SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Health Care Committee

BILL:	CS/SB 1090
SPONSOR:	Children and Families Committee and Senators Campbell, Dawson, and Lynn
SUBJECT:	Mental Health Services for Minors and Incapacitated Persons
DATE:	March 13, 2005 REVISED: 03/15/05

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Collins	Whiddon	CF	**Fav/CS**
2.	Harkey	Wilson	HE	**Fav/2 amendments**
3.			JU	
4.			HA	
5.				
6.				

Please see last section for Summary of Amendments

- [ ] Technical amendments were recommended
- [x] Amendments were recommended
- [ ] Significant amendments were recommended

I. Summary:

This bill specifies requirements for the Department of Children and Family Services (DCF or the department) with respect to providing psychotropic medications to a child who is in the custody of the department. These provisions address:

- Obtaining parental consent whenever possible;
- Requiring the department to provide known pertinent medical information to the evaluating physician when seeking an evaluation to consider the provision of a psychotropic medication to a child in its custody;
- Authorizing the continuation of a psychotropic medication until the shelter hearing if a child is taking the medication at the time of removal from his or her home pursuant to s. 39.401, F.S.;
- Requiring the department to seek court approval to provide psychotropic medications except in certain situations;
- Specifying the contents of the physician's medical report and requiring that the report be submitted to the court when the department seeks approval to provide psychotropic medications to a child in its custody;
- Requiring that a court hearing be held if any party objects to the department's motion to provide a child with a psychotropic medication;

- Providing an exception to obtaining a court order to provide a psychotropic medication to a child under certain conditions;
- Providing for the ongoing judicial review of a child in the custody of the department who is taking psychotropic medications; and
- Requiring the department to adopt rules pertaining to the use of psychotropic medications by children in its care.

The bill expands the information that must be provided under the "Florida Mental Health Act" or "The Baker Act" to a patient or a person who is legally authorized to make health care decisions on behalf of the patient, to obtain express and informed consent. The language proposed by this bill specifies the information that must be provided regarding medications. The bill requires mental health facilities to develop a system for investigating, tracking, managing, and responding to complaints by persons receiving services or individuals acting on their behalf. This system must be consistent with the rules adopted by the department.

The bill provides for an exemption from the provisions relating to persons who may consent for medical care and treatment of a minor to permit the department to authorize treatment with psychotropic medications for a child in its custody, as provided in s. 39.407(3), F.S., as created in this bill.

This bill amends ss. 39.407, 394.459 and 743.0645, F.S.

I. Present Situation:

A growing number of children are diagnosed with mental disorders in the United States each year, a trend that is prevalent in Florida, as well. The increasing number of children needing mental health treatment in this state significantly impacts the child welfare system that is the responsibility of the department. This impact may be due to the disproportionate number of children in the department's care who are considered "high-risk" for emotional and behavioral problems because of the trauma of abuse or neglect, as well as the necessity of removing these children from their homes and separating them from their families. These children may experience behavioral, socio-emotional, or psychological problems and are frequently in need of treatment that may include psychotropic medications.

In 2004, the department studied the use of psychotropic medications with children in its custody over a specified period of time. As a result of this study, it was determined that 13 percent of all children in state custody were receiving at least one psychotropic medication. Further analysis indicated that of the children receiving at least one psychotropic medication, eight percent were being treated with three or more medications concurrently. Findings also indicated that 3.5 percent of the children in state custody who were age five and under received at least one psychotropic medication. A surprising finding was that 25 percent of the children living in a foster care setting were being treated with psychotropic medications, a rate five times higher than that for the general population of Medicaid eligible children.

Despite initiatives by the department to identify children in its care who are on psychotropic medications and to determine the appropriateness of this treatment, there is limited information available to make such determinations.

Psychotropic Medications

Psychotropic medications are one of many treatment interventions that may be used to address mental health problems. Medication may be recommended and prescribed for children with mental, behavioral, or emotional symptoms when the potential benefits of treatment outweigh the risks. This is particularly true when the problems experienced by the child are so severe that there would be serious negative consequences for the child if the child is left untreated and when other treatment interventions have not been effective. However, there has been growing public concern over reports that very young children are being prescribed psychotropic medications, which is **not** generally the first option of treatment for a child, that some children are on multiple medications, and that these medications are sometimes used inappropriately to control a child's behavior.

