

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 1163 Intermediate Care Facilities

SPONSOR(S): Health & Human Services Committee, Health Market Reform Subcommittee, Burton

TIED BILLS: **IDEN./SIM. BILLS:** SB 1344

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health Market Reform Subcommittee	13 Y, 0 N, As CS	Guzzo	Calamas
2) Health Care Appropriations Subcommittee	10 Y, 0 N	Nobles	Clark
3) Health & Human Services Committee	15 Y, 0 N, As CS	Guzzo	Calamas

SUMMARY ANALYSIS

An intermediate care facility for the developmentally disabled (ICFDD) provides intensive care and rehabilitative services in a residential setting to individuals with developmental disabilities. Medicaid is the only payer for ICFDD services, so current law requires a need assessment and a certificate of need (CON) from the Agency for Health Care Administration (AHCA), to build a new ICFDD or add beds to an existing ICFDD.

HB 1163 creates a CON exemption for a new ICFDD that meets specific criteria. It must have a total of 24 beds, comprising three eight-bed homes, for use by individuals exhibiting severe maladaptive behaviors and co-occurring psychiatric diagnoses requiring increased levels of behavioral, medical, and therapeutic oversight. To obtain an exemption, an applicant must not have had a license denied, revoked, or suspended within the 36 months preceding the request for exemption and must have at least 10 years of experience serving individuals with severe maladaptive behaviors in Florida. The bill limits the number of CON exemptions authorized under the bill to three.

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

The bill includes sunset provisions to repeal the continued licensure requirements and the statutory authority for AHCA to grant the CON exemption created by the bill on July 1, 2022, unless reviewed and saved from repeal by the Legislature.

The bill may have a significant, indeterminate, negative fiscal impact on AHCA. The bill has no fiscal impact on local governments.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Intermediate Care Facilities for the Developmentally Disabled

An intermediate care facility for the developmentally disabled (ICFDD) provides institutional care for individuals with developmental disabilities. A developmental disability is a disorder or syndrome that is attributable to intellectual disability, cerebral palsy, autism, spina bifida, Down syndrome, Phelan-McDermid syndrome, or Prader-Willi syndrome; that manifests before the age of 18; and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely.¹

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

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

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

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

Maladaptive Behaviors

Maladaptive behaviors are those behaviors by persons with developmental disabilities that are disruptive, destructive, aggressive, or significantly repetitive.⁵

The Agency for Persons with Disabilities (APD) developed a Global Behavioral Service Need Matrix (Matrix) to classify the severity of a person's maladaptive behavior for purposes of its home and community based waiver services, or iBudget, program, which is the Medicaid waiver program for persons with developmental disabilities.⁶ The Matrix categorizes symptoms of maladaptive behaviors

¹ See s. 393.063(12), F.S.

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

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

⁴ S. 408.038, F.S.

⁵ Fulton, Elizabeth et al. "Reducing maladaptive behaviors in preschool-aged children with autism spectrum disorder using the early start denver model." *Frontiers in pediatrics* vol. 2 40. available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4023017/> (last visited February 2, 2020).

⁶ Available at <http://apdcares.org/news/news/2011/ib-matrix-instructions.pdf> (last visited February 2, 2020). ICFDD services are not included in this program, which was created to provide home and community-based services, not institutional services. APD waiver

such as behavior frequency, behavioral impact, physical aggression to others, police involvement, property destruction, and elopement/wandering, among others. Each symptom is ranked on a scale of one to six, with one being the least severe and six being the most severe. If a symptom is not present, it is ranked as a zero. Based on a person's behavior score, the person will be evaluated for services. The initial evaluation period is 12 months and then the frequency of evaluations afterwards depends on the severity of the person's score, with a need level of six being evaluated more frequently than a need level of one.⁷

According to APD, 661 people within its iBudget program have higher level Matrix scores of 4, 5 or 6. The table below shows the average annual cost for individuals at these levels within the APD home- and-community-based services program.⁸

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

Certificates of Need (CON)

Florida's CON program was created in 1973. From 1974 through 1986, the specifics of the program were largely dictated by the federal National Health Planning and Resources Development Act of 1974 ("the Act"), which established minimum requirements regarding the type of services subject to CON review, review procedures, and review criteria.⁹ Each state was required to have a CON program in compliance with the Act as a condition for obtaining federal funds for health programs. The Act was repealed in 1986.

In Florida, a CON is a written statement issued by AHCA evidencing community need for a new, converted, expanded, or otherwise significantly modified health care facility or health service.¹⁰ The current CON program only applies to nursing homes, hospices, and ICFDDs.

A CON is predicated on a determination of need. The future need for services and projects is known as the "fixed need pool"¹¹, which AHCA publishes for each batching cycle. A batching cycle is a means of grouping of, for comparative review, CON applications submitted for beds, services or programs having a like CON need methodology, or licensing category in the same planning horizon and the same applicable district or sub-district.¹²

Upon determining that a need exists, AHCA accepts applications for CON based on batching cycles for each district. Section 408.032(5), F.S., establishes the 11 district service areas in Florida.¹³ The CON

clients who require or choose institutionalization can leave the waiver program and be placed in an ICFDD covered by the traditional Medicaid program.

