

The Florida Senate
PROFESSIONAL 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: Children, Families, and Elder Affairs Committee

BILL: CS/SB 402

INTRODUCER: Children, Families, and Elder Affairs Committee and Senator Fasano

SUBJECT: Developmental Disabilities Institutions

DATE: March 21, 2007 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Toman	Jameson	CF	Fav/CS
2.			GO	
3.			HA	
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I. Summary:

Committee Substitute for Senate Bill 402 requires the Agency for Persons with Disabilities (APD) to give written notice to certain specified persons when it proposes to close or reduce by more than 10 percent the resident population of a developmental disabilities institution (DDI).

The bill also requires the Governor and Cabinet to notice and hold a public hearing on any such proposal. After considering the evidence, the bill requires the Governor and Cabinet to approve or disapprove the proposal. Upon approval of a plan to close or reduce by more than 10 percent the resident population of a DDI, the bill requires that the Governor and the Cabinet direct the agency to give written assurance that each affected resident may choose to receive services in another DDI or in a community-based setting.

The bill obligates APD to periodically report on the progress of the phase-down of the Gulf Coast Center in Fort Myers.

This bill creates s. 393.35, Florida Statutes.

II. Present Situation:

Section 393.062, F.S., 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.”¹

In the Americans with Disabilities Act of 1990 (ADA), Congress described the isolation and segregation of individuals with disabilities as a serious and pervasive form of discrimination.² Title II of the ADA, which proscribes discrimination in the provision of public services, specifies, *inter alia*, that no qualified individual with a disability shall, “by reason of such disability,” be excluded from participation in, or be denied the benefits of, a public entity's services, programs, or activities.³

In *Olmstead v. Zimring*,⁴ the United States Supreme Court concluded that “under Title II of the ADA, States are required to provide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.”

In 1998, Shalyndra Brown, et. al., filed a federal class action lawsuit against the state of Florida, alleging that individuals with developmental disabilities were being unnecessarily institutionalized in violation of Title 42 U.S.C. s. 1983, the Medicaid provisions of the Social Security Act and the ADA.⁵ The Brown Plaintiffs sought injunctive and declaratory relief, the net effect of which would have been the closure of all state owned and operated DDIs. On June 14, 2004, the lawsuit was settled in an amended settlement agreement which, *inter alia*, required the state to close two of its four DDIs by the year 2010.⁶ The settlement agreement is scheduled to expire in June 2007 if the state is found to be in compliance at that time.

Consistent with the *Brown v. Bush* settlement agreement, the state closed the Community of Landmark in Miami-Dade County in 2005. In a continuing effort to comply with the settlement agreement, APD is currently administering a phase-down of the Gulf Coast Center in Ft. Myers.

Pursuant to Title 42 U.S.C.1396n(c), developmentally disabled consumers have the right to choose their treatment setting. The closure of an institution does not obligate an individual, guardian or other legally authorized representative to choose a home and community-based waiver placement if the individual, in fact, wants an institutional placement.

¹ See also, Office of Program Policy Analysis and Government Accountability (OPPAGA), Report No: 00 -17, November, 2000 – Justification Review of the Developmental Disabilities Program Florida Department of Children and Families which found that “[m]any 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.”

² 42 U.S.C. §§ 12101(a) (2), (5).

³ *Id.* at § 12132.

⁴ 119 S.Ct. 2176, 2190 (1999).

⁵ *Brown, et. al. v. Bush et. al.*, Case No. 98-673-CIV, United States District Court, Southern District of Florida.

⁶ The order approving the *Brown v. Bush* settlement agreement was signed by the Honorable Joe E. Martinez, United States District Judge, on August 11, 2006.

In 1993, the Legislature established the Family Care Councils (FCC) pursuant to s. 393.502, F.S., to advise APD on the needs of consumers and their families. Each FCC may have up to fifteen members who are appointed by the Governor. At least three of the members must be consumers, and the remainder of the membership must be parents, guardians or siblings of consumers. In order to ensure non-partiality, employees of the agency are not eligible to serve on a local family care council. The functions of the FCCs include providing outreach to families, providing review and recommendations as to service programs, advising the agency as to policy and sharing information with other councils.

