

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 985 Involuntary Commitment  
**SPONSOR(S):** Gonzalez  
**TIED BILLS:** **IDEN./SIM. BILLS:** SB 1280

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Children, Families & Seniors Subcommittee	12 Y, 0 N	Gilani	Brazzell
2) Health Care Appropriations Subcommittee			
3) Health & Human Services Committee			

### SUMMARY ANALYSIS

The Agency for Persons with Disabilities (APD) provides services to persons 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. APD uses community-based services to reduce the severity of the developmental disability and maximize the individual's potential for productive living in the least restrictive means.

APD serves individuals in a variety of ways, including through the Medicaid waiver program known as iBudget Florida and through court-ordered involuntary admissions and commitments.

APD provides supports and services to 33,900 developmentally disabled individuals through iBudget Florida. Due to budget constraints, there are 20,561 individuals on a waitlist to receive these services, the majority of whom have been on the waitlist for over 5 years. Despite this waitlist, the court may order a developmentally disabled individual to APD's care in one of two ways:

- Involuntarily admit the individual for residential services because he or she is need of residential services but lacks the intellectual capacity to request these services on his or her own; or
- Involuntarily commit the individual for competency training when he or she is a defendant in a felony criminal case and found incompetent to proceed to trial due to the developmental disability.

Involuntary admission is for an indeterminate time and can only be removed by further court order. Involuntary commitment is for up to two years of competency training so that the defendant may attain competency and proceed to trial. If the defendant remains incompetent for two years despite APD's training, then the criminal charges must be dismissed. The individual may still qualify for involuntary admission even if the criminal charges are dismissed.

APD must continue to provide services to these individuals until the court orders their release, even in instances where the individual did not initially or no longer meets the eligibility criteria for APD services.

The bill amends several provisions related to the involuntary admission process: giving APD a greater role in initial eligibility determinations and providing hearing rights for adverse determinations; revising the composition of and qualifications of examining committee experts; revising examining committee report requirements; revising hearing requirements; revising what the courts should consider; and requiring added consideration of and notice to the individual's guardian, if he or she has one.

With respect to the involuntary commitment process, the bill amends provisions relating to appointment of experts, competency training and conditional release determinations, and competency hearing requirements.

The bill integrates the processes of involuntary admission under ch. 393, F.S., and involuntary commitment under ch. 916, F.S. It also removes duplicative processes and makes technical changes to provide consistency.

The bill has an indeterminate positive fiscal impact on APD and an indeterminate fiscal impact on the state court system.

The bill provides an effective date of July 1, 2018.

**This document does not reflect the intent or official position of the bill sponsor or House of Representatives.**

**STORAGE NAME:** h0985a.CFS

**DATE:** 1/24/2018

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Present Situation**

##### Agency for Person with Disabilities

The Agency for Persons with Disabilities (APD) is responsible for providing services to persons with developmental disabilities. A developmental disability is defined as 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.<sup>1</sup> The overarching goal for APD is to prevent or reduce the severity of the developmental disability and implement community-based services that will help individuals with developmental disabilities achieve their greatest potential for independent and productive living in the least restrictive means.<sup>2</sup>

Individuals with specified developmental disabilities who meet Medicaid eligibility requirements may choose to receive services in the community through the state's Medicaid Home and Community-Based Services (HCBS) waiver, known as iBudget Florida, or in an institutional setting known as an Intermediate Care Facility for the Developmentally Disabled (ICF/DD).<sup>3</sup>

APD serves almost 33,900 individuals through iBudget Florida, offering 27 supports and services delivered by contracted service providers to assist individuals to live in their community.<sup>4</sup> Examples of waiver services enabling children and adults to live, learn and work in their communities are residential habilitation, behavioral services, personal supports, adult day training, employment services, and occupational and physical therapy.<sup>5</sup>

Currently, due to demand exceeding available funding, individuals with developmental disabilities who wish to receive iBudget Florida HCBS services from APD are placed on a wait list for services in priority categories of need, unless they are in a crisis.<sup>6</sup> As of March 2017, 20,561 individuals were waiting for developmental disability waiver services.<sup>7</sup> A majority of people on the wait list have been on the list for more than 5 years, though some are children receiving services through the school system and others are individuals who have been offered waiver services previously but refused them and chose to remain on the wait list.<sup>8</sup>

##### *Individual Support Plans*

Pursuant to s. 393.0651, F.S., APD must develop a support plan for each client receiving services from APD.<sup>9</sup> This support plan is developed with a support coordinator.<sup>10</sup> Each support plan must include the

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<sup>1</sup> s. 393.063(9), F.S.

<sup>2</sup> s. 393.062, F.S.

<sup>3</sup> s. 393.0662, F.S.

<sup>4</sup> AGENCY FOR PERSONS WITH DISABILITIES, *Quarterly Report on Agency Services to Floridians with Developmental Disabilities and Their Costs: Third Quarter Fiscal Year 2016-17*, November 2017, available at <http://apdcare.org/publications/reports/docs/Quarterly%20Report%203rd%20Quarter%20FY%202016-17.pdf> (last visited Jan. 21, 2018).

<sup>5</sup> Id.

