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 Health Policy

BILL:	SB 1420
INTRODUCER:	Senator Sobel
SUBJECT:	Mental Health Treatment
DATE:	March 14, 2013
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Davlantes	Stovall	HP	**Pre-meeting**
2.			CJ	
3.			AP	
4.				
5.				
6.				

I. Summary:

SB 1420 allows a client who has been recently transferred to a civil or forensic facility operated in conjunction with the Department of Children and Families (DCF) to be involuntarily continued on psychotherapeutic medications if he or she has been deemed to lack informed decision-making capacity regarding treatment, the admitting physician judges that abrupt cessation could jeopardize the health or safety of the client, and the facility administrator petitions the court for authorization. The bill requires the court to hold a competency hearing within 30 days of receiving notification that any facility client adjudicated mentally incompetent or not guilty by reason of insanity no longer meets the criteria for continued commitment.

The bill provides for the dismissal of charges against any defendant adjudicated mentally incompetent if he or she remains incompetent three (rather than five) years after the initial competency decision was made, unless the court believes that he or she will become competent in the future. If the defendant was committed in relation to an allegation of violent crime against a person, the period before charge dismissal remains five years.

The bill also provides additional details for how incompetency is determined in juvenile delinquency cases. It provides a definition for when a child is considered competent and specifies certain components which must be included in a competency evaluation report. Concerning competency evaluations related to mental retardation or autism, the bill requires the evaluator to provide a clinical opinion as to whether the child is competent to proceed with delinquency hearings.

The bill provides an effective date of July 1, 2013.

This bill amends sections 916.107, 916.13, 916.145, 916.15, and 985.19 of the Florida Statutes.

II. Present Situation:

The Due Process Clause of the 14th Amendment prohibits the states from trying and convicting defendants who are incompetent to stand trial.[1] The states must have procedures in place that adequately protect the defendant's right to a fair trial, which includes his or her participation in all material stages of the process.[2] Specifically, defendants (and juveniles charged with having committed felony-level delinquent acts) must be able to appreciate the range and nature of the charges and penalties that may be imposed, and must be able to understand the adversarial nature of the legal process and disclose to counsel facts pertinent to the proceedings at issue. Defendants also must manifest appropriate courtroom behavior and be able to testify relevantly.[3]

If a defendant is suspected of being incompetent, the court or counsel for the defendant or the state may file a motion for examination to have the defendant's cognitive state assessed. If the motion is well-founded the court will appoint experts to evaluate the defendant's cognitive state. The defendant's competency is then determined by the judge in a subsequent hearing. If the defendant is found to be competent, the criminal proceeding resumes. If, however, the defendant is found to be incompetent to proceed, competency must be restored before the criminal proceeding may resume.[4]

Restoration of Competency

Competency restoration is designed to help defendants meaningfully participate in their own defense. The DCF has oversight of felony defendants who are found incompetent to proceed due to mental illness, while the Agency for Persons with Disabilities (APD) is charged with oversight of felony defendants who are incompetent to proceed due to developmental disabilities.[5] The DCF is directed by statute to provide competency training for juveniles who have been found incompetent to proceed to trial as a result of mental illness, mental retardation or autism.[6]

If the court determines that the defendant is a danger to himself or others, it may involuntarily commit the defendant to a secure forensic facility.[7] Defendants may be placed on conditional release to receive competency restoration training in the community if the court finds they do not pose a risk to public safety.[8]

Once a defendant is determined to have regained his or her competence to proceed, the court is notified and a hearing is set for the judge to determine the defendant's competency.[9] If the court finds the defendant to be competent, the criminal proceeding resumes. If, however, the court

[1] See *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed. 815 (1966); *Bishop v. U.S.*, 350 U.S.961, 76 S.Ct. 440, 100 L.Ed. 835 (1956); *Jones v. State*, 740 So.2d 520 (Fla. 1999).
[2] *Id.* See also Rule 3.210(a)(1), Fla.R.Crim.P., Rule 8.095(d)(1), Fla.R.Juv.P.
[3] *Id.* See also s. 916.12, 916.3012, and 985.19, F.S.
[4] Rule 3.210(b), 3.211, 3.212, Fla.R.Crim.P.; Rule 8.095(a)(1)-(6), Fla.R.Juv.P.
[5] Ch. 916, F.S.
[6] s. 985.19(4), F.S.
[7] s. 916.13, F.S.
[8] s. 916.17, F.S.
[9] Rule 3.212, Fla.R.Crim.P.

