

STORAGE NAME: h0637a.lt

DATE: March 12, 1999

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
Elder Affairs & Long Term Care
ANALYSIS**

BILL #: HB 637

RELATING TO: Developmental Disabilities

SPONSOR(S): Representative Gottlieb

COMPANION BILL(S): SB 1608 (Similar)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) Elder Affairs & Long Term Care YEAS 9 NAYS 0
 - (2) Judiciary
 - (3) Health & Human Services Appropriations
 - (4)
 - (5)
-

I. SUMMARY:

HB 637 does six major things:

1. Provides that the Agency for Health Care Administration (AHCA) license private facilities which meet the requirements as intermediate care facilities for the mentally retarded/developmentally disabled (ICF/DDs).
2. Requires AHCA to make unannounced inspections and review residential facilities.
3. It provides a "Bill of Rights of Persons Who Are Developmentally Disabled."
4. Provides that the Departments of Children & Family Services develop annual plans for implementation of treatment programs and residential placements.
5. Provides that funding such programs and residential placements should be a priority for Legislative funding.
6. Provides action to enforce the rights of persons with developmental disabilities. The bill provides for recovery of actual and punitive damages, costs, and attorneys' fees. It revises the requirements for Medicaid reimbursement for intermediate care facilities for the developmentally disabled (ICF/DD).

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

In 1971, the Federal government authorized an optional Medicaid state plan service: Intermediate Care Facilities/Developmental Disabilities programs (ICF/DD). States that elected to include this service in their Medicaid state plan, could earn federal financial participation (FFP, Medicaid matching money) if their programs met the new, rigorous federal certification requirements. Most states took advantage of this financial opportunity. Florida added the ICF/DD program as a Medicaid service in 1976. There are now 90 privately operated programs and 1,419 publicly operated beds. The private programs include facility sizes from six beds up to 120 beds. The public programs are in state institutions and have sizes ranging from 32 to 120 beds.

Over the last two decades, the delivery of services to individuals with developmental disabilities has changed significantly. Nationally, 64 percent of Medicaid recipients with developmental disabilities receive home and community-based waiver services. In Florida, approximately 52 percent of the persons with developmental disabilities served by the Department of Children and Family Services (DCF) are served in a waiver program. Nationally, the number of ICF/DD beds continues to decline. In the mid-1980s, more than 80 percent of individuals with developmental disabilities nationwide who received Medicaid-funded long-term care lived in large, public institutions. Today, less than 16 percent do.

In the 1996 session, the Legislature took actions to support the goal, expressed in statutory language over the preceding years, of relying more heavily on community-based supports as opposed to institutional placements, [393.062; 393.13(2)(b)(1), F.S.]. The 1996 Legislature enacted HB 2723, 96-407, L.O.F. The bill analysis characterized the effects of that bill as follows:

The bill eliminates what will become obsolete references to the private Intermediate Care Facility for the Developmentally Disabled program and modifies the definition of an Intermediate Care Facility for the Developmentally Disabled in Chapter 393, F.S. The bill further provides for the issuance of an alternative license for those facilities that wish to continue providing services through non-institutional funding mechanisms.

A recent federal court opinion (Ferguson 1998) declared that access to ICF/DD for eligible Medicaid recipients is an "entitlement" under federal law and regulation.

Other Court Actions Related to ICF/DDs

FARF I

Alleges state ICF/DD rates are inadequate to reimburse providers.

John & Jane Does, 1-13 -- a.k.a. FARF II

Requires that the state provide an ICF/DD placement within 90 days for eligible persons who choose that service.

Cramer -- a spinoff of FARF II

Halts 1996 legislation that converted community ICF/DD to an essentially waiver funding. The court has required the state to continue funding the existing Medicaid participating private ICF/DDs. Requires a transition plan be submitted to the federal district court.

B. EFFECT OF PROPOSED CHANGES:

The bill returns to the statutes provisions related to privately owned ICF/DDs. It makes them an eligible provider under Medicaid and restores the statutory language associated with their capacity to receive Medicaid reimbursement. It creates an explicit right to a cause of action in instances where the rights of a person with a developmental disability have been violated. The bill removes Legislative intent language related to "abating" the use of large institutions, and favoring community-based care over institutional care. It removes the current statutory limit of 120 beds in a licensed facility and removes the prohibition on the licensure of any residential habilitation facilities.

The bill creates a standard for assessment, planning, and placement of meeting "the individual's unique needs." The bill provides for more frequent, unannounced visits of licensed facilities and requires that some of those be at night, weekends, holidays, and during the overnight hours.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

The bill requires licensure of privately owned ICF/DDs.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

The Agency for Health Care Administration will be required to license and inspect these facilities. However, AHCA was taking steps to assume this activity before this bill was filed and planned to continue to license and inspect ICF/DDs. Therefore, this is not a completely *new* responsibility.

(3) any entitlement to a government service or benefit?

The federal court has ruled that the Medicaid ICF/DD service is an entitlement. This is not specifically addressed in HB 637.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

No agency or program is reduced or eliminated.

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

The bill does not provide for a tax increase.

b. Does the bill require or authorize an increase in any fees?

The bill does not provide for an increase in any fees.

c. Does the bill reduce total taxes, both rates and revenues?

The bill does not provide for a tax reduction.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

The bill restores statutory provisions related to Medicaid ICF/DD services and, therefore, provides another choice to consumers and their families.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

No.

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

The bill does not address the issue of evaluating a consumer or family's needs.

(2) Who makes the decisions?

The bill does not address the issue of decision making.