<sup>6</sup> s. 393.065, F.S.

<sup>7</sup> *Supra* note 4.

<sup>8</sup> Id.

<sup>9</sup> s. 393.0651, F.S.

<sup>10</sup> s. 393.063(37), F.S., defines "Support Coordinator" as a person designated by APD to assist individuals and families in identifying their capacities, needs, and resources, as well as finding and gaining access to necessary supports and services; coordinating the necessary supports and services; advocating on behalf of the individual or family; maintaining relevant records; and monitoring and

most appropriate, least restrictive, and most cost-beneficial environment for accomplishment of the objectives for client progress and a specification of all services authorized.<sup>11</sup> The client and his or her support coordinator must review and, if necessary, revise the support plan annually to review progress in achieving the objectives specified.<sup>12</sup>

### *Residential Facilities*

Persons with developmental disabilities reside in various types of residential settings. Some individuals with developmental disabilities live with family, some live in their own homes, while others may live in community-based residential facilities.<sup>13</sup> Pursuant to s. 393.067, F.S., APD is charged with licensing community-based residential facilities that serve and assist individuals with developmental disabilities; these include foster care facilities, group home facilities, residential habilitation centers, and comprehensive transitional education programs.<sup>14</sup>

### Guardianship

When an individual is unable to make legal decisions regarding his or her person or property, a guardian may be appointed to act on his or her behalf. There are three main types of guardians: family or friends of the ward, professional guardians, and public guardians.<sup>15</sup> Examples include relatives, financial organizations, nonprofit organizations, and healthcare providers with no conflict of interest.<sup>16</sup> Guardianships that place decision-making authority for property and person with another individual are the most restrictive because they remove the individuals fundamental and civil rights. Therefore, establishing this form of guardianship requires an examining committee to determine that the alleged incapacitated adult is lacking decision-making capacity, and then requires a judge to adjudicate the individual as incapacitated.<sup>17</sup> The level of decision-making assistance should not be more restrictive than required for that particular individual's needs and capacity.

There is a wide range of options to provide decision-making assistance to those with developmental disabilities or other incapacity that are not as restrictive as guardianships.<sup>18</sup> Examples are a power of attorney to officially act for the owner of a bank account;<sup>19</sup> general powers of attorney;<sup>20</sup> durable powers of attorney;<sup>21</sup> representative payee of benefits; advance directives; medical proxies; trusts; and guardian advocates (a less restrictive form of guardianship that does not require an adjudication of incapacity).<sup>22</sup>

Guardians are subject to the requirements of ch. 744, F.S. There is a fiduciary relationship between the guardian and the ward, and such relationship may not be used for the private gain of the guardian other than the payment for fees and expenses provided by law.<sup>23</sup> As such, the guardian must act in the best interest of the ward and carry out his or her responsibilities in an informed and considered manner.<sup>24</sup>

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evaluating the delivery of supports and services to determine the extent to which they meet the needs and expectations identified by the individual, family, and others who participated in the development of the support plan.

<sup>11</sup> Id.

<sup>12</sup> s. 393.0651(7), F.S.

<sup>13</sup> s. 393.063(28) defines residential facility as a facility providing room and board and personal care for persons who have developmental disabilities.

<sup>14</sup> AGENCY FOR PERSONS WITH DISABILITIES, *Planning Resources*, <http://apd.myflorida.com/planning-resources/> (last visited Jan. 21, 2018).

<sup>15</sup> ch. 744, F.S.

<sup>16</sup> s. 744.309, F.S.

<sup>17</sup> s. 744.331, F.S.

<sup>18</sup> FLORIDA DEVELOPMENTAL DISABILITIES COUNCIL, INC., *Lighting the Way to Guardianship and Other Decision-Making Alternatives: A Manual for Individuals and Families* (2010).

<sup>19</sup> ch. 709, F.S.

<sup>20</sup> Id.

<sup>21</sup> Id.

<sup>22</sup> s. 744.3085, F.S.

<sup>23</sup> s. 744.446, F.S.

<sup>24</sup> s. 744.446, F.S.