finds the defendant incompetent to proceed, the defendant is returned to a forensic facility or community restoration on conditional release until competency is restored.[10]

Competency restoration training and mental health services are provided in four state forensic facilities, that have a total of 1,108 beds (two facilities are state-operated and two are operated under contract with a private provider).[11] The DCF served 2,531 adults who were committed for competency restoration services during fiscal year 2011-2012.[12] The DCF reports that 405 juveniles received competency training during fiscal year 2011-2012.[13]

Qualifications of Competency Experts

Section 916.115 (1)(a), F.S., provides that experts appointed by the court to conduct competency evaluations shall, to the extent possible, have completed forensic evaluator training approved by the DCF and each shall be a psychiatrist, licensed psychologist, or physician. The DCF is required by s. 916.115 (1)(b), F.S., to maintain and annually provide the courts with a list of available mental health professionals who have completed the approved training as experts. However, current law does not require attendance at a department-authorized training or training renewal.

In the juvenile system, the court appoints mental health experts to conduct competency evaluations although there does not appear to be a specific requirement in the juvenile competency statute that the expert be a psychiatrist, licensed psychologist, or physician as is the case in the adult system.[14] As in the adult system, the DCF provides the court a list of experts who have completed a department-approved training program but there is no statute that requires any attendance or on-going forensic training for the purpose of competency evaluation and reporting.[15] The APD conducts the evaluations and makes the reports to the court regarding juveniles who meet the definition of "retardation" or "autism."[16] Although there is a requirement in s. 916.301(2)(b)1., F.S., that the expert appointed to examine adult defendants be a psychologist, the juvenile statute does not make such a specification.

Hearing to Determine Restoration of Competency or Need for Continued Commitment

When the court adjudicates a defendant incompetent to proceed and the defendant is committed to the DCF to be restored to competency, or if the defendant has been found not guilty by reason of insanity and committed to the DCF, the defendant is returned to court periodically for a review and report on his or her condition.[17] Generally, a review is conducted:

- No later than six months after the date of admission;
- At the end of any extended period of commitment;

[10] *Id.*
[11] DCF Analysis of SB 1420 dated March 7, 2013. On file with Health Policy Committee staff.
[12] *Id.*
[13] *Id*.
[14] s. 985.19(1)(b), F.S.
[15] s. 985.19(1)(d), F.S.
[16] s. 985.19(1)(e), F.S.
[17] ss. 916.13(2), 916.15(3) and 916.302(2)(a), F.S. See also s. 985.19(4)(e), (5) and (6), F.S., related to the court's jurisdiction and reporting requirements in juvenile cases.

- At any time upon the facility administrator's communication to the court that the defendant no longer meets commitment criteria; or
- Upon counsel's Motion for Review having been granted.

Rules of Criminal and Juvenile Procedure require that a hearing be held within 30 days of the court's receiving the administrator's pre-hearing report.[18] There is no corresponding statutory time constraint on the court conducting a hearing.

The court also retains jurisdiction for purposes of dismissing charges if a defendant has not become competent within five years.[19]

Psychotropic Medication

Forensic clients of the DCF, which includes defendants who have been committed to the DCF for competency restoration or because they have been found not guilty by reason of insanity, must be treated with dignity and respect. The DCF; however, is responsible for providing treatment deemed necessary to fulfill its obligation under the statutes governing competency restoration and mental illness.

