



# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. HOUSE PRINCIPLES ANALYSIS:

**Limited Government:** The bill limits the actions of the Legislature and Governor in making decisions including appropriations to best serve persons with development disabilities.

**Safeguard Individual Liberty:** The bill seeks to insure the individual choice of residential setting for persons with developmental disabilities, whether in institutions or the community.

**Empower Families:** The bill provides for family participation in hearings and decision making regarding the residential decisions of persons with developmental disabilities.

### B. EFFECT OF PROPOSED CHANGES:

#### **Intent**

The bill establishes intent of the Legislature that the Agency not close or reduce resident population of a developmental disabilities institution unless it has complied with provisions of the bill.

#### **Written Notice and Right to Litigate**

The bill requires the Agency for Persons with Disabilities to give written notice to certain specified persons if it proposes to close or reduce the resident population of a developmental disabilities institution and specifies the contents of notices. The written notice is required to be sent to the Governor and Cabinet, each resident of the Developmental Disabilities Institution, an adult member of the resident's immediate family (if known) and resident's guardian.

The notice must advise the resident, adult member of the resident's immediate family, or the guardian that the resident has the right to initiate legal action relating to the notice and closure, or reduction in the resident population of the developmental disabilities institution.

#### **Public Hearing and Approval by the Governor and Cabinet**

The bill requires the Governor and Cabinet to hold a public hearing and to approve/disapprove closure or reduction of population.

The Governor and Cabinet must give notice of the public hearing by registered mail to each resident, an adult member of the resident's immediate family, if known, the guardian of the resident, and each member of the Legislature not less than 90 days prior to the scheduled date of the hearing.

The public hearing is required to include, the:

- Capacity of the community to provide services;
- Total cost of reducing resident population or closure of the institution;
- Effect the reduction or closure will have on residents of the institution;
- Monitoring and safety systems in place in the community;
- Process to be used to develop a community living plan for each resident;
- Services necessary to provide family and guardian involvement in the community living plan;
- Responsibility of each state agency and local government for the closure or reduction in population of an institution;
- Procedures used to transfer ownership of the institution or plan to reuse the property; and
- Any other issues identified by the Legislature, resident, family member, guardian or other interested party

The Governor and Cabinet are required to approve or disapprove the agency's plan to close or reduce the resident population of a developmental disabilities institution upon consideration of testimony and

other evidence. If they approve, the Governor and Cabinet are required to direct the agency to give each affected resident, an adult member of their immediate family, if known, and the guardian of an affected resident, written assurance that the resident may choose to receive services in another developmental disabilities institution or in a community-based setting.

### **Maintenance of Funding**

The bill requires funding be maintained at the same level as the first year the closure was approved throughout all of the years to completion of closure.

### **Family Advisory Council**

The Governor and Cabinet are required to appoint a "family advisory council" to:

- Review the state's adherence to federal law and to s. 2. Article I of the State Constitution as it relates to residential choice;
- Study Developmental Disabilities Institutions, including the cost effectiveness of current programs, staffing necessary to provide quality care, and the possibility of converting institutions to out-patient health care and evaluation clinics;
- Study the wait list for residential services, including consideration of the ability of community homes to serve people on the wait list; and
- Review any other issues relating to residential capacity, quality of care and access to people with developmental disabilities.

**The bill requires its effects be retroactive.**

### **PRESENT SITUATION**

Florida Statute 393.062 states that "The Legislature finds and declares that existing state programs for the treatment of individuals with developmental disabilities, which often unnecessarily place clients in institutions, are unreasonably costly, are ineffective in bringing the individual client to his or her maximum potential, and are in fact debilitating to many clients"

The Office of Program Policy Analysis and Government Accountability (OPPAGA) of the Florida Legislature conducted a review of the Developmental Disabilities Program in 2000 (Report No: 00 -17). The report found "Many clients who currently live in state institutions and private intermediate care facilities could be appropriately served in less costly settings, saving about \$35 million per year. Closing one or more of the state institutions could save another \$4 million annually, although some investment in community-based services would be needed to expand services for these clients."

The closure of Landmark in Miami-Dade County in 2005, and the planned closure of Gulf Coast Center by 2010, are the result of the Agency's 1998 settlement agreement in the federal *Brown v. Bush* lawsuit initiated by the Advocacy Center for Persons with Disabilities. The Governor's Office and the Legislature were active participants in all stages of the litigation, decision making, and final resolution. Currently, there are no plans to close the two remaining developmental disabilities institutions, Sunland, located in Marianna, and Tacachale, located in Gainesville.

Current requirements for client notification differ depending upon whether the action is the result of the agency's own initiative or part of a settlement agreement. In the case of the former, the agency is already required to provide a public meeting and adequate notice of the meeting. If the closure is the result of a proposed settlement agreement, notice can not be provided until negotiations are concluded.