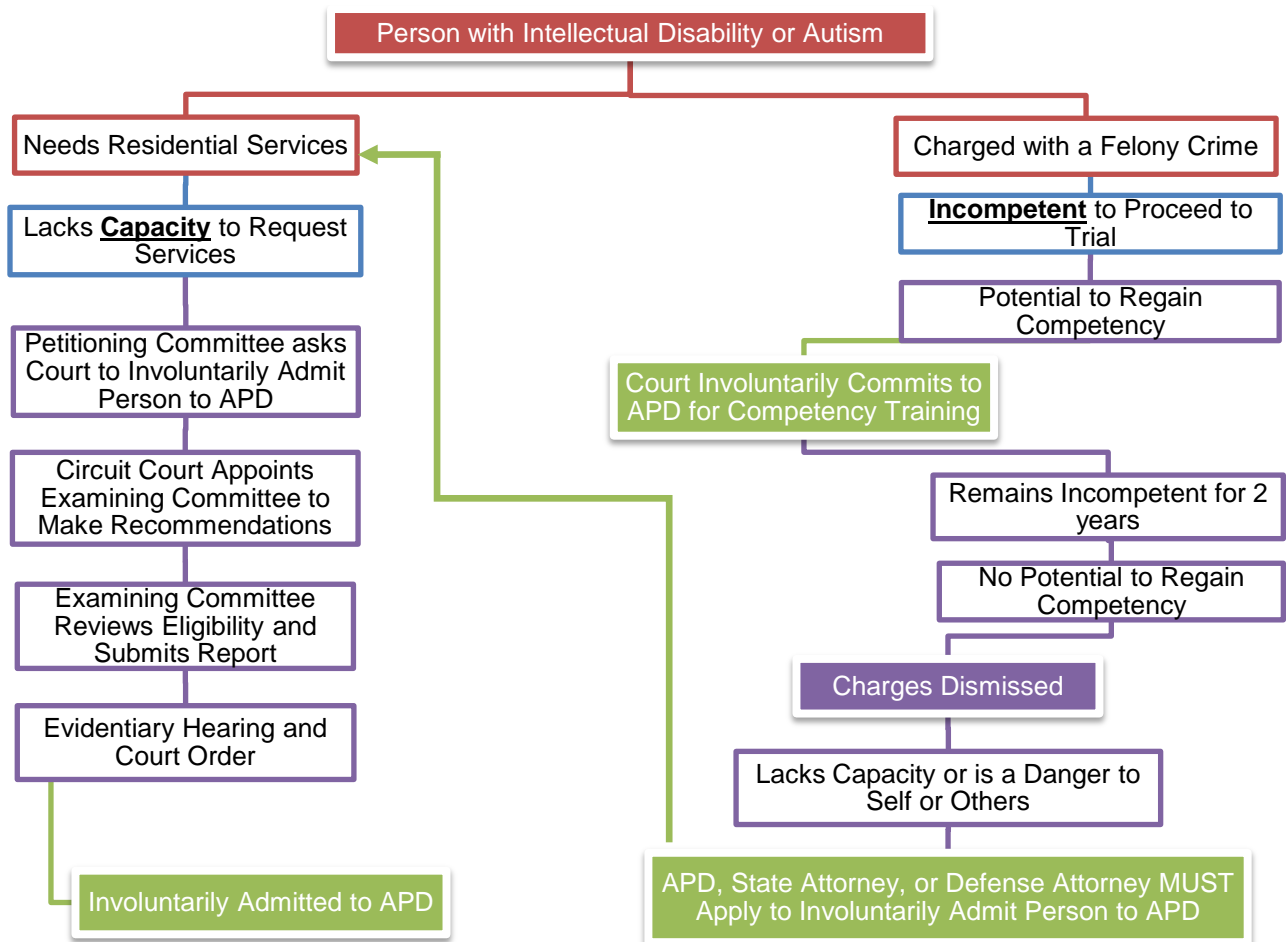
Should a guardian breach his or her fiduciary duty to the ward, the court may intervene.<sup>25</sup>

The guardian, as fiduciary, must:

- Act within the scope of the authority granted by the court and as provided by law;
- Act in good faith;
- Not act in a manner contrary to the ward's best interests under the circumstances; and
- Use any special skills or expertise the guardian possesses when acting on behalf of the ward.<sup>26</sup>

### Overview of Involuntary Commitment and Admission

There are a variety of ways that a person can receive services from APD, but there are two methods that are involuntary. Both are ordered through the court: civil involuntary admission and an involuntary commitment through the criminal justice system. APD must provide services to clients involuntarily admitted or committed to the agency regardless of funding constraints and the existing waitlist for services. The graphic below depicts the relevant procedural elements of these two methods.



<sup>25</sup> s. 744.446(4), F.S.

<sup>26</sup> s. 744.361(1), F.S.

## *Involuntary Admission to Residential Services*

Section 393.11, F.S., creates the statutory scheme for the involuntary admission of persons with intellectual disabilities who require residential services.<sup>27</sup> Residential services include the care, treatment, habilitation, and rehabilitation the person is alleged to need.<sup>28</sup> Examples of residential services are supervision and training in personal hygiene, homemaking, and social skills, 24-hour nursing services and medical supervision, and independent living training.<sup>29</sup>

When a person with an intellectual disability or autism is in need of residential services and suspected to lack the intellectual capacity to request those services on his or her own, concerned individuals may form a petitioning commission and ask the court to order these services on the person's behalf.<sup>30</sup> Anyone may form the petitioning commission, but there must be at least three members, one of whom is a licensed allopathic or osteopathic physician in Florida.<sup>31</sup> The commission files its petition in the circuit court of the county where the person alleged to need involuntary admission resides.<sup>32</sup>

In their petition, members must provide their contact information, disclose their relationship to the individual, identify the person with an intellectual disability or autism, provide factual information demonstrating that the individual needs involuntary residential services, assert that they believe the individual lacks sufficient capacity to request these services or is a danger to himself or herself or others, and state which type of residential setting would be least restrictive and most appropriate for the individual.