(3) Are private alternatives permitted?

This is not addressed or affected by the bill.

(4) Are families required to participate in a program?

No.

(5) Are families penalized for not participating in a program?

No.

- b. Does the bill directly affect the legal rights and obligations between family members?

No.

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

- (1) parents and guardians?

The bill provides for the licensure by AHCA of private facilities that qualify as federally certified ICF/DDs. The bill does not address control of the Developmental Services program itself.

- (2) service providers?

The bill does not address the service delivery system of developmental services.

- (3) government employees/agencies?

The bill does not address the service delivery system of developmental services.

D. STATUTE(S) AFFECTED:

393.063, 393.0651, 393.067, 393.068, 393.13, 409.906, 409.908, 92.53, 914.16, 914.17, 918.16, 393.165, 393.166, F.S.

E. SECTION-BY-SECTION ANALYSIS:

Section 1. Subsection (30) relating to the definition of an ICF/DD is amended to include facilities that are not state owned and operated. This section deletes the limit of 120 beds for an ICF/DD. It provides a definition of "least restrictive." This section deletes the language in subsection (43) that prohibited the licensure of any residential habilitation centers built after October 1, 1989 and eliminates the provision that limited licensed capacity of such facilities to 120 beds.

Section 2. This section amends subsection (5) of section 393.0651, F.S., related to support plans to insert the requirement that support plans help residents live a dignified life, in the least restrictive setting "possible, based on the individual's unique needs." It deletes the ranked order to be considered for residential placements.

Section 3. This amends section 393.067, F.S., related to licensure of residential facilities and comprehensive transitional education programs. It provides that in addition to the required minimum annual visit that the department make periodic unannounced inspection and reviews at night, on weekends and holidays, and other times.

Section 4. This section deletes language expressing Legislative recognition of the importance of family support in the long-range success of deinstitutionalization from section 393.068.

Section 5. This section amends 393.13, Personal treatment of persons who are developmentally disabled. This section of the bill deletes the expression of Legislative intent to "abate the use of large institutions." It further adds a clarification to the expression of Legislative intent to continue the development of community-based services, "as an alternative to institutional placement when appropriate and based on the individual's unique needs." This section expresses as Legislative intent:

- ▶ that all persons with developmental disabilities have "all the rights" enjoyed by all other citizens;

- ▶ that individualized assessments be used to determine where a person should live;
- ▶ to develop an annual plan that reviews and revises the previous year's plan;
- ▶ to fund the recommended programs and placements "to the fullest extent possible";
- ▶ to make the funding of treatment programs and residential placements recommended in the plan a priority; and,
- ▶ to facilitate normalization when appropriate;
- ▶ residential placements are the least restrictive possible based on the individual's unique needs.

This section creates a new subsection (8) Civil Enforcement which provides that any developmentally disabled person whose rights as specified in this section are deprived or infringed upon shall have "an action" against any licensee or the state for the violation. This action may be brought by the individual, the guardian, a person or organization acting, or by the personal representative of a deceased individual. It provides that the prevailing defendants may be entitled to recover reasonable attorneys' fees. It specifies criteria for determination of attorneys' fees. This section provides that punitive damages may be awarded for conduct that is "willful, wanton, gross or flagrant, reckless, or consciously indifferent to the rights of the individual."

Section 6. This section deletes the provision that required that an ICF/DD be owned and operated by the state to be eligible to receive Medicaid reimbursement as one of the optional Medicaid state plan services.

Section 7. This section deletes the provision that required that an ICF/DD be owned and operated by the state to be eligible to receive Medicaid reimbursement.

Section 8 corrects a cross-reference.

Section 9 corrects a cross-reference.

Section 10 corrects a cross-reference.

Section 11 corrects a cross-reference.

Section 12. Sections 393.165 and 393.166, F.S., are repealed. Section 393.165 provides Legislative findings related to the value of home and community-based programs. Section 393.166 relates to licensure of "homes for special services."

Section 13. The bill provides an effective date of July 1, 1999.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

There is no appropriation associated with this bill. However, analysis of the potential impact of litigation pending in federal district court suggests the following:

The John & Jane Does, 1-13 & The Cramer Cases

Estimated cost: \$150 million General Revenue
Combines the requirement for timely (within 90 days) ICF/DD placements with improvements and enhancements in home and community-based services.

2. Recurring Effects:

DCF reports that no fiscal impact is anticipated from this bill. AHCA did not prepare a fiscal analysis.

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

No revenues or expenditures are associated with this bill.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None.

2. Direct Private Sector Benefits:

None.

3. Effects on Competition, Private Enterprise and Employment Markets:

None.

D. FISCAL COMMENTS:

This bill essentially reinstates the statutory language to its form before passage of HB 2725 in the 1996 Legislature. Because of federal court actions, the state has continued to fund the ICF/DD program as though no statutory change had occurred. Removing the limit of 120 beds per ICF/DD and removing the prohibition on the licensure of additional residential habilitation facilities could be associated with a fiscal impact, if additional beds are licensed, certified, and are therefore eligible for Medicaid reimbursement.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

N/A

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B. REDUCTION OF REVENUE RAISING AUTHORITY:

N/A

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

N/A

V. COMMENTS:

This bill significantly revises Legislative intent by removing expressions that directed resources and efforts toward deinstitutionalization and use of non-institutional community-based supports and services.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

Two amendments were adopted. The first corrected a drafting error and the second removed a completion date that had passed to make the subsection more current.

VII. SIGNATURES:

COMMITTEE ON Elder Affairs & Long Term Care:

Prepared by:

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