There are several major categories of psychotropic medications: stimulants, antidepressants, anti-anxiety agents, anti-psychotics, and mood stabilizers. However, effective treatment with psychotropic medication depends on the appropriate diagnosis of the problem. These medications may be used to treat a variety of symptoms which include:

- Stimulant medications that are frequently used to treat Attention Deficit Hyperactivity Disorder (ADHD), the most common behavioral disorder of childhood;
- Anti-depressants and anti-anxiety medications which follow the stimulant medications in prevalence among children and adolescents. These medications are commonly used for depression, anxiety, and obsessive compulsive disorders;
- Anti-psychotic medications which are used to treat children with schizophrenia, bipolar disorders, autism, and severe conduct disorders; and
- Mood stabilizing medications which are used to treat bipolar disorders.

Some of the concerns regarding the use of psychotropic medications with children stem from the limited information that is available regarding the efficacy and the potential side effects of these drugs with children. Most clinical trials for these drugs were conducted on an adult population. The same results are not always obtained when these drugs are used with children, and the side effects for children are frequently different than those experienced by adults. The U.S. Food and Drug Administration (FDA) has publicly expressed concerns regarding the use of antidepressants in children and established an advisory committee to further study and evaluate the use of these medications with children.

The Department's Authority to Consent to Medical Treatment

Currently, s. 39.407, F.S., requires consent for medical treatment to be obtained from a parent or legal custodian of a child in state custody, or by a court order approving treatment if the parent or legal custodian is unavailable, his/her whereabouts cannot be ascertained, or the parent refuses to give consent. The department may consent to the medical care or treatment of any minor who is in its custody under ch. 39, F.S., when the person who has the power to consent, as otherwise provided by law, cannot be contacted, and has not expressly objected to that consent. *See* s. 743.0645(3), F.S.

However, the term "medical care and treatment" is defined to include **ordinary** and necessary medical and dental examination and treatment, including blood testing, preventive care including ordinary immunizations, tuberculin testing, and well-child care, *but does not* include surgery, general anesthesia, provision of psychotropic medications, or other **extraordinary** procedures for which a separate court order, power of attorney, or informed consent as provided by law is required. *See* s. 743.0645(1)(b), F.S.

Problems have been experienced when children taking psychotropic medications come into the department's care and parental consent cannot be obtained. When this situation occurs, the child does not receive his or her medication until either parental consent or court authorization can be obtained. Similarly, problems are also experienced when a child in out-of-home care needs medication and the physician advises that it is unwise to wait for court approval before providing the medication. There are times that failing to provide the needed medication on time results in the significant deterioration of the child's mental and emotional stability.

While court approval must be obtained, in the absence of parental consent, to provide psychotropic medications for children in the custody of the department, the courts have expressed discomfort with providing authorization, for reasons that include the following:

- Courts frequently lack the necessary information about the child's condition to make informed decisions;
- There is a lack of information (particularly medical history) that travels with the child through the child welfare system, making it difficult for the treating physician to meet procedural requirements associated with children in out of home care;
- There are no state endorsed standards of care or guidelines for treatment decisions to be measured against;
- Medication oversight and monitoring requirements for children on psychotropic medications are not clearly defined; and
- The level and quality of information that must be provided to the parents/legal custodian in order to ensure express and informed consent is provided is not clear.

Express and Informed Consent

Chapter 394, F.S., relates to mental health. Pt. 1 of ch. 394, F.S., is the "Florida Mental Health Act" or "The Baker Act." *Express and informed consent* is defined under s. 394.455(9), F.S., as consent given voluntarily in writing, by a competent person, after sufficient explanation and disclosure of subject matter involved to enable the person to make a knowing and willful decision without any element of force, fraud, deceit, duress, or other form of coercion.

Each person entering treatment, if competent, must be asked to give express and informed consent for treatment. If the person is a minor, express and informed consent is required from the guardian. Section 394.459(3), F.S., further provides that prior to seeking consent; the individual or the individual's parent or legal guardian must be given the following information:

- The reason for the admission;
- The proposed treatment;

- The purpose of the treatment to be provided;
- The common side-effects thereof;
- The consideration of any alternative treatment modalities;
- The approximate length of care; and
- That any consent given may be revoked orally or in writing prior to or during the treatment period.

The requirements specified by s. 394.459, F.S., are referenced by rule 65E-10, F.A.C., which governs the provision of mental health services to children in residential treatment settings and addresses the need to protect children's rights by requiring that policies be developed in accordance with the provisions of ch. 394, Pt. I. F.S. However, the rules pertaining to the provision of mental health services to children on an outpatient basis do not provide similar safeguards nor do they specifically address treatment with psychotropic medications.

The current safeguards for children taking psychotropic medications do not appear to be sufficient. There are ongoing reports of incidents involving inappropriate utilization of these medications, specifically regarding practices around the provision of psychotropic medications to children who are in the care of DCF.