Once this petition is filed, the circuit court appoints a committee, known as the examining committee, to examine the person being considered for involuntary admission.<sup>33</sup> The examining committee consists of at least three disinterested<sup>34</sup> experts in intellectual disabilities or autism, to include, at least:

- One licensed and qualified physician;
- One licensed and qualified psychologist; and
- One qualified professional who, at a minimum, has a master's degree in social work, special education, or vocational rehabilitation counseling.<sup>35</sup>

The court then sets an evidentiary hearing to rule on the petition. At least 10 days prior to this hearing date,<sup>36</sup> the examining committee must file its report with the court, to include, but not be limited to:

- The degree of the person's intellectual disability using APD's diagnostic standards and whether the person is eligible for APD services;
- Whether the person either:
  - Lacks sufficient capacity to consent for services from APD and lacks basic survival and self-care skills to such a degree that close supervision and habilitation in a residential setting is necessary to avoid a real and present threat of substantial harm; or
  - Is likely to physically injure others if allowed to remain at liberty;
- Purpose to be served by the residential care;

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<sup>27</sup> s. 393.11(1), F.S.

<sup>28</sup> s. 393.11(1), F.S.

<sup>29</sup> AGENCY FOR PERSONS WITH DISABILITIES, *iBudget Florida Services*, <http://apdcares.org/ibudget/services.htm> (last visited Jan. 18, 2018).

<sup>30</sup> s. 393.11(2)(a)

<sup>31</sup> s. 393.11(2)(b), F.S..

<sup>32</sup> s. 393.11(2), F.S.

<sup>33</sup> s. 393.11(5), F.S.

<sup>34</sup> s. 393.11(5)(d), F.S., members cannot be employees of the agency or be associated with each other in practice or in an employer-employee relationship; members cannot be employees of the members of the petitioning commission or be associated in practice with members of the petitioning commission.

<sup>35</sup> s. 393.11(5)(b), F.S.

<sup>36</sup> s. 393.11(5)(f), F.S.

- A recommendation on the type of residential placement that would be most appropriate and least restrictive; and
- The appropriate care, habilitation, and treatment.<sup>37</sup>

When a court receives a petition, it must also immediately notify APD to conduct an examination of the individual and submit a report containing the findings of its evaluation, any recommendations deemed appropriate, and a determination of whether the person is eligible for APD services.<sup>38</sup> This report is also due to the court 10 days before the hearing, and a copy must be served on the individual and his or her attorney.<sup>39</sup> Currently, APD does not need to serve the individual's guardian, if he or she has one.

At the determination hearing, the court considers reports from the examining committee and APD, and allows the person alleged to need involuntary admission to present evidence and cross-examine all witnesses.<sup>40</sup> The person alleged to need involuntary admission must be physically present and represented by counsel at all stages of this proceeding.<sup>41</sup>

To order an involuntary admission, the court must find by clear and convincing evidence, that:

- The person alleged to need involuntary admission is intellectually disabled or autistic;
- Placement in a residential setting is the least restrictive and most appropriate alternative to meet the person's needs, and;
- Because of the person's intellectual disability or autism, the person either:
  - Lacks sufficient capacity to consent for services from APD and lacks basic survival and self-care skills to such a degree that close supervision and habilitation in a residential setting is necessary to avoid a real and present threat of substantial harm; or
  - Is likely to physically injure others if allowed to remain at liberty.<sup>42</sup>

Within 45 days of the court's order, APD must provide the court with a copy of the person's family or individual support plan and copies of all examinations and evaluations outlining the treatment and rehabilitative programs.<sup>43</sup> APD has to document that it is placing the person in the most appropriate, least restrictive, and most cost-beneficial residential setting.<sup>44</sup> APD must serve the individual and his or her counsel at the same time these documents are filed with the court.<sup>45</sup> Currently, APD does not have to serve the individual's guardian, if he or she has one.

This order for involuntary admission is of indeterminate duration and only further order of the circuit court may release the individual from the involuntary admission.<sup>46</sup> APD must continue to provide residential services until such time the court releases the individual. Given this, APD performs annual reviews of involuntarily admitted persons to determine the propriety of continued involuntary admission and assess the most appropriate and least restrictive type of residential placement for the person.<sup>47</sup> The court must have an annual hearing to review APD's findings and order the person's release or adjustment of residential setting, if appropriate.<sup>48</sup> If a minor is involuntarily admitted to residential

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<sup>37</sup> s. 393.11(5)(e), F.S.

<sup>38</sup> s. 393.11(4), F.S.

<sup>39</sup> Id.

<sup>40</sup> s. 393.11(7), F.S.

<sup>41</sup> s. 393.11(6), s. 393.11(7)(d), F.S.. However, if the person's attorney believes it is not in his or her best interest to be present, the person's presence may be waived once the court has seen the person and the hearing has commenced.

<sup>42</sup> s. 393.11(8)(e), F.S.

<sup>43</sup> Id.

<sup>44</sup> Id.

<sup>45</sup> Id.

<sup>46</sup> s. 393.11(11), F.S.

<sup>47</sup> s. 393.11(14), F.S. Annual hearings were not held prior to the statutory change in 2016.