Forensic clients are, therefore, asked to give express and informed consent for treatment.[20] When treatment is refused, it may nonetheless be provided in an emergency situation for periods of up to 48 hours (excluding weekends and holidays, subject to review in 48-hour increments by a physician until a court rules) unless or until the DCF obtains a court order authorizing continued treatment.[21]

III. Effect of Proposed Changes:

Section 1 amends s. 916.107, F.S., concerning administration of psychotherapeutic medications to forensic clients. If a client has been receiving psychotherapeutic medications in jail at the time of transfer to the forensic or civil facility and lacks informed decision-making capacity with respect to mental health treatment, the admitting physician at the facility may order continued administration of these medications if he or she judges that abrupt cessation could jeopardize the health or safety of the client during the period before acquisition of a court order for medication administration. To continue the psychotherapeutic medication, the facility administrator or his or her designee must petition the committing court or the local circuit court for an authorization order. This petition must be made within five business days after admission of the client. The jail physician must also a current therapeutic medication order for the client at the admitting physician's request or at the time of transfer to the facility.

The bill also makes some technical changes to s. 916.107(3)(a), F.S.

[18] Rules 3.212 and 3.218, Fla.R.Crim.P.; Rule 8.095(a)(5), Fla.R.Juv.P. See also Rule 8.095(e), Fla.R.Juv.P.
[19] s. 916.145, 916.303, F.S. Regarding dismissal of charges of juvenile delinquency, see s. 985.19(5)(c), F.S.
[20] s. 916.107(3), F.S.
[21] *Id.*

Section 2 amends s. 916.13, F.S., to require the court to hold a competency hearing within 30 days after receiving notification that any facility client adjudicated mentally incompetent no longer meets the criteria for continued commitment. The bill also makes some technical changes.

Section 3 amends s. 916.145, F.S., to state that charges against any defendant adjudicated mentally incompetent will be dismissed if he or she remains incompetent three (rather than five) years after the initial competency decision was made, unless the court believes that he or she will become competent in the future. If the defendant was committed in relation to an allegation of violent crime against a person, the period before charge dismissal is five years.

Section 4 amends s. 916.15, F.S., to require the court to hold a competency hearing within 30 days after receiving notification that any facility client adjudicated not guilty by reason of insanity no longer meets the criteria for continued commitment.

Section 5 amends s. 985.19, F.S., to change references to the Department of Children and Family Services to the Department of Children and Families. The bill also provides additional details for how incompetency is determined in juvenile delinquency cases. A child is considered competent to proceed if he or she has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and has a rational and factual understanding of the proceedings.[22]

A child's competency evaluation report must specifically state the basis for the determination of his or her mental condition and must also include written findings that:

- Identify the specific matters referred for evaluation;
- Identify the sources of information used by the expert;
- Describe the procedures, techniques, and diagnostic tests used in the examination to determine the basis of the child's mental condition;
- Assess the child's capacity to:
  - Appreciate the charges or allegations against him or her;
  - Appreciate the range and nature of possible penalties that may be imposed in proceedings against him or her, if applicable;
  - Understand the adversarial nature of the legal process;
  - Disclose to counsel facts pertinent to the proceedings at issue;
  - Display appropriate courtroom behavior; and
  - Testify relevantly.

The evaluation report must also a summary of findings which presents the factual basis for the expert's clinical findings and opinions of the child's mental condition; this factual basis must be supported by the diagnostic criteria found in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM) published by the American Psychiatric Association. The summary of findings must include:

- The day, month, year, and length of time of the face-to-face diagnostic clinical interview to determine the child's mental condition;

[22] This definition is very similar to how competency and incompetency are described in s. 916.12(1), F.S., governing adults.

- A statement that identifies the DSM clinical name and associated diagnostic code for the specific mental disorder that forms the basis of the child's incompetency;
- A statement of how the child would benefit from competency restoration services in the community or in a secure residential treatment facility;
- An assessment of the probable duration of the treatment to restore competence and the probability that the child will attain competence to proceed in the foreseeable future; and
- A description of recommended treatment or education appropriate for the mental disorder.

If the evaluator finds the child to be incompetent to proceed to trial, he or she must report on the mental disorder that forms the basis of the incompetency.

The bill also changes the term "incompetency evaluations" to "competency evaluations" in this section.

Concerning competency evaluations related to mental retardation or autism, the bill requires the evaluator to provide a clinical opinion as to whether the child is competent to proceed with delinquency hearings.

Section 6 provides an effective date of July 1, 2013.

