

**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.)

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

BILL: SB 1422

INTRODUCER: Senator Altman

SUBJECT: Developmental Disabilities

DATE: April 11, 2011                      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Daniell	Walsh	CF	<b>Pre-meeting</b>
2.			BC	
3.				
4.				
5.				
6.				

**I. Summary:**

This bill creates the Developmental Disabilities Savings Program (savings program), which is a savings and investment program that offers continued accessibility to services, regardless of income, insurance, or Medicaid eligibility, for families who have children with developmental disabilities who will become ineligible for services due to age.

The bill creates the Developmental Disabilities Savings Program Board (board) to administer the savings program. The board consists of seven members who are to serve on the board without compensation. The bill lists the powers and duties of the board and provides that the goals of the board are to provide all purchasers and benefactors of the program with the most secure, well-diversified, and beneficially administered savings program possible, to allow all qualified firms interested in providing services equal consideration, and to provide such services to the state at no cost and to the purchasers and benefactors at the lowest cost possible.

This bill creates unnumbered sections of the Florida Statutes.

**II. Present Situation:**

**Services Provided by the Agency for Persons with Disabilities**

The Agency for Persons with Disabilities (APD or agency) has the responsibility to provide services to persons with developmental disabilities. A developmental disability is a disorder or syndrome attributable to retardation, cerebral palsy, autism, spina bifida, or Prader-Willi

syndrome and constitutes a substantial handicap expected to continue indefinitely.<sup>1</sup> The agency serves approximately 35,000 Floridians with developmental disabilities annually.<sup>2</sup>

To be eligible for services, a person must be three years of age or older and have a confirmed diagnosis of a developmental disability prior to age 18. Services provided by APD include community services and supports as well as a limited institutional program. The agency determines eligibility, assesses service needs, and provides funding for purchasing the supports and services identified in assessments. The range of services and supports available to an individual include employment and training services, environmental adaptive equipment, personal or family supports, residential habilitation, support coordination, and therapeutic supports. The majority of services are provided through one of two federal Medicaid waivers.<sup>3</sup>

The developmental disabilities Home and Community Based Services (HCBS) waiver program is a Medicaid funded program that allows Florida to serve persons with developmental disabilities in community settings, such as a client's home or group home, instead of institutions.<sup>4</sup> Services provided include personal care assistance, supported employment, respite care, skilled nursing, and residential rehabilitation.<sup>5</sup>

The Family and Supported Living (FSL) waiver makes services available to clients who live with their family or in their own home. Annual expenditures per client are capped at \$14,792, and fewer services are available.<sup>6</sup>

In 2007, section 393.0661, F.S., was modified to require a four tier delivery system for waiver services and in 2010 the specific criteria and dollar caps for each of the tiers was updated.<sup>7</sup> Because there are not enough HCBS waiver slots to serve all eligible persons, APD maintains a waiting list of individuals who have requested services.<sup>8</sup> According to Disability Rights Florida, an advocacy group for persons with disabilities, there were over 19,000 individuals with developmental and intellectual disabilities waiting for home and community based Medicaid waiver services in 2010.<sup>9</sup> As of March 2010, 10,926 of those individuals waiting for waiver

---

<sup>1</sup> Section 393.063(9), F.S.

<sup>2</sup> *APD Takes Action to Prevent Elimination of Services*, CapitalSoup.com (Mar. 31, 2011), <http://capitalsoup.com/2011/03/31/apd-takes-action-to-prevent-elimination-of-services/> (last visited April 5, 2011).

<sup>3</sup> Comm. on Ways and Means, The Florida Senate, *Bill Analysis and Fiscal Impact Statement CS/SB 1660* (April 6, 2009), available at <http://archive.flsenate.gov/data/session/2009/Senate/bills/analysis/pdf/2009s1660.wpsc.pdf> (last visited April 5, 2011).

<sup>4</sup> Office of Program Policy Analysis and Gov't Accountability, Florida Legislature, *APD Should Take Steps to Ensure New Needs Assessment and Individual Budget Process is Timely and Effective*, Report No. 08-15, 2 (Mar. 2008), available at <http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/0815rpt.pdf> (last visited April 5, 2011).

<sup>5</sup> *Id.*

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

<sup>7</sup> Chapter 2007-64, Laws of Fla. and ch. 2010-157, Laws of Fla.

<sup>8</sup> Office of Program Policy Analysis and Gov't Accountability, *Gov't Program Summaries, Agency for Persons with Disabilities* (Jan. 21, 2011), <http://www.oppaga.state.fl.us/profiles/5060/> (last visited April 5, 2011).