<sup>48</sup> Id.

services, then he or she is also given a hearing once he or she reaches age 18 to determine appropriateness of continued involuntary admission.<sup>49</sup>

Additionally, any person involuntarily admitted to residential services may file a petition for writ of habeas corpus<sup>50</sup> to challenge his or her involuntary admission at any time.<sup>51</sup>

At all judicial proceedings in this process, the individual with a developmental disability or autism must be physically present and represented by counsel, and the proceedings must be stenographically recorded.<sup>52</sup>

### *Involuntary Commitment for Those Found Incompetent to Proceed to Trial*

When a person with an intellectual disability or autism is charged with a crime, the court will often have to determine if he or she is competent to proceed to trial. The competency standard employed in the criminal justice system is different from the standard used to determine capacity for civil admissions to APD. A defendant is considered incompetent to proceed if he or she:

- Does not have the sufficient present ability to consult with the defendant's attorney with a reasonable degree of rational understanding; or
- Has no rational, or factual, understanding of the proceedings against the defendant.<sup>53</sup>

Chapter 916, F.S., called the "Forensic Client Services Act," addresses the treatment and training of individuals who have been charged with felonies and found incompetent to proceed to trial due to mental illness, intellectual disability, or autism, or are acquitted by reason of insanity. Part III of ch. 916, F.S., describes the criteria and procedures for the examination, involuntary commitment, and adjudication of persons who are incompetent to proceed to trial due to the intellectual disability or autism. APD provides forensic services to defendants charged with a felony who have been found incompetent to proceed due to an intellectual disability or autism.

To assess competency, if a defendant's suspected mental condition is intellectual disability or autism, the court must appoint at least three experts:

- At least one, or at the request of any party, two experts to evaluate whether the defendant meets the definition of intellectual disability or autism, and if so, whether the defendant is competent to proceed;
- An APD-selected psychologist with experience in evaluating intellectual disabilities or autism to evaluate whether the defendant meets the definition of intellectual disability or autism, and if so, whether the defendant is competent to proceed; and
- A social services professional with experience working with intellectually disabled or autistic individuals to provide a social and developmental history of the defendant.<sup>54</sup>

In their review of the defendant's competency, the experts must consider the defendant's capacity to appreciate the charges and allegations and the range and nature of possible penalties against the defendant, understand the adversarial nature of the legal process, disclose pertinent facts to the defense attorney, behave appropriately in the courtroom, and testify relevantly.<sup>55</sup>

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<sup>49</sup> s. 393.11(9), F.S.

<sup>50</sup> Latin for "you have the body" – a legal action, and constitutional right guaranteed by Art. I Sec. 9 of the U.S. Constitution, by means of which those detained may seek relief from alleged unlawful imprisonment.

<sup>51</sup> s. 393.11(13), F.S.

<sup>52</sup> s. 393.11(7), F.S.

<sup>53</sup> s. 916.3012, F.S.

<sup>54</sup> s. 916.301, F.S.

<sup>55</sup> s. 916.3012(3), F.S.

If the expert finds that the defendant is incompetent to proceed due to the defendant's intellectual disability or autism, the expert must prepare a report for the court recommending training for the defendant in order to attain competency.<sup>56</sup> The report also explains possible training alternatives in order of choices, the availability of acceptable training in the community, and the likelihood of the defendant attaining competence through training or otherwise in the foreseeable future.<sup>57</sup>

If appropriate, the court will involuntarily commit these individuals to APD for competency training.<sup>58</sup> This training is intended to help individuals understand the court process and be able to assist in their defense so that they may return to court to stand trial. While individuals who are alleged to have committed violent crimes or otherwise present a public safety risk will receive forensic services in secure settings, in other circumstances, the court may order the conditional release of a defendant found incompetent to proceed due to intellectual disability or autism based on an approved plan for providing community-based training.<sup>59</sup> At any time a defendant is deemed competent or no longer meets the requirements for commitment, the administrator of the facility shall report it to the court so a hearing may be held to determine if the defendant should be released from APD's custody.<sup>60</sup>

Unlike involuntary admission to APD services under s. 393.11, F.S., involuntary commitment for purposes of competency restoration is not of indefinite duration. If a defendant remains incompetent after two years despite APD competency training, and there is reason to believe that he or she will not gain competency in the foreseeable future, the charges against the defendant must be dismissed.<sup>61</sup>

#### *Involuntary Admission for Those Found Incompetent to Proceed to Trial*

For individuals charged with a crime but found incompetent to proceed to trial due to an intellectual disability or autism, pursuant to s. 916.303, F.S., the process of involuntary admission to APD's services is slightly different.

In cases where the criminal charges are dismissed, but the defendant still lacks sufficient capacity to voluntarily request needed residential services, lacks the basic survival or self-care skills to provide for his or her well-being, or is likely to injure others if allowed to remain at liberty, then APD, the state attorney, or the defendant's attorney must apply for involuntary admission to APD for residential services under s. 393.11, F.S.<sup>62</sup>

Once a petition for involuntary admission to residential services is filed, all of the same procedures under s. 393.11, F.S., are followed. However, because this person has been found incompetent by a criminal court, there is the added ability to place the individual in a secure facility if there is a substantial likelihood that the individual will injure another person or continues to present a danger of escape.<sup>63</sup> If the committing court places the individual in a secure facility, that placement must be reviewed annually to determine whether the individual continues to meet the criteria for placement.<sup>64</sup> Furthermore, an individual cannot be placed in a secure facility longer than the maximum sentence for the crime he or she was charged with.<sup>65</sup>

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<sup>56</sup> s. 916.3012(4), F.S.