III. Effect of Proposed Changes:

The bill 402 creates s. 393.35, F.S., and states that the intent of the Legislature is that APD not close or reduce resident population of a DDI unless it has complied with provisions of the section.

The bill requires that, if APD intends to take any action resulting in the closure or reduction of more than 10 percent in the resident population of a DDI, the agency must provide written notice by registered mail to the Governor and Cabinet, to each resident of the DDI, to each resident's guardian, and to any other individual authorized to receive such information under the Health Insurance Portability and Accountability Act of 1996 (HIPAA). The bill specifies that the notice must advise its recipients that the resident has the right to initiate legal action relating to the notice provision and to the closure or reduction of the resident population of the DDI.

The bill further provides that no closure or reduction of more than 10 percent in the resident population of a DDI can take place unless the Governor and Cabinet schedule a public hearing, giving notice by registered mail of the public hearing to each resident of the DDI, to each resident's guardian, and to any other individual authorized to receive such information under HIPAA, and to each member of the Legislature, not less than 90 days prior to the scheduled date of the hearing. The bill requires the public hearing to include testimony about the following:

- Capacity of the community to provide services;
- Total cost of reducing resident population or closure of the DDI;
- Effect reduction or closure will have on residents of the DDI;
- 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 a DDI;
- Procedures used to transfer ownership of the DDI or plan to reuse the property;
- Plans to reemploy the DDI employees; and
- Any other issues identified by the Legislature, resident, family member, guardian or other interested party.

The bill mandates that the Governor and Cabinet approve or disapprove the plan, upon consideration of testimony and other evidence. If the Governor and Cabinet approve the plan,

they are to direct the Agency to give each affected resident, each resident's guardian, and any other individual authorized to receive such information under HIPAA written assurance that the resident may choose to receive services in another developmental disabilities institution or in a community-based setting.

The bill requires APD to provide a monthly report, beginning August 1, 2007, to the Governor, the President of the Senate and the Speaker of the House of Representatives detailing the progress of the phase-down of the Gulf Coast Center in Fort Myers, and to post the report on its website. The report is to give details about the following:

- Actual population in conjunction with targeted census;
- Location of residential placements by number and type;
- Number of significant reportable events;
- Statistics regarding placement choice and preference;
- Efforts by the agency to assist in placement decisions.

The agency is also directed to conduct a feasibility study and issue a report by December 1, 2007, on the development of alternate intermediate care facilities for Gulf Coast residents.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The cost of the notice provisions of the bill could be substantial. The bill requires notice to be provided three separate times: once to advise that the agency is contemplating a

closure or reduction, once to advise of public hearing, and once to advise of the approval of a closure or reduction plan. In each instance, the bill requires notice to be given to up to three individuals by Registered Mail. In the case of public hearing, notice is also to be provided to each member of the Legislature, also by Registered Mail. The current fee for Registered Mail (in addition to regular postage) is \$7.90 for an item with no declared value.⁷ As of this date, there are over 900 residents at the remaining DDIs.

The bill will also require General Revenue funding for travel and per diem expenses for the twenty-one members of the family advisory council to attend quarterly meetings.

VI. Technical Deficiencies:

On page 1, lines 27 through 31, the bill sets up a “Notice” subsection requiring the agency to give notice if it intends to take action or in any manner authorizes or encourages the immediate or phased closure or reduction of more than 10 percent in the resident population of a DDI. This could be interpreted to mean that mere discussions within the agency with regard to potential closure or reduction would invoke the requirement to give notice.

The bill appears to create a cause of action relating to “the notice provisions of this subsection and to the closure of the developmental disabilities institution.” The bill does not specify whether this is an administrative or a civil action. It is not clear whether this section is providing two grounds for challenge, or one compound ground for challenge.

Authorizing the Governor to conduct public hearings and provide anything other than an advisory opinion with respect to a plan to close an institution may usurp Legislative prerogative.

VII. Related Issues:

None.

This Senate Professional Staff Analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.

⁷ <http://pe.usps.gov/text/DMM300/503.htm#wp1100045>

VIII. Summary of Amendments:

None.

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