In 1993, the Florida Legislature established the Family Care Council to advise the Agency for Persons with Disabilities (APD) on the needs of self-advocates and their families.

The Advocacy Center for Persons with Disabilities is monitoring the progress of the implementation of the *Brown v Bush* lawsuit, settlement agreement.

Medicaid regulations and agency rules and policy already provide for client choice. Title 42 U.S.C.1396n(c), gives residents the right to choose the treatment setting. The closure of an institution does not obligate an individual or guardian or other legally authorized representative to choose a home and community-based waiver placement if the individual, in fact, wants an institutional placement. In addition, federal law, 42 C.F.R. 431.220, provides that an individual retains the right to challenge placement decisions through the fair hearing process.

To ensure the health and safety of residents, the agency states that it has developed steps to accomplish the closure of Gulf Coast Center in an appropriate and effective manner. Fiscal oversight for the closure of Gulf Coast Center and the downsizing of the census in the remaining developmental disabilities institutions is managed through the budget process. The agency cannot implement plans to close or significantly reduce the population of a developmental disabilities institution without thorough review, and approval by the Governor and Legislature.

C. SECTION DIRECTORY:

**Section 1.** Creates section 393.35, Florida Statutes, regarding closure of developmental disabilities institutions.

**Section 2.** Provides that the effect of the bill is retroactive.

**Section 3.** Provides an effective date of upon becoming law.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

Potentially significant. See fiscal comments below.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill requires the agency to maintain the level of funding to the institution in the same amount that was allocated to the institution for the year that the closure or reduction of the resident population was approved. The agency expressed concern that this requires the same level of funding to be in place for the year that the closure was approved with hundreds of residents residing in the institution until the final closure year when there could be only a handful of residents.

According to the agency, the fiscal impact of this bill is difficult to determine because significant reductions in the facilities have already been initiated. In moving residents from the state facilities to community-based settings, the agency has implemented a multi-year plan that would require increased

appropriations to maintain facility operations under the provisions of the bill. According to the agency, a halt to the closure plan would include increasing staffing to reinstate direct care and restore other services reduced since the closure began. The fiscal impact is indeterminate, however, the agency indicates the potential costs could exceed \$6.5 million. The facility would need to increase the recurring costs of maintenance through a Fixed Capital Outlay request at approximately \$750,000 per year to maintain the facilities and do deferred maintenance.

The agency may also incur expenses associated with the hearing and appeals process as described. These would include administrative costs for staff and legal representation, as well as travel and expense costs.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

##### 2. Other:

Retroactive application of the bill may violate the Florida Constitution, Contract Clause of Article I, Section 10 the prohibition against ex post facto laws in Article I, Section 9, and the Due Process Clauses of the Fifth and Fourteenth Amendment.

Requiring the same continued level of funding of an institution during its closure or reduction process is contrary to the finding of the Florida Supreme Court (1878 WL 2240 (Fla.)) that the power of one Legislature is not limited by the act of an antecedent one.

#### B. RULE-MAKING AUTHORITY:

None.

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

According to the Agency for Persons with Disabilities, the bill as drafted has the following problems:

- Requiring the provisions of the proposed bill to be retroactive would impact the settlement of the Brown v Bush lawsuit. The order approving the lawsuit settlement agreement was signed by the Honorable Joe E. Martinez, United States District Judge on August 11, 2006, further administratively closing the case and all pending motions denied as moot.
- Federal Rule of Civil Procedure 23(e) provides that settlement of a class action requires approval by the Court. This proposed legislation requires Cabinet approval in addition to approval of the Governor and Legislature. Currently the Governor and Legislature authorize and approve Agency actions.
- Requiring that the institution's funding level is maintained at the level allocated in the year closure or reduction is approved, through to final closure or reduction, binds the appropriation authority of future Legislatures.
- The retroactive provisions of the bill could conflict with current statutory provisions set forth in the 2006-2007 Appropriations Act that provide funds and direction for the agency to transfer up to 60 individuals from Gulf Coast Center to residential settings funded through the home and community based waiver. Because the retroactive time-period is unspecified it might be interpreted to also apply to previously closed institutions.

In addition:

- Key components of this bill currently exist in statute or rule.

- Establishing a family advisory council would be duplicative, as family advisory councils already exist to perform these duties.

D. STATEMENT OF THE SPONSOR

No statement provided.

**IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES**

On March 20, 2007, the Committee on Healthy Families adopted a "strike-all" amendment by the bill sponsor that is traveling with the bill and voted the bill favorably.

The amendment addresses issues identified in the bill analysis and does the following:

- Limits requirements of the bill to closures and reductions of more than 10 percent of residents in an institution.
- Removes required maintenance of effort funding level.
- Removes creation of the Family Advisory Council.
- Removes the retroactive effect of the bill.

The amendment also adds language to require monthly reports on phase down of the Gulf Coast Center and requires a feasibility study of an alternate facility.