<sup>9</sup> Disability Rights Florida, *Annual Report*, 12 (2010) (on file with the Senate Committee on Children, Families, and Elder Affairs).

services were under the age of 22.<sup>10</sup> Many individuals on the waiting list have few options for meaningful activities, training, education, or employment.

### **Education for Persons with Developmental Disabilities**

Prior to 1975, children with developmental disabilities often did not receive appropriate educational services, in part, because they were being excluded from public schools or because there was a lack of adequate resources in public schools. However, that changed with the passage of the Education for All Handicapped Children Act of 1975 (Act), which has been successful in ensuring children with disabilities, and the families of such children, access to a free appropriate public education and in improving educational results for children with disabilities.<sup>11</sup>

The federal government provides grants to states through the Act in order to assist them in providing special education and related services to children with disabilities.<sup>12</sup> In order to be eligible for these funds, federal law requires each state to make free appropriate public education available to all children with disabilities residing in the state between the ages of three and 21, including children who have been suspended or expelled from school.<sup>13</sup> The state educational agency must exercise general supervision over all educational programs for children with disabilities in the state, including all programs administered by other state or local agencies, and ensure that the programs meet the educational standards of the state educational agency.<sup>14</sup>

#### *Exceptional Students in Florida*

Florida law provides that special education services be available to persons with disabilities. The law defines “special education services” as specially designed instruction and related services that are necessary for an exceptional student to benefit from education. These services may include:

- Transportation;
- Diagnostic and evaluation services;
- Social services;
- Physical and occupational therapy;
- Speech and language pathology services;
- Job placement;
- Orientation and mobility training;
- Braillists, typists, and readers for the blind;
- Interpreters and auditory amplification;
- Rehabilitation counseling;
- Transition services;

---

<sup>10</sup> Comm. on Children, Families, and Elder Affairs, The Florida Senate, *Bill Analysis and Fiscal Impact Statement CS/SB 2192* (Mar. 19, 2010), available at <http://archive.flsenate.gov/data/session/2010/Senate/bills/analysis/pdf/2010s2192.cf.pdf> (last visited April 5, 2011).

<sup>11</sup> 20 U.S.C. s. 1400.

<sup>12</sup> 20 U.S.C. s. 1411.

<sup>13</sup> 20 U.S.C. s. 1412.

<sup>14</sup> 34 C.F.R. s. 300.149.

- Mental health services;
- Guidance and career counseling;
- Specified materials, assistive technology devices, and other specialized equipment; and
- Other such services as approved by rules of the State Board of Education.<sup>15</sup>

An “exceptional student” is defined as:

[A]ny student who has been determined eligible for a special program in accordance with rules of the State Board of Education. The term includes students who are gifted and students with disabilities who have an intellectual disability; autism spectrum disorder; a speech impairment; a language impairment; an orthopedic impairment; [any] other health impairment; traumatic brain injury; a visual impairment; an emotional or behavioral disability; or a specific learning disability, including, but not limited to, dyslexia, dyscalculia, or developmental aphasia; students who are deaf or hard of hearing or dual sensory impaired; students who are hospitalized or homebound; children with developmental delays ages birth through 5 years, or children, ages birth through 2 years, with established conditions that are identified in State Board of Education rules pursuant to s. 1003.21(1)(e).<sup>16</sup>

Section 1003.57, F.S., ensures that all exceptional students are provided a public education with appropriate due process rights. Chapter 6A-6 of the Florida Administrative Code operationally defines the statute and establishes program eligibility and evaluation criteria for all exceptional students, including students identified as gifted.<sup>17</sup> In the fall of 2010, there were nearly 362,000 exceptional students in the state, not including those designated as gifted students.<sup>18</sup>

### **Prepaid Educational Plans**

The Stanley G. Tate Florida Prepaid College Program allow purchasers to buy prepaid contracts to pay the registration fees, local fees, tuition differential fees, and dormitory expenses of beneficiaries at Florida community colleges and state universities, in advance of enrollment.<sup>19</sup> Beneficiaries of prepaid contracts are permitted to transfer the benefits of their contracts to any of the following institutions that qualify as an “eligible educational institution” under s. 529 of the Internal Revenue Code:

- An independent college or university located and chartered in Florida, that confers degrees and is accredited by the Southern Association of Colleges and Schools or the Accrediting Council for Independent Colleges and Schools and that confers degrees;

<sup>15</sup> Section 1003.01(3)(b), F.S.