⁷ *Id.*

⁸ Agency for Persons with Disabilities, email from Jeff Ivey, Legislative Affairs Director, Feb. 3, 2020 (on file with staff of the Health Market Reform Subcommittee).

⁹ Pub. L. No. 93-641, 42 U.S.C. §§ 300k et seq.

¹⁰ S. 408.036, F.S.

¹¹ Rule 59C-1.002(19), F.A.C., defines "fixed need pool" as the identified numerical need, as published in the Florida Administrative Register, for new beds or services for the applicable planning horizon established by AHCA in accordance with need methodologies which are in effect by rule at the time of publication of the fixed need pools for the applicable batching cycle.

¹² Rule 59C-1.002(5), F.A.C.

¹³ District 1.—Escambia, Santa Rosa, Okaloosa, and Walton Counties; District 2.—Holmes, Washington, Bay, Jackson, Franklin, Gulf, Gadsden, Liberty, Calhoun, Leon, Wakulla, Jefferson, Madison, and Taylor Counties; District 3.—Hamilton, Suwannee, Lafayette, Dixie, Columbia, Gilchrist, Levy, Union, Bradford, Putnam, Alachua, Marion, Citrus, Hernando, Sumter, and Lake Counties; District 4.—Baker, Nassau, Duval, Clay, St. Johns, Flagler, and Volusia Counties;

District 5.—Pasco and Pinellas Counties; District 6.—Hillsborough, Manatee, Polk, Hardee, and Highlands Counties;

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

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

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

At least 30 days prior to the application deadline for a batch cycle, an applicant must file a letter of intent with AHCA.¹⁴ A letter of intent must describe the proposal, specify the number of beds sought, and identify the services to be provided and the location of the project.¹⁵ Applications for CON review must be submitted by the specified deadline for the particular batch cycle.¹⁶ AHCA must review the application within 15 days of the filing deadline and, if necessary, request additional information for an incomplete application.¹⁷ The applicant then has 21 days to complete the application or it is deemed withdrawn from consideration.¹⁸

Within 60 days of receipt of the completed applications for that batch, AHCA must issue a State Agency Action Report and Notice of Intent to Award a CON for a project in its entirety, to award a CON for identifiable portions of a project, or to deny a CON for a project.¹⁹ AHCA must then publish the decision within 14 days.²⁰ If no administrative hearing is requested within 21 days of the publication, the State Agency Action Report and the Notice of Intent to Award the CON become a final order of AHCA.²¹

An applicant for CON review must pay a fee to AHCA when the application is submitted. The minimum CON application filing fee is \$10,000.²² In addition to the base fee, an applicant must pay a fee of 1.5 percent of each dollar of the proposed expenditure; however, the total fee may not exceed \$50,000.²³ A request for a CON exemption must be accompanied by a \$250 fee payable to AHCA.²⁴

CON for ICFDDs

Prior to obtaining a license, an ICFDD applicant must obtain CON approval from AHCA. CON is required for new ICFDDs, and for adding beds to existing ICFDDs.²⁵ Since Medicaid is the only payer, the CON requirement is used to manage the Medicaid provider network of ICFDD services.

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

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

Since 2010, there have been six ICFDD CON applications, of which five were to replace an existing facility. The one CON application for a new ICFDD project was submitted by Sunrise Community, Inc., in 2018, to establish a new 24-bed facility in Hardee County. AHCA denied the application, finding:²⁶

- The applicant failed to demonstrate the new ICFDD project would work in harmony with APD's efforts to meet the needs of APD's clients;

¹⁴ S. 408.039(2)(a), F.S.

¹⁵ S. 408.039(2)(c), F.S.

¹⁶ Rule 59C-1.008(1)(g), F.A.C.

¹⁷ S. 408.039(3)(a), F.S.

¹⁸ Id.

¹⁹ S. 408.039(4)(b), F.S.

²⁰ S. 408.039(4)(c), F.S.

²¹ S. 408.039(4)(d), F.S.

²² S. 408.038, F.S.

²³ Id.

²⁴ S. 408.036(4), F.S., and Rule 59C-1.005(2)(g), F.A.C.

²⁵ S. 408.036(1)(a), F.S.

²⁶ AHCA, State Agency Action Report on Application for Certificate of Need, Sunrise Community, Inc., August 17, 2018, CON #10541, available at https://ahca.myflorida.com/MCHQ/CON_FA/Batching/pdf/10541.pdf (last visited February 2, 2020).

- The applicant failed to demonstrate the stated need could be met by the proposed new ICFDD beds on the timeline of the stated need; and
- Funding for the new ICFDD is doubtful and awarding a CON cannot be justified in the context of legislative appropriations.

Effect of the Bill

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

The bill limits the number of CON exemptions authorized under the bill to three.

