

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

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

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Prepared By: The Professional Staff of the Children, Families, and Elder Affairs Committee

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BILL: SB 862

INTRODUCER: Senator Fasano

SUBJECT: Developmental disabilities institutions

DATE: February 15, 2008

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Ray	Jameson	CF	Fav/CS
2.			HA	
3.				
4.				
5.				
6.				

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**I. Summary:**

Senate Bill 862 requires the Agency for Persons with Disabilities (APD or “the agency”) to give written notice to certain specified persons when the agency proposes to close or reduce by 20 percent or more within one fiscal year the resident population at either the Marianna Sunland developmental disabilities institution (DDI) or the Gainesville Tacachale DDI.

The bill provides that if the agency or the Legislature announce the intent to close a DDI, or to reduce the census as indicated above, then the agency must prepare a plan for the closure or reduction as further specified in the bill. The bill provides for comment by the President of the Senate and the Speaker of the House on the agency plan prior to the Governor approving or disapproving the agency’s plan to close or reduce the census at one of the two named institutions.

The bill requires the agency to provide a quarterly report to the Governor, President of the Senate, and Speaker of the House of Representatives on the progress of the closure or census reduction affecting the Gulf Coast Center, which is scheduled to close in 2010, and any other DDI approved for closure after July 1, 2008.

This bill creates, s. 393.35, F.S., and provides an effective date of July 1, 2008.

**II. Present Situation:**

Section 393.062, F.S., provides 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.”<sup>1</sup>

In the Americans with Disabilities Act of 1990 (ADA), Congress described the isolation and segregation of an individual with disabilities as a serious and pervasive form of discrimination.<sup>2</sup> Title II of the ADA, which proscribes discrimination in the provision of public services, specifies, among other things, 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.<sup>3</sup>

In *Olmstead v. Zimring*,<sup>4</sup> 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. § 1983, the Medicaid provisions of the Social Security Act and the ADA.<sup>5</sup> 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, among other things, required the state to close the Community of Landmark by June 30, 2005, and the Gulf Coast Center by July 1, 2010.<sup>6</sup>

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.

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<sup>1</sup> See also, Office of Program Policy Analysis and Government Accountability (OPPAGA), Report No: 00-17, Justification Review, *Developmental Disabilities Program Florida Department of Children and Families* (November, 2000) 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.”

<sup>2</sup> 42 U.S.C. §12101(a)(2),(5).

<sup>3</sup> *Id.* at §12132.

<sup>4</sup> 119 S.Ct. 2176, 2190 (1999).

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

<sup>6</sup> *Id.*

### III. Effect of Proposed Changes:

The bill creates s. 393.35, F.S., providing that it is the intent of the Legislature that APD do the following:

- Notify each resident and resident guardian of the Marianna Sunland DDI or the Tacachale DDI if the agency or Legislature announces an intention to close or reduce the census of the DDI<sup>7</sup> by 20 percent or greater within one fiscal year.
- Assure each resident or resident guardian that planning for his or her transition to another setting will be done with resident involvement and address the needs of the resident in the most appropriate setting.
- Assure the health and safety of each resident during the transitional period.
- Conduct a planning process for activities associated with a closure or reduction of population and comply with the newly created section.

The bill provides that if APD or the Legislature intends to take any action resulting in the closure or reduction of the census by 20 percent or more within one-fiscal-year at either the Marianna Sunland DDI or Tacachale DDI after July 1, 2008, APD must provide a report to the Governor, the President of the Senate, and the Speaker of the House of Representatives relating to the closure or census reduction of the institution. On lines 30 through 36, the one fiscal year window included in the definition of the terms “census reduction” and “reduce the census” may allow the census reduction of no greater than nineteen percent on an annual basis without triggering the notice, planning, and reporting provisions of this bill.

The agency’s report must include plans to:

- Notify by registered mail each affected resident, his or her guardian, designated family member, or other designee of the intent to close or reduce the census of the institution, the reason for the closure or census reduction, and contact information for additional information.
- Educate staff, each affected resident, his or her guardian, family member, or designee about residential placement opportunities.
- Provide services for residents after they leave the institution.
- Assess the ability of each service provider to meet a resident’s needs.
- Recruit, develop, and train service providers.
- Monitor and ensure the safety of residents after leaving the institution.
- Develop support plans for residents.
- Provide a process for residents to appeal the services planned through the support planning process.
- Adjust employee staffing levels during the closure or census reduction to ensure the safety and quality of care and assist employees seeking new employment.