Complaints

Section 394.459(4)(b), F.S., requires, among other things, that mental health receiving and treatment facilities develop and maintain a system for the review of complaints by patients or their families or guardians. This provision does not address the resolution of these complaints, only that they be reviewed.

II. Effect of Proposed Changes:

Section 1: Amends s. 39.407, F.S., to specify requirements for DCF to follow with respect to providing psychotropic medications to a child who is in its custody.

These provisions address:

- Obtaining parental consent whenever possible;
- Requiring the department to provide known pertinent medical information to the evaluating physician when seeking an evaluation to consider the provision of a psychotropic medication to a child in its custody;
- If certain conditions are met, authorizing the continuation of psychotropic medication until the shelter hearing if a child is taking the medication at the time of removal from the home pursuant to s. 39.401, F.S.;
- Requiring the department to seek court approval to provide psychotropic medications except in certain situations;
- Specifying the contents of the physician's medical report and requiring that the report be submitted to the court when the department seeks approval to provide psychotropic medications to a child in its custody;

- Requiring that a court hearing be held if any party objects to the department's motion to provide a child with psychotropic medications;
- Providing an exception to obtaining a court order to provide a psychotropic medication to a child under certain conditions;
- Providing for the ongoing judicial review of a child in the custody of the department who is taking psychotropic medications; and
- Requiring that the department adopt rules pertaining to the use of psychotropic medications by children in its care.

Parental Consent for Treatment

The bill provides that, before the department provides psychotropic medications to a child in its custody, the prescribing physician must attempt to obtain informed consent as defined by s. 394.455(9), F.S., and as described in s. 394.459(3)(a), F.S., from the parent or legal guardian. However, if the parental rights have been terminated, the parent's location or identity is unknown or cannot reasonably be ascertained, or the parent declines to give express and informed consent, the department may, after consultation with the prescribing physician, seek court authorization to provide psychotropic medications to the child. If parental rights have not been terminated, and it is possible to do so, the department must make efforts to involve parents in the decision-making process regarding the provision of these medications. A parent who retains parental rights may, at any time, give express and informed consent to provide the child with psychotropic medications, therefore negating the requirement to seek court authorization for the medication.

Information Provided to Evaluating Physician

The bill specifies that any time the department seeks a medical evaluation to determine the need to initiate or continue a psychotropic medication for a child; the department must provide to the evaluating physician all pertinent medical information known to the department concerning that child.

Continuation of Psychotropic Medications When a Child Is Removed From Home

Under the provisions of the bill, if a child who is taking psychotropic medication is removed from the home under s. 39.401, F.S., and parental authorization to continue providing the medication cannot be obtained, the department may take possession of the remaining medication and continue to provide the medication as prescribed until the shelter hearing.[1] In order for the department to continue providing the medication, the medication must be in its original container and determined to be a current prescription for that child.

If the department authorizes the continued provision of the psychotropic medication when parental authorization cannot be obtained, the department must notify the parent or legal guardian as soon as possible that the medication is being provided to the child. Furthermore, the child's official departmental record must contain the reason that parental authorization was not obtained and an explanation of why the medication is necessary for the child's well being.

[1] The shelter hearing must occur within 24 hours of the child being removed from the home (s. 39.401(3), F.S).

If the department is advised by a physician who is licensed under ch. 458 or ch. 459, F.S., that the child should continue the psychotropic medication and express and informed consent has not been obtained, the department is required to request court authorization at the shelter hearing to continue to provide the psychotropic medication. At the shelter hearing the department must provide to the court any information in its possession to support the request. When court authorization for the provision of psychotropic medications is granted at the shelter hearing, the authorization only extends until the arraignment hearing on the dependency motion, or within 28 days following the date of the child's removal, whichever occurs sooner.

Before filing the dependency petition, the department must ensure that the child is evaluated by a physician licensed under ch. 458 or ch. 459, F.S., to determine the appropriateness of continuing the psychotropic medication. If, as a result of the evaluation, the department seeks court authorization to continue the psychotropic medication, a motion for continued authorization shall be filed at the same time as the dependency petition, within 21 days after the shelter hearing.

Court Authorization to Provide Psychotropic Medications

Except in the situations that are otherwise provided for by this bill, the department is directed to seek court approval to provide psychotropic medication, as a part of the dependency hearing process, if consent cannot be obtained from the parent or legal guardian. The bill also specifies that the motion that is filed by the department to seek the court authorization to initially provide or to continue to provide psychotropic medication to a child in its legal custody must be supported by a written report prepared by the department that describes the efforts that have been made to enable the prescribing physician to obtain express and informed consent for providing the medication to the child as well as other treatments considered or recommended for the child.