The bill includes sunset provisions to repeal the continued licensure requirements and the statutory authority for AHCA to grant the CON exemption created by the bill on July 1, 2022, unless reviewed and saved from repeal by the Legislature.

To obtain the exemption, the applicant must not have had a license denied, revoked, or suspended within the 36 months preceding the request for exemption and must have at least 10 years of experience serving individuals with severe maladaptive behaviors in this state. It is unknown how many providers would meet these two criteria, and be eligible to apply for a CON exemption under the bill.

The bill also amends s. 400.962, F.S., to establish additional licensure and application requirements for an ICFDD with a CON exemption under the bill, including:

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

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

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

B. SECTION DIRECTORY:

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

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

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

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill will have a significant, but indeterminate, negative fiscal impact on the Medicaid program, within AHCA. The bill limits the number of CON exemptions that may be granted under the bill to three.

The Legislature appropriates specific allocations for Medicaid ICFDD payments, so the establishment of new ICFDDs under the bill would be paid for with the existing allocation unless the Legislature appropriates additional funds. According to AHCA, if more facilities and recipients are added to the program, the per day reimbursement rate for facilities would decrease without an additional appropriation.²⁷

The following estimates assume that all the patients of the new ICFDDs are not currently served in the APD home and community-based care waiver. The estimates also assume a 95% occupancy rate of 3 new ICFDDs with 24 beds each.

The weighted average rate for a resident in an ICFDD in FY 2019-20 is \$395.27 per day, and facilities currently have an average occupancy rate of 95%. Based on these figures, the additional estimated annual funding for each new, 24 bed facility is \$3,289,437. (24 beds x .95 occupancy = 22.8 beds x \$395.27 per day = \$9,012.16 x 365 days = \$3,289,436.94.) The bill may result in additional annual Medicaid **expenditures** of \$9,868,311. (\$3,289,437 per facility x 3 facilities = **\$9,868,311.**)

The House proposed budget for FY 2020-21 includes a new payment rate to ICFDDs of \$562 per day for individuals with severe behavioral needs.²⁸ If this provision is adopted in the budget for FY 2020-21, the additional estimated annual funding for a 24 bed facility is \$4,676,964. (24 beds x .95 occupancy = 22.8 beds x \$562 per day = \$12,813.60 x 365 days = \$4,676,964.) At most, the bill may result in additional annual Medicaid **expenditures** of \$14,030,892. (\$4,676,964 per facility x 3 facilities = **\$14,030,892.**)

²⁷ Agency for Health Care Administration, 2020 Agency Legislative Bill Analysis, HB 1163, January 4, 2020 (on file with Health & Human Services Committee staff).

²⁸ 2020 General Appropriations Act, HB 5001, specific appropriation 224.

The following estimates assume that all of the new ICFDD beds will be utilized by current APD iBudget clients. The estimates also assume a 95% occupancy rate of 3 new ICFDDs with 24 beds each.

The average annual cost for the 661 APD iBudget clients with scores of 4 or higher on the global behavioral matrix is \$143,359.23.²⁹

The annual cost for a Medicaid recipient in an ICFDD under the current daily reimbursement rate is \$137,059.87. (\$395.27 daily rate x 365 days = \$144,273.55 x .95 occupancy = \$137,059.87.) If passed, the bill would result in annual savings in Medicaid expenditures of \$6,299.36 for each individual that switches from home and community-based care to institutional ICFDD care. (\$143,359.23 APD iBudget recipients - \$137,059.87 ICFDD residents = +\$6,299.36.) The bill may result in annual **savings** of \$453,553.92. (3 facilities x 24 beds = 72 beds x \$6,299.36 annual savings per individual = **\$453,553.92.**)

The annual cost for a Medicaid recipient in an ICFDD under the new daily reimbursement rate in House budget is \$194,873.50.³⁰ (\$562 daily rate x 365 days = \$205.130 x .95 occupancy = \$194,873.50. If passed, the bill would result in additional Medicaid expenditures of \$57,813.63 for each individual that switches from home and community-based care to institutional ICFDD care. (\$194,873.50 ICFDD residents - \$143,359.23 APD iBudget recipients = \$57,813.63). The bill may result in additional annual Medicaid **expenditures** of \$4,162,581.36. (3 facilities x 24 beds = 72 beds x \$57,813.63 annual cost increase per individual = **\$4,162,581.36.**)

As detailed above (see bold totals), the bill could have a fiscal impact ranging from annual savings of \$453,553.92 to annual expenditures of \$14,030,892.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

²⁹ SUPRA FN 8.

³⁰ SUPRA FN 27.

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

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

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

On February 26, 2020, the Health & Human Services Committee adopted an amendment and reported the bill favorably as a committee substitute. The amendment:

- Limits the number of CON exemptions authorized under the bill to three; and
- Sunsets the CON exemption July 1, 2022.

The analysis is drafted to the committee substitute as passed by the Health & Human Services Committee.