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:

The 30-day court hearing time restrictions for certain competency and commitment hearings may be viewed as a Separation of Powers issue. It could be argued to be a procedural matter that falls within the power of the court, rather than a substantive matter of the law, a legislative matter. The issue may not arise, however, as the statutory change set forth in the bill mirrors the current court rules.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Adults and children with mental illness will be evaluated and treated differently in the justice system. Some adults with mental illness may be released from facilities earlier.

C. Government Sector Impact:

DCF reports no fiscal impact.[23]

VI. Technical Deficiencies:

The bill is entitled "an act relating to mental health treatment." However, the bill relates to both evaluation and treatment of mental health patients within the justice system. This may represent a single-subject violation.

The bill's title also fails to mention that evaluations of children with mental retardation or autism must include a clinical opinion of competency.

Section 4 of the bill (lines 150-154) adds a paragraph to s. 916.15, F.S. Although a paragraph is the smallest division of law which may be independently amended by a bill, providing language for only the paragraph to be added without reprinting the existing statute as context is confusing for the reader.

In line 191, "the" could be changed to "each" since at least two experts are required to perform competency assessments on each child.

VII. Related Issues:

Lines 52-70 of the bill, which amend s. 916.107, F.S., refer frequently to administration of psychotherapeutic medications to facility clients. However, ch. 916, F.S., provides no definition for "psychotherapeutic medications." This chapter does, however, provide a detailed definition for "psychotropic medications" in s. 916.12(5), F.S. Perhaps "psychotherapeutic medications" could be changed to "psychotropic medications" in the bill to create greater congruency with existing statute.

Lines 52-70 of the bill also refer frequently to the admitting physician; this term is also not defined or used elsewhere in ch. 916, F.S. Perhaps this term could be changed to "facility physician" to increase clarity and to parallel the term "jail physician" which is used in conjunction with "admitting physician" throughout Section 1.

Lines 54-56 state that a client who has been receiving psychotherapeutic medications in jail and "lack the capacity to make an informed decision regarding mental health treatment at the time of admission" may continue to receive psychotherapeutic medications upon court order. However, there is no provision in the bill as to who determines that the client lacks decision-making capacity or how this determination is made.

[23] DCF Analysis of SB 1420 dated March 7, 2013. On file with Health Policy Committee staff.

Lines 60-61 could be clarified by providing a timeframe for pursuing court orders for continued medication and limits on the amount of time a medication may be continued while awaiting the order. Similar constraints are provided for in emergency situation under s. 916.107(3)(a)1., F.S.

Line 140 states that charges against a defendant who was adjudicated incompetent and who was accused of committing a violent crime against a person will be dismissed after five years if the defendant is still deemed incompetent at that time. However, the bill does not describe what is considered a violent crime against a person. Other Florida law relating to violent crimes provides specific statutory references to crimes which are considered violent for purposes of each law.

Language in lines 187-234 appears confusing and redundant. Required components of the expert's evaluation report are reiterated in several places in these lines. Also, nothing in these lines provides for the disposition of a child who is found to be mentally incompetent based on his or her immature age rather than on any psychological or psychiatric diagnoses.

It is unclear what the "specific matters referred for evaluation" are in line 194.

The "sources of information used by the expert" in line 195 likely intends to refer to sources used in the competency evaluation of the child, but this is not clear.

Furthermore, the bill requires an evaluator's clinical findings and opinions to be supported by the diagnostic criteria in the DSM in lines 212-214. The DSM contains diagnostic criteria for hundreds of mental disorders; it is unclear as to what "the diagnostic criteria" in line 212 refers to.

Lines 230-231 require each evaluation report to contain a description of recommended treatment or education appropriate for the mental disorder. Perhaps the words "the mental disorder" could be replaced with "mental disorders of the child" to prevent a person from being viewed only as his or her diagnosis and to acknowledge the fact that each child may have more than one psychological or psychiatric diagnosis.

The term "mental disorder" is found nowhere in ch. 985, F.S., but is found frequently in lines 187-234, which amend a section of this chapter. Perhaps this term could be changed to "mental condition" or "psychological or psychiatric disorder" to provide congruity with terms in existing statute.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.