The motion must also include a physician's signed medical report providing:

- The name of the child, the name and dosage range of the medication, and that there is a need to prescribe psychotropic medication to the child based upon a diagnosed condition for which the medication is being prescribed;
- A statement indicating that the physician has reviewed all medical information on the child that has been provided;
- A statement indicating that the psychotropic medication, at its prescribed dosage, is appropriate for treating the child's diagnosed medical condition, as well as the behaviors and symptoms the medication, at its prescribed dosage, is expected to address;
- An explanation of the nature and purpose of the treatment; the recognized side effects, risks, and contraindications of the medication; drug-interaction precautions; the possible effects of stopping the medication; and how the treatment will be monitored, followed by a statement indicating that this explanation was provided to the child if age appropriate and to the child's caregiver; and
- Documentation addressing whether the psychotropic medication will replace or supplement any other currently prescribed medications or treatments; the length of time the child is expected to be taking the medication; and any additional medical, mental health, behavioral, counseling, or other services the prescribing physician recommends.

Hearing Requirements

If any party objects to the department's motion requesting court authorization to provide a child with psychotropic medication, the court must hold a hearing before approving the department to initially provide or continue psychotropic medications for a child. The physician's medical report is admissible evidence. However, the physician is not required to attend the hearing or testify unless court ordered to do so.

The court may, in the best interests of the child, order the provision of the psychotropic medication based upon the department's motion and the physician's report. However, the court must ask the department whether additional medical, mental health, behavioral, counseling, or other services which the prescribing physician considers to be necessary or beneficial in treating the child's medical condition, and that the physician recommends or expects to provide to the child in concert with the medication, are being provided to the child by the department. The court may also order additional medical consultation, including obtaining a second opinion within five working days after such order, based upon consideration of the best interests of the child.

The court may not order the discontinuation of a prescribed psychotropic medication contrary to the decision of the prescribing physician without first obtaining a second opinion from a licensed psychiatrist, if available, or, if not available, a physician licensed under ch. 458 or ch. 459, F.S., stating that the psychotropic medication should be discontinued. If, however, the prescribing physician is a child or adolescent psychiatrist, the court may not order the discontinuation of prescribed psychotropic medication unless the second opinion is also from a child or adolescent psychiatrist. The burden of proof at any hearing must be made by a preponderance of evidence.

This bill does not specify the criteria that must be addressed by a physician providing a second opinion that the psychotropic medications should be discontinued. Based upon the requirements of this bill, a physician who is not a psychiatrist could provide a second opinion recommending the discontinuation of a medication that has been prescribed by a child or adolescent psychiatrist.

Exceptions

When the child's prescribing physician certifies that a delay in providing a psychotropic medication to a child (already in the custody of the department) is more likely than not to result in significant harm to the child, the department may immediately authorize the provision of the medication to the child. In this situation, the department must seek a court order for medications at the next regularly scheduled hearing or within 30 days after the prescription, whichever occurs sooner. If any party objects to the department's motion, the court must hold a hearing within seven days.

Additionally, psychotropic medications may be administered in advance of a court order in hospitals, crisis stabilization units, and in statewide inpatient psychiatric programs. Within three working days after the medication is begun, the department must seek court authorization as specified in this bill.

Ongoing Judicial Review of a Child on Psychotropic Medications

When a child who is in the custody of the department is prescribed psychotropic medications, in accordance with the provisions of this bill, the department is required to fully inform the court of the child's medical and behavioral status as a part of the social services report that is prepared for each judicial review. As a part of the information that is provided to the court, the department must also furnish copies of all pertinent medical records concerning the child which have been generated since the previous hearing.

The bill authorizes the court to review the child's status more frequently on its own motion or on good cause shown by any party, including any guardian ad litem, attorney, or attorney ad litem who has been appointed to represent the child or the child's best interests. The bill also specifically authorizes the court to review the medical and behavioral status of the child more frequently than at the intervals specified by this bill as well as order the department to obtain a medical opinion that the continued use of the medication under the circumstances is safe and medically appropriate. However, the court currently has the authority to order additional hearings or to seek a second medical opinion whenever the court deems necessary.

