. 2d DCA 1997) (holding that the father's rights could not be terminated because he had no meaningful opportunity to participate in the case plan; noting that the court was troubled by DCF's failure to make any effort to visit the father in jail to review the terms of the case plan with him, DCF's failure to respond to the father's letters or otherwise attempt to contact him, and DCF's admitted delay in sending the father information). *See also In re G.M., Jr.*, 71 So. 3d 924, 927 (Fla. 2d DCA 2011) (reversing termination of incarcerated father's parental rights where DCF failed to either send him a copy of his case plan or communicate with him about it, noting the signature space for the father on the case plan was left blank; DCF ignored father's written requests for assistance holding that incarcerated father; but the father attempted to improve himself by seeking a transfer to a facility to participating in parenting classes); *T.M. v. Department of Children and Families*, 905 So. 2d 993 (Fla. 4th DCA 2005) (holding that incarcerated father's parental rights could not be terminated for case plan non-compliance without DCF first showing reasonable efforts were made to help him secure the services needed to comply while in prison).

²⁵ "Accordingly, we reverse the final judgment terminating the Father's parental rights to his son and remand for further proceedings." *In re J.L.*, 15 So. 3d at 870.

The problem, however, is that affording the incarcerated parent his or her due process means delay for the dependent child's permanency goal. Notwithstanding that there is an expedited process for termination of parental rights cases in the courts,²⁶ by the time an appellate court reverses a trial court's determination to terminate the incarcerated parent's parental rights and DCF begins the case planning process anew with the incarcerated parent, the permanency and stability of the child in dependent care is further delayed. While the delay may be constitutionally necessary to preserve the parent's rights, it is also in tension with the public policy underlying Florida's dependency system, to bring stability to the child as soon as possible.²⁷

Logistical Issues in Case Planning with Incarcerated Parents

Many of the tasks parents are asked to complete as part of the case planning process involve courses or counseling in parenting, substance abuse treatment, anger management, and the like. The Florida Department of Corrections (DOC), which has 148 facilities statewide that houses approximately 98,000 inmates, provides access for inmates to a range of educational and vocational services that may help an incarcerated parent meet some of his or her case plan goals, including substance abuse treatment, anger management programs, and parenting classes. Annually, the DOC publishes the list of services available at each facility in its annual report and on the facility's website.²⁸

Similarly, county jail facilities also provide many of the same services to inmates. Generally, these services are listed in the county jail's "Inmate Handbook" which should be distributed to the inmate upon arrival. Some jail facilities have also published the Inmate Handbook on the jail's website.²⁹

The primary problem is that many of these programs and services are provided on a first come, first serve basis, meaning some inmates may encounter problems completing case plan tasks within certain timeframes while incarcerated.³⁰ However, according to the DOC, they have been willing to approve transfers when appropriate for incarcerated parents to facilities that meet the inmate's programming needs, as well as allow the incarcerated parent to have routine visits with

²⁶ See Fl. R. App. P. 9.146.

²⁷ "Time is of the essence" in dependency cases. See n. 7, *supra*.

²⁸ Florida Department of Corrections, *Introduction to Information on Florida Prison Facilities*, <http://www.dc.state.fl.us/facilities/ciindex.html> (last visited Jan. 15, 2018). For example, Bay Correctional Facility offers substance abuse programs, including prevention/education and intensive outpatient. See Bay Correctional Facility page, Florida Department of Corrections, <http://www.dc.state.fl.us/facilities/region1/112.html> (last visited Jan. 15, 2018).

²⁹ See, e.g., Leon County Sheriff's Office, *Leon County Detention Facility Inmate Handbook: Rules, Regulations and General Information*, "Programs," pp. 38-43 (Sept. 2017), <http://www.leoncountysos.com/docs/default-source/jail-documents/jail-inmate-handbook-2017.pdf?sfvrsn=0> (noting that 16 educational programs are currently offered to inmates); Broward Sheriff's Office, *Department of Detention and Community Control Inmate Handbook*, "Programs," p. 17 (Rev. 2012), http://sheriff.org/DOD/Documents/Inmate_Handbook.pdf (noting that there are substance abuse, life skills, and mental health programs available to inmates).