<sup>57</sup> s. 916.3012(4), F.S.

<sup>58</sup> s. 916.302, F.S.

<sup>59</sup> s. 916.304, F.S.

<sup>60</sup> s. 916.302(2)(a), F.S.

<sup>61</sup> s. 916.303(1), F.S. The state may refile charges if the defendant gains competency in the future.

<sup>62</sup> s. 916.303(2), F.S.

<sup>63</sup> s. 916.303(3), F.S.

<sup>64</sup> Id.

<sup>65</sup> Id.



Following a change in the law in 2016<sup>66</sup> requiring APD and the court to conduct annual hearings for all APD clients who were involuntarily admitted, APD audited its records of clients. APD discovered approximately 150 to 200 clients who had been involuntarily admitted decades ago but no longer need or require court supervision because they have court-appointed guardians.<sup>67</sup> Under current law, they must involuntarily receive services from APD even though guardians have decision-making authority on their behalf.

APD also found a few clients who may not have met the eligibility criteria for APD services at the time they were involuntarily admitted but to whom APD must provide services. For example, during FY 16-17, APD spent approximately \$100,000 in services on these three clients who have been involuntarily committed to APD but do not meet the eligibility requirements for APD services.<sup>68</sup>

With respect to involuntarily committed clients, a hearing must be held when the defendant gains competency or there is no possibility of the defendant gaining competency in the foreseeable future. Defendants are transferred to the courts when such a hearing needs to be held; however, APD has had difficulty scheduling such hearings in the circuit courts, resulting in the defendants waiting in the court's custody for weeks or months without maintenance competency training before a hearing is held.

In a separate but related issue, circuit courts around the state reportedly are having difficulty finding qualified individuals to serve as experts on the examining committees.<sup>69</sup> To promote efficiency in the court-appointed expert witness services, the Florida Supreme Court issued an administrative order directing the courts to initially only appoint one expert in adult competency proceedings despite the fact that such proceedings under ch. 916, F.S., require at least three expert evaluations of an individual with intellectual disabilities or autism.<sup>70</sup> If a party disagrees with the findings of the expert, then the order allows up to two additional experts to be appointed according to the statute.<sup>71</sup>

### **Effect of Proposed Changes**

The bill revises various provisions of s. 393.11, F.S., and ch. 916, F.S., relating to involuntary admission and involuntary commitment respectively. The bill allows APD to have more involvement in the initial stages of a petition for involuntary admission and in determining placement and services ordered in involuntary commitments. In particular, this involvement will prohibit individuals from being involuntarily admitted to APD when they do not meet eligibility criteria for receiving APD services, subject to due process rights. It also restricts the court's ability to order services to individuals that APD does not provide or are inappropriate for them.

The bill provides specific timelines in the process that do not currently exist in law and reduces the number and types of experts required in various stages of both processes. The bill explicitly involves the individual's guardian in the processes and requires the existence of a guardian to be considered at each stage of the admission and commitment processes, as well as increased notice provided to him or her. If the individual has a guardian or similar advocate, he or she will be restricted in his or her ability to be involuntarily admitted to APD services.

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<sup>66</sup> Ch. 16-140, Laws of Fla., resolving a constitutional right to due process lacking in the original law.

<sup>67</sup> Agency for Persons with Disabilities, Agency Analysis of 2018 HB 985, p. 2 (Jan. 10, 2018).

<sup>68</sup> *Id.* at 10.

<sup>69</sup> *Supra* note 67.

<sup>70</sup> *In Re: Court Appointed Expert Witness Services in Florida's Trial Courts*, Fla. Admin. Order No. AOSC 17-12 (Feb. 6, 2017), available at: <http://www.floridasupremecourt.org/clerk/adminorders/2017/AOSC17-12.pdf> (last visited Jan. 21, 2018). *See generally*, Joint Workgroup of the Trial Court Budget Commission and the Commission on Trial Court Performance, *Expert Witnesses in Florida's Trial Courts: Recommendations from the Joint Workgroup of the Trial Court Budget Commission and the Commission on Trial Court Performance and Accountability* (Nov. 2016), available at:

<http://www.flcourts.org/core/fileparse.php/574/urlt/ReportExpertWitnessesInFloridasTrialCourts.pdf> (last visited Jan. 21, 2018).

<sup>71</sup> *Id.*

The bill also attempts to integrate both methods of involuntary admission and commitment, providing consistency between both chapters and removing duplicative processes. The bill makes several technical changes to conform terminology used in the statutes to that used in practice by APD. The bill also fixes cross-references affected by the changes proposed.

### Involuntary Admission to Residential Services, s. 393.11, F.S.

#### *Petitioning Commission*

The bill makes a petitioning commission the only entity that can file a petition for involuntary admission in most cases. However, it allows APD, a state attorney, or the defense attorney of an individual to file a petition for involuntary admission if criminal charges have been dismissed against the individual but he or she still lacks capacity to request needed services or is a danger to himself or herself or others. The bill changes the composition requirements of a petitioning commission by allowing a licensed psychologist to serve in place of the requisite physician member of the commission.