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<sup>7</sup> For purposes of s. 393.35, F.S., the phrases “census reduction” or “reduce the census” mean to reduce the current resident population of an institution within one-fiscal-year beginning July 1 and ending June 30 annually. A resident placed in the institution under court order, and a resident or his or her guardian who have requested in writing to leave the institution are not included in the census reduction calculation.

The report must also include a complete timeline for closure or census reduction, including a financial plan, a communications plan, and a plan for disposing of property. The report must identify responsibility of each state agency involved in the closure or census reduction.

The bill provides that the President of the Senate and the Speaker of the House shall have 90 days from the receipt of notification to provide comments to the Governor regarding the announced closure or census reduction. The bill provides that once the Governor considers these comments, the Governor must approve or disapprove the agency's plan. This decision is not binding on the Legislature.

The bill requires the agency to provide a quarterly report to the Governor, President of the Senate, and Speaker of the House of Representatives on the progress of the closure or census reduction affecting the Gulf Coast Center and any other DDI approved for closure or census reduction after July 1, 2008.

The bill requires that APD's quarterly report documenting the progress of the closure or census reduction plan include the following information:

- The number of residents, guardians, designated family members, and designees notified and the number needing notification.
- Resident population compared to the target census reduction.
- The location of residential placements by number and facility.
- The number of significant reportable events for residents in the institution.
- Statistics indicating the successful placement of each resident and assessing the APD's efforts in assisting in those choices.

This bill will take effect July 1, 2008.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

##### **B. Public Records/Open Meetings Issues:**

None.

##### **C. Trust Funds Restrictions:**

None.

#### **V. Fiscal Impact Statement:**

##### **A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

According to APD this will not result in a fiscal impact for the department.

**VI. Technical Deficiencies:**

Line 24 states that it is the intent of the legislature that APD timely notify residents and guardians of residents when the agency or the legislature announces its intent to close or reduce a DDI's census by 20 percent or more. The term "timely" is not defined and would therefore be subject to judicial construction.

Line 53 through 66 contain a provision requiring the agency to create a plan and submit the plan to the Governor, the President of the Senate, and the Speaker of the House prior to any proposed closure or census reduction by the agency or the Legislature. Lines 113 through 119 provide that the Governor shall approve or disapprove the agency's plan. It is not clear whether or not the Governor is required to approve or disapprove the agency's plan if it is pursuant to a legislative announcement, as described in this bill, or if the Governor's approval or disapproval is only invoked pursuant to an agency announcement of an intent to close or reduce census in a DDI. The broad purpose of the legislative branch is to determine policies and programs and review program performance. The purpose of the executive branch is to execute the programs and policies adopted by the Legislature and make policy recommendations to the Legislature.<sup>8</sup> Article II, Section 3, of the State Constitution provides that no person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided. Safeguards are required to support a proper delegation of power.<sup>9</sup> If the bill is read to grant the Governor the ability to approve or disapprove a legislative action in a manner other than through executive veto power, this could be subject to challenge.

Line 57 refers to "a report" regarding the agency or legislative plan; however lines 62 and 63 allow the President of the Senate and the Speaker of the House 90 days to provide comments to the Governor after receipt of "notification of intent." It appears that the "report" referred to in line 57 may be the same as or serve as the **notice of** intent, however this is not clear.

Line 96 refers to "residents and their guardians." This does not appear to contemplate a resident who does not have a guardian.

Lines 96 and 97 require the agency to include within their report an appeal process for residents and their guardians. According to the agency, APD is required to provide notice of hearing rights for administrative hearings before the Division of Administrative Hearings (DOAH) as governed by ch.120, F.S., and 42 C.F.R. §1396.

Line 115 includes the term "other evidence." It is unclear what is contemplated by this provision.

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<sup>8</sup> Section 20.02(1), F.S.

<sup>9</sup> *Askew v. Cross Key Waterways*, 372 So.2d 913 (Fla. 1978).

Lines 129 through 131 require that the agency's quarterly report document the progress of the original plan to close or reduce the census of a DDI. Lines 131 through 145 require that the agency's quarterly report include a list of additional items some of which are required to be reported on within the progress report described on lines 129 through 131.

Line 141 requires the agency's quarterly report to include statistics that indicate the successful placement of residents. The term "successful placement" is not defined and susceptible to subjective interpretation.

## **VII. Related Issues:**

The terms "census reduction" and "reduce the census" are defined within the legislative intent section of the bill. This is an unusual construction.

## **VIII. Additional Information:**

### **A. Committee Substitute – Statement of Substantial Changes:** (Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

### **B. Amendments:**

None.