<sup>16</sup> Section 1003.01(3)(a), F.S.

<sup>17</sup> Florida Dep’t of Education, *Memorandum: Revised Exceptional Student Education Rules*, 2 (Oct. 15, 2004), available at <http://info.fldoe.org/docushare/dsweb/Get/Document-2533/ESE.pdf> (last visited April 5, 2011).

<sup>18</sup> Education Information and Accountability Servs., Florida Dep’t of Education, *Data Report: Membership in Programs for Exceptional Students, Fall 2010*, 2 (Feb. 2011), available at <http://www.fldoe.org/eias/eiaspubs/default.asp> (follow the “Membership in Programs for Exceptional Students” hyperlink) (last visited April 5, 2011).

<sup>19</sup> Section 1009.98, F.S.

- Any out-of-state college or university that confers degrees, is not-for-profit, and is accredited by a regional accrediting association; and
- An applied technology diploma program or career certification program operated by a Florida community college or a career center operated by a district school board.<sup>20</sup>

### **Prepaid Services for Parents of Children with Developmental Disabilities Study Group**

In 2009, the Florida Legislature created the Prepaid Services for Parents of Children with Developmental Disabilities Study Group to evaluate the feasibility of establishing a prepaid service plan for children with disabilities modeled after the Florida prepaid college plan.<sup>21</sup> The purpose of the plan was to allow funds to be paid into a plan on behalf of a child to provide a voucher for purchasing additional services from a qualified, willing provider upon the child's exit from an exceptional student program.<sup>22</sup> The services would provide support to help the parent retain the benefits to the child of the exceptional student program and to help the child in transitioning to the workforce.<sup>23</sup>

In its Final Report, the study group concluded that “the years after a student with a developmental disability ages out of the education system are critical for learning and transition.”<sup>24</sup> The study group also drafted a legislative proposal for consideration by the Legislature.<sup>25</sup>

## **III. Effect of Proposed Changes:**

### **Developmental Disabilities Savings Program**

This bill creates the Developmental Disabilities Savings Program (savings program), which is a savings and investment program that offers continued accessibility to services, regardless of income, insurance, or Medicaid eligibility, for families who have children with developmental disabilities who will become ineligible for services due to age.

The bill defines the following terms:

- “Advance payment contract” means the contract under the savings program which allows a purchaser or benefactor to make payments into an investment plan that will provide funds that may be used to pay for eligible services for a qualified beneficiary.
- “Benefactor” means any person making a deposit, payment, contribution, gift, or other expenditure into the investment plan for a qualified beneficiary, and may include a noncustodial parent who is obligated to make payments into the plan for his or her child.

<sup>20</sup> *Id.*

<sup>21</sup> Chapter 2009-56, s. 4, Laws of Fla.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Developmental Disabilities Prepaid Services, Florida Gap Plan, *Prepaid Services for Parents of Children with Developmental Disabilities Study Group, Final Report*, 9, available at <http://www.floridagapplan.com/wp-content/uploads/2010/02/Final-Report-12-28-09.pdf> (last visited April 5, 2011).

<sup>25</sup> *Id.* at 3-9.

- “Developmental disability” means a disorder or syndrome attributable to retardation, cerebral palsy, autism, spina bifida, or Prader-Willi syndrome, that manifests before the age of 18, and that can reasonably be expected to continue indefinitely;<sup>26</sup> **or** means any severe, chronic disability that:
  - Is attributable to a mental or physical impairment or a combination of those impairments;
  - Occurs before the individual reaches 18 years of age;
  - Is likely to continue indefinitely;
  - Results in substantial functional limitations in three or more of the following areas of major life activity: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, or economic self-sufficiency;
  - Reflects the individual’s need for a combination and sequence of special, interdisciplinary, or generic services, individualized supports, or other forms of assistance that are of lifelong or extended duration and are individually planned and coordinated; and
  - For a child younger than 10 years of age, is likely to meet the criteria above without intervention.
- “Eligible services” may be health-related, housing-related, education-related, employment-related, or other specific services.
- “Purchaser” means a resident of this state who is the parent or grandparent of a qualified beneficiary and who enters into an advance payment contract.
- “Qualified beneficiary” means an individual with a developmental disability who is a resident of the state and who is under 22 years of age at the time a purchaser enters into an advance payment contract on his or her behalf.
- “Savings program” means the Developmental Disabilities Savings Program.