Rule Development

This bill requires the department to adopt rules to ensure that children receive timely access to clinically appropriate psychotropic medications. The rules must include but need not be limited to the process for determining which adjunctive services are needed, the uniform process for facilitating the prescribing physician's ability to obtain the express and informed consent of a child's parent or guardian, the procedures for obtaining court authorization for the provision of psychotropic medications, and the frequency of medical monitoring and reporting on the status of the child to the court, how the child's parents will be involved in the treatment planning process if parental rights have not been terminated, and how caretakers are to be provided information contained in the physician's report. These rules must also include uniform forms to be used to request court authorization for the use of a psychotropic medication as well as provide for the integration of each child's treatment plan and case plan. The department must begin the formal rulemaking process within 90 days after the effective date of this act.

Although there are currently requirements specified in rule pertaining to the provision of mental health services for children, these requirements do not specifically address the use of psychotropic medications and may only be applicable in crisis stabilization units or residential treatment settings. There are situations when a child who is in the custody of the department may be prescribed a psychotropic medication without there being clear departmental requirements for the administration of this medication. Staff from DCF's children's mental health and child welfare programs indicates that rules are under development to address some of these gaps. The language proposed in this section of the bill will assist the department in ensuring that safeguards are in place for children who are prescribed psychotropic medications.

Section 2. Amends s. 394.459(3) and (4), F.S., to increase the information that must be provided to a patient or a person who is legally authorized to make mental health care decisions on behalf of the patient in order to obtain express and informed consent and to expand the requirements of facilities when handling complaints.

Current law specifies that a fairly extensive list of information be explained. However, the amendments proposed by this section of the bill strengthen the requirements for obtaining express and informed consent by requiring that information be provided to the individual in "plain language," as well as specifying that additional information be provided regarding medications. Other improvements include the additional requirements to inform the individual of the potential effects for stopping treatment and to address the monitoring that is to occur while treatment is being provided.

In addition, the bill provides that mental health facilities are to develop a system for investigating, tracking, managing, and responding to complaints by persons receiving services or individuals acting on their behalf. This system must be consistent with rules adopted by the department.

Section 3. Amends s. 743.0645(1), F.S., to provide an exemption from the requirements relating to the consent for medical care and treatment to allow the department to authorize treatment with psychotropic medications for a child in its custody as provided under s. 39.407(3), F.S., as created in section 1 of the bill.

Section 4. Provides that the bill takes effect on July 1, 2005.

III. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Article I, Section 24(a) and (b) of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

IV. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This legislation will have an impact on Florida licensed physicians, including those enrolled in Medicaid, who prescribe psychotropic medications to children in the care and

custody of the state, by expanding documentation and reporting requirements. The majority of children in the care and custody of the state are on Medicaid.

C. Government Sector Impact:

According to the Agency for Health Care Administration (AHCA), this bill does not have a significant impact to Medicaid.

There will be an undetermined cost for DCF's Child Welfare and Community-Based Care Program and the Children's Mental Health Program to develop new rules and amend current rules to comply with the requirements of this bill.

There may be other costs associated with the implementation of this bill, but these costs cannot be estimated based on available data.

- There may be litigation expenses to pay for medical testimony on behalf of DCF.
- The cost of additional psychiatric or other medical evaluations will depend on the number of children requiring these evaluations and the number of evaluations performed each year.

Implementation of this bill may lower the use of psychotropic medications among children in state custody, potentially generating a cost savings to the state.

The Office of the State Courts Administrator (OSCA) reports that the hearings on psychotropic medications required by this bill may result in an increase in judicial workload. Additionally, OSCA notes that the bill authorizes the court to order additional medical consultation and second opinions without specifying who pays for these activities. The court has and exercises this authority now without the provisions of this bill. Currently, Medicaid will reimburse for up to two psychiatric evaluations per state year and any medication management appointments.[2] Any evaluations beyond the two allowable under Medicaid would be paid for by the department.

V. Technical Deficiencies:

On page 7, lines 19 and 22, the term "child or adolescent psychiatrist" is unclear. "A psychiatrist who specializes in mental health care for children and adolescents" would be clearer, if that is the intent of the bill.

VI. Related Issues:

The department maintains that it may be difficult to obtain psychiatric evaluations within the time frames specified by this bill.

There will be a need to integrate activities across agencies (AHCA and DCF) and service settings to meet the requirements specified by this bill. Additionally, the contractual requirements of

[2] Most children in the custody of the state are Medicaid eligible.

community-based care agencies and children's mental health providers should be revised in order to reflect the provisions of this bill.

VII. Summary of Amendments:

Barcode 425408 by Health Care:
Requires a parent or guardian to provide all known medical information to DCF when a child is placed in a shelter. (WITH TITLE AMENDMENT)

Barcode 262816 by Health Care
Changes certain procedural requirements relating to court oversight of the administration of psychotropic medications to children and corrects references to "child or adolescent psychiatrist". (WITH TITLE AMENDMENT)