The bill adds an element to the petition requirements: in order to file the petition, the petitioning commission must assert that there is no guardian or advocate for the individual who can consent to services on his or her behalf. This means that individuals with guardians or other similar advocates cannot have a petition for involuntary admission made on their behalf.

#### *APD's Role*

The bill requires the court to immediately have APD examine the individual and determine if he or she is eligible for APD's services before appointing an examining committee. If APD determines that an individual is not eligible for its services, APD shall provide its decision in writing to the individual and his or her attorney. The individual will have the right to appeal the decision under the Medicaid fair hearing process. The proceeding for involuntary admission to residential services will be stayed until the appellate proceeding is completed.

#### *Examining Committee*

The bill changes the composition requirements of an examining committee. Instead of three disqualified experts that includes a physician, psychologist, and a person with a master's degree in either social work, special education, or vocational rehabilitation training, the court may appoint two to three disinterested experts, who may only be psychiatrists or psychologists. The bill adds the state attorney in ch. 916, F.S., proceedings and APD as entities who may dispute the qualifications of the court-appointed members of the examining committee.

The bill requires each member of an examining committee to submit a report instead of one report being submitted by the entire committee. The bill removes the requirement that the reports include a determination on the degree of the person's intellectual disability or autism and whether the individual meets the eligibility requirements for APD services. Under the bill, APD would be making this determination before an examining committee is appointed. The bill requires the committee to report whether the individual requires secure placement and limits the committee to only recommend care, habilitation, and treatment services that are within the scope of APD's responsibilities.

#### *Court Hearings and Orders*

The bill amends what the court should consider during a hearing for involuntary admission. The court must consider whether there is an alternative to involuntary admission to APD that will sufficiently address the person's needs and what are the least restrictive means for doing so. The court must also consider whether the individual has a guardian or guardian advocate, the scope of his or her powers to make decisions on behalf of the individual, and whether the guardian or guardian advocate will be able

to sufficiently address the individual's needs rather than involuntarily admitting him or her to APD. If the court orders involuntary admission, it must specify whether it orders a secure or non-secure placement.

The bill removes the requirement that the individual with a developmental disability or autism be physically present and allows him or her to be present by contemporaneous video communication, so long as one party has shown good cause for doing so and reasonably noticed all parties.

The bill eliminates the requirement that APD provide the individual's family or individual support plan and copies of examinations and evaluations to the court and the individual or his or her counsel. Instead, APD may recommend special provisions for residential services and adequate supervision of the individual to ensure that he or she is placed in the least restrictive and most appropriate setting. The bill provides examples of these special provisions. The court has discretion to order any of these provisions.

The bill distinguishes capacity from competency as it relates to involuntary admission proceedings.

The bill requires the court to:

- Hold a hearing six months prior to any involuntarily-admitted minor reaching age 18 to evaluate whether continued involuntary admission is appropriate;
- Review an individualized support plan when considering whether to order further services for an individual involuntarily admitted to APD; and
- Hold an annual hearing within 30 days of receiving APD's evaluation of the continued appropriateness of involuntary admission. In an annual hearing on the matter, the court must consider whether the individual has been appointed a guardian or guardian advocate since the initial order and whether the individual is still eligible for APD services.

#### *Notice Requirements*

The bill adds APD as an entity that should be noticed when an initial petition is filed. Additionally, when APD files its examination, an examining committee files its report, or a court enters its order, the individual's guardian must be noticed.

The bill updates the cross-reference language in other sections to conform to these changes. The bill also makes technical and minor substantive changes to conform to APD's services terminology.

#### Involuntary Commitment in Criminal Proceedings

##### *Experts*

The bill revises the court's expert-appointment process in competency proceedings involving criminal defendants with developmental disabilities or autism.

The bill eliminates the requirement that the court appoint at least two experts to determine a developmentally disabled or autistic person's competency to proceed to trial. The bill further eliminates the requirement that APD annually provide the court with a list of qualified experts. Instead, the bill only requires one expert to review the individual, provided that expert is a psychiatrist or psychologist who has demonstrated to the court an expertise in the diagnosis, evaluation, and treatment of persons with intellectual disabilities.

The bill requires the court to defer to APD in the expert selection when it involves a defendant with a developmental disability or autism. If any party wishes to have an additional expert examine the defendant, the court may, but is not required to, appoint another expert or direct APD to do so. The bill adds APD-appointed experts to the list of experts who may receive reasonable fees from the court.

The bill deletes the requirement for the court to appoint a social service professional to provide a social and developmental history of the defendant.

### *Competency Training*

When an expert determines that a defendant is incompetent to proceed to trial due to intellectual disability or autism, the expert must make recommendations for competency training so the defendant may attain competency. The bill eliminates the requirement that the expert explain each of the possible training alternatives in order of choice or even comment on the availability of the training in the community. Instead, the bill requires the expert to simply state whether the training should occur in the community or in a secure facility.