The bill provides that the savings program must inform the purchaser of the potential impact of plan participation on eligibility for Medicaid or other state or federally funded programs. Also, information and training concerning the program and its benefits for a qualified beneficiary to advance his or her goals and become a contributing member of society must be provided.

Before the savings program may be implemented, the following must be obtained by the Developmental Disabilities Savings Program Board:

- A written opinion of qualified counsel specializing in federal securities law that the savings program and the offering of participation in the investment plan does not violate federal securities law; and
- A private letter ruling from the federal Internal Revenue Service (IRS) indicating that under the savings program taxes on any payments made, moneys deposited, investments made, and resulting earnings may be deferred under the Internal Revenue Code.

If the IRS declines to issue a private letter ruling, the bill provides that the program may rely on the legal opinion of a qualified attorney specializing in tax law.

---

<sup>26</sup> This is the definition of “developmental disability” found in s. 393.063(9), F.S.

The bill provides that the savings program is not a promise or guarantee that a qualified beneficiary or a designated beneficiary will become eligible for Medicaid, receive permanent services, be enrolled in the Medicaid waiver program, or receive any other state or federal assistance.

### **Developmental Disabilities Savings Program Board**

The bill creates the Developmental Disabilities Savings Program Board (board), which has all of the powers of a body corporate, and is to administer the savings program.

The board consists of seven members:

- The director of the Agency for Persons with Disabilities.
- The director of Vocational Rehabilitation.
- The executive director of The Arc of Florida.
- The president of The Family Care Council of Florida, or designee.
- Three members, appointed by the Governor, who possess knowledge, skill, and experience in the areas of accounting, actuary, risk management, or investment management. These members are appointed for three-year terms.

A chair and vice chair shall be elected annually and the board shall designate a secretary-treasurer who does not need to be a member of the board. The board shall meet on a quarterly basis. Members of the board are to serve without compensation and must file a full and public disclosure of his or her financial interests.

The bill provides that the board shall have the following powers and duties:

- Appointing an executive director to serve as the chief administrative and operational officer of the program and to perform other duties assigned to him or her by the board.
- Delegating responsibility for administration of the savings program to persons the board determines are qualified.
- Adopting an official seal and rules.
- Making and executing contracts and other necessary instruments.
- Establishing agreements or other transactions with federal, state, and local agencies.
- Forming strategic alliances with public and private entities to provide benefits to the savings program.
- Appearing in its own behalf before boards, commissions, or other government agencies.
- Procuring and contracting for goods and services, employing personnel, and engaging the services of private consultants, actuaries, managers, legal counsel, and auditors in a manner determined to be necessary and appropriate by the board.
- Adopting procedures to govern contract dispute proceedings between the board and its vendors.
- Soliciting proposals and contracting for the marketing of the savings program.<sup>27</sup>

---

<sup>27</sup> The bill provides that all marketing materials must be approved by the board and that neither the state nor the board is liable for misrepresentation of the savings program by a marketing agent.

- Investing funds not required for immediate disbursement.
- Holding, buying, and selling any instruments, obligations, securities, and property determined appropriate by the board.
- Administering the savings program in a manner that is sufficiently actuarially sound to defray the obligations of the savings program. The board shall evaluate the actuarial soundness of the investment plan on an annual basis.
- Soliciting and accepting gifts, grants, loans, and other aids from any source or participating in any other way in any government program to carry out the purposes of the savings program.
- Requiring and collecting administrative fees and charges in connection with any transaction and imposing reasonable penalties, including default, for delinquent payments or for entering into an advance payment contract on a fraudulent basis.
- Suing and being sued.
- Endorsing insurance coverage written exclusively for the purpose of protecting the investment plan, and the purchasers, benefactors, and beneficiaries thereof.
- Procuring insurance against any loss in connection with the property, assets, and activities of the savings program or the board.
- Providing for the receipt of contributions in lump sums or installment payments.
- Imposing reasonable time limits on use of the benefits provided by the savings program.
- Delineating the terms and conditions under which payments may be withdrawn from the investment plan and impose reasonable fees and charges for such withdrawal.
- Establishing other policies, procedures, and criteria to implement and administer the savings program.

Additionally, the bill provides that the board shall solicit proposals and contract for investment managers, investment consultants, trustee services firms, and records administrators. The board may adopt rules necessary for the savings program to qualify for or retain its status as a qualified tax-deferred program or other similar status of the program, purchasers, and qualified beneficiaries under the Internal Revenue Code.

#### **Effective Date**

The bill shall take effect July 1, 2011.