³⁰ See n. 28, *Leon County* at p. 38 ("Most programs have a waiting list and new members are added on a first come, first serve basis. Maximum capacity for each program is 15 inmates per class. Inmates are to send one request per program you wish to attend. Attendance is expected and those missing two classes will be removed from the list to make way for those waiting."); *Broward* at 17 ("Inmates who volunteer for programs will be recruited by program staff as bed space is available. Whether participating voluntarily or by court order, your participation is contingent upon meeting classification criteria for placement into a program housing unit.").

his or her children, when appropriate. Additionally, the DOC cooperates with DCF by allowing DCF staff access to inmates for relevant meetings and interviews.³¹ Likewise, in the county jails, the “Inmate Handbook” reflects that inmates may have visitors, including children.³²

III. Effect of Proposed Changes:

Section 1 creates a new provision under chapter 39, F.S., (proceedings involving children) requiring that the Department of Children and Families include or make an effort to include an incarcerated parent in the statutory case planning process requiring that DCF meet with and obtain input from all parties involved in a child dependency case in order to determine the ultimate goal for the child’s permanent living arrangement (permanency goal) and the steps the parties must take (complete certain tasks or receive certain services) by certain dates to achieve the child’s permanency goal. An incarcerated parent must be included in case planning regardless of the ultimate permanency goal, *and* DCF must ensure that the incarcerated parent receives a copy of the written case plan.

The bill provides two levels of assistance DCF must provide during the case planning process to an incarcerated parent depending on the permanency goal:

- When reunification between the incarcerated parent and the child is the permanency goal, DCF must proactively obtain information from the parent’s prison facility to determine how the parent may complete the case plan and receive services while in prison.
- However, if reunification is not the goal, DCF must only ensure that consideration is given to the available services and regulations at the parent’s prison facility in developing the case plan, and attach a list of those services to the case plan.

The bill also addresses several other scenarios:

- If a parent becomes incarcerated *after the case plan is developed*, the parties must make a motion to modify the case plan if the parent’s incarceration impacts the permanency goal.
- If an incarcerated parent *is released before expiration of the case plan*, the case plan must include a contingency plan of tasks and services to be completed or received outside the prison.
- If an incarcerated parent *does not participate* in the preparation of the case plan, DCF must document the circumstances and its efforts to include the incarcerated parent in the case plan.

The bill also contains several express caveats:

- DOC and its facilities have *no* new or additional obligations or duties to perform.
- The incarcerated parent is ultimately responsible to comply with the case plan while in prison.

Section 2 provides for an effective date of July 1, 2018.

³¹ Dep’t of Corrections, *Agency Legislative Bill Analysis for HB 281* (Nov. 1, 2017) (identical to SB 522) (on file with Senate Judiciary Committee) (“FDC currently assists DCF by allowing DCF representatives access to inmates for interviews, meetings, etc.; by approving transfers, when appropriate, for incarcerated parents to facilities which meet the inmate’s programming needs; and by allowing incarcerated parents to have routine visits with their children, when appropriate.”).

³² See n. 28, *Leon County*, “Visitation” at p. 38 (permitting inmates five (5) thirty minute visitation sessions each week not exceed 2.5 hours, and permitting children to visit with an adult); *Broward*, “Visitation” at 14 (permitting inmates up to two (2) hours visitation each week, and permitting children when accompanied by a parent of legal guardian).

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill will not likely have a fiscal impact to the state for several reasons. First, DCF currently includes incarcerated parents in case planning for dependent children. Second, the bill states that it is not the intent to require additional obligations to the Department of Corrections beyond what is currently provided to inmates who are parents. Services such as substance abuse treatment, anger management, and parenting classes are available to inmates; however, demand for these services exceeds their availability. During FY 2015-2016, for example, 12,234 inmates received institutional-based substance abuse treatment, which represents approximately 20 percent of the inmate population assessed as needing treatment.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The Department of Children and Families is currently required to include incarcerated parents in the dependency case planning process. With the exception of specifically requiring the department to attach a list of services available at a correctional facility, all other provisions in the bill mirror provisions in current law.³³ The department is required to explain a parent's

³³ Section 39.602, F.S.

nonparticipation in case planning and that could include an explanation that services are unavailable at the parent's correctional facility.

VIII. Statutes Affected:

This bill creates section 39.6021 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

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

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