The bill requires the court to hold a competency hearing within 30 days of being notified that the defendant has attained competency and no longer meets the criteria for involuntary commitment. The defendant must be transported to the court to await the hearing. The bill allows the court to order maintenance competency training while the defendant waits for his or her hearing, if recommended by the expert, so as not to become incompetent again in the interim period.

Currently, the court may grant a defendant conditional release in lieu of involuntary commitment if it approves a plan for providing community-based training. If APD has determined that the defendant is eligible for APD services, the plan should also include special provisions for residential services, adequate supervision, and placement. The bill eliminates the provision for recommending auxiliary services. If a plan for community-based competency training is being proposed for conditional release and if APD has deemed the defendant ineligible for APD services, then the court can only order APD's community-based competency training but not residential services or supervision.

The bill limits release for community-based training to two years, instead of allowing extensions to that period. If the defendant remains incompetent after two years of competency training, then the provisions of s. 916.303, F.S., involving dismissal of charges and petitions for involuntary admissions shall apply.

### Involuntary Admission Arising from Criminal Proceedings

The bill allows the committing court to also have jurisdiction over involuntary admission petitions when the defendant has been deemed non-restorable to competency.

If a defendant has been deemed non-restorable to competency and the criminal charges have accordingly been dismissed, the defendant may still be eligible for involuntary admission to APD if he or she lacks sufficient capacity to request needed residential services; however, the bill additionally requires that the defendant not have a guardian or guardian advocate who can request these services on his or her behalf.

The bill revises the procedures for applying for involuntary admission for a defendant and allows APD, the state attorney, or the defendant's attorney to file a petition for involuntary admission in lieu of a petitioning commission.

The process for involuntary admission of individuals with developmental disabilities or autism is already laid out in ch. 393, F.S. The bill deletes duplicative procedures from part III of ch. 916, F.S., relating to involuntary admission.

The bill makes technical changes to distinguish APD's role from that of the Department of Children and Families.

## **B. SECTION DIRECTORY:**

**Section 1:** Amends s. 393.11, F.S., relating to involuntary admission.

- Section 2:** Amends s. 916.301, F.S., relating to appointment of experts.  
**Section 3:** Amends s. 916.3012, F.S., relating to mental competence to proceed.  
**Section 4:** Amends s. 916.302, F.S., relating to involuntary commitment of a defendant determined incompetent to proceed.  
**Section 5:** Amends s. 916.3025, F.S., relating to jurisdiction of committing court.  
**Section 6:** Amends s. 916.303, F.S., relating to determination of incompetency; dismissal of charges.  
**Section 7:** Amends s. 916.304, F.S., relating to conditional release.  
**Section 8:** Provides an effective date.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:  
None.
2. Expenditures:  
See Fiscal Comments.

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:  
None.
2. Expenditures:  
None.

### **C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

In the future, individuals who would have previously been involuntarily admitted to APD services despite not meeting APD's eligibility criteria will not be able to receive such services.

### **D. FISCAL COMMENTS:**

By being able to determine eligibility of individuals at the beginning of the involuntary commitment process, APD will reduce its expenditures from not having to serve clients who are in fact ineligible for APD services.

The added hearing requirements in the bill will have an indeterminate negative fiscal impact on the courts. However, the courts may avoid hearings if the APD review of eligibility earlier in the involuntary admission process identified individuals who are ineligible for services. Furthermore, the revisions of expert requirements will reduce the courts' costs of appointing experts.

## **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:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

The bill deletes the requirement that APD serve the court with a copy of the individual's family or individual support plan, but requires the court to consider it in its order for involuntary admission of the individual.

The Joint Workgroup of the Trial Court Budget Commission and the Commission on Trial Court Performance (Joint Workgroup), appointed by the Florida Supreme Court in 2012<sup>72</sup>, prepared a report making various recommendations to improve fiscal efficiency in the court system, including some regarding experts in competency proceedings for intellectually disabled or autistic defendants:

- Instead of the three professionals currently appointed by the court, only two should be mandatory: the psychologist and the social services professional. Any additional experts should be discretionary and at the expense of the party requesting them.
- There should be a process that allows parties to stipulate to the findings of one expert to avoid the appointment of additional experts.
- The law should clearly state that the court must pay for expert evaluations and testimonies in proceedings involving the defendant's failure to comply with conditions of release and whether he or she now meets the criteria for involuntary commitment.<sup>73</sup>

The bill does not address any of these recommendations, and it eliminates the social services professional from the experts appointed in involuntary commitment proceedings.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

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<sup>72</sup> In re: Commission on Trial Court Performance and Accountability, Fla. Admin. Order No. AOSC12-25 (July 2, 2012).

<sup>73</sup> Joint Workgroup of the Trial Court Budget Commission and the Commission on Trial Court Performance, *Expert Witnesses in Florida's Trial Courts: Recommendations from the Joint Workgroup of the Trial Court Budget Commission and the Commission on Trial Court Performance and Accountability* (Nov. 2016), available at:

<http://www.flcourts.org/core/fileparse.php/574/urlt/ReportExpertWitnessesInFloridasTrialCourts.pdf> (last visited Jan. 21, 2018).