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

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

None.

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

None.

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

None.



**D. Other Constitutional Issues:**

This bill provides that neither the state nor the Developmental Disabilities Savings Program Board (board) is liable for the misrepresentation of the savings program by a marketing agent. This bill possibly implicates the right of access to the courts under article I, section 21 of the Florida Constitution by eliminating or circumscribing an individual's right of action. Article I, section 21 of the Florida Constitution provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." The Florida Constitution protects "only rights that existed at common law or by statute prior to the enactment of the Declaration of Rights of the Florida Constitution."<sup>28</sup> Constitutional limitations were placed on the Legislature's right to abolish a cause of action in the Florida Supreme Court case *Kluger v. White*, 281 So. 2d 1 (Fla. 1973). The Court held:

[W]here a right of access ... has been provided ... the Legislature is without power to abolish such a right without providing a reasonable alternative ... unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.<sup>29</sup>

To the extent that this bill is seen as depriving a person of the right to go to court to pursue a claim against the state or the board for a misrepresentation of the savings program, the bill may face constitutional scrutiny.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

Parents or grandparents of children with developmental disabilities may be able to use the savings program to plan for their children or grandchildren's future educational and health related services.

**C. Government Sector Impact:**

According to the Agency for Persons with Disabilities, the bill should not have a direct financial impact on the agency; however, the bill will require some administrative support and costs in the establishment and staffing of the program.<sup>30</sup>

<sup>28</sup> 10A FLA. JUR 2D *Constitutional Law* s. 360. When analyzing an access to courts issue, the Florida Supreme Court clarified that 1968 is the relevant year in deciding whether a common law cause of action existed. *Eller v. Shova*, 630 So. 2d 537, 542 n. 4 (Fla. 1993).

<sup>29</sup> *Kluger*, 281 So. 2d at 4.

<sup>30</sup> Agency for Persons with Disabilities, *2011 Bill Analysis SB 1422* (Mar. 17, 2011) (on file with the Senate Committee on Children, Families, and Elder Affairs).

Members of the Developmental Disabilities Savings Program Board (board) serve without compensation and without reimbursement for per diem and travel expenses.

The bill prescribes the powers and duties of the board, such as procuring and contracting for goods and services, employing personnel, and engaging the services of private consultants, actuaries, managers, legal counsel, and auditors. However, the bill does not provide a funding source for the board to pay for these services.

## **VI. Technical Deficiencies:**

The definition of “developmental disabilities” (lines 47-65) differs from and is broader than the definition found in ch. 393, F.S., the chapter of law relating to developmental disabilities. In addition, the definition as it relates to children younger than 10 years of age may be overly vague and problematic to administer.

On line 114, the bill provides that a written opinion of “qualified *counsel* specializing in federal securities law” is needed to implement the Developmental Disabilities Savings Program (savings program). Additionally, if the Internal Revenue Service declines to provide a private letter ruling, then a legal opinion rendered by a “qualified *attorney* specializing in tax law” is also needed to implement the savings program (line 124). It is unclear whether “qualified counsel” on line 114 is meant to mean a “qualified attorney,” similar to line 124.

On line 127, the bill references a “qualified beneficiary or a designated beneficiary.” The bill provides a definition for qualified beneficiary, but not for a designated beneficiary. It is unclear who will be considered a designated beneficiary.

On line 223, the bill provides that time limits on the use of benefits provided by the savings program must be specified in the “contract.” It appears that the bill is referencing the “advance payment contract,” which is defined by the bill. The Legislature may wish to use the term “advance payment contract” rather than “contract” on line 223 in order to avoid confusion.

## **VII. Related Issues:**

This bill allows a purchaser to enter into an advance payment contract to make payments into an investment plan that will provide funds to be used to pay for eligible services for a qualified beneficiary. The bill defines “eligible services” broadly and includes health-related services, housing-related services, education-related services, employment-related services, and other specific services. It appears that based on the types of services eligible, the advance payment contracts will provide both immediate as well as deferred benefits; however it is unclear what reimbursement parameters will accompany them. Unlike the pre-paid college program, these contracts will have a wider spectrum of services reimbursement and the recipient’s needs will have been determined very early in life. In a pre-paid tuition or dormitory contract, the recipient may choose to enroll or not in a postsecondary institution as that status is voluntary. Many of the recipients and services affected by the advance payment contracts in this bill are entitlements and the voluntariness of the governmental role in providing direct support services is materially different.

**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.

---

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

---