

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 339 Developmental Disabilities

SPONSOR(S): Healthy Families Subcommittee, Ford

TIED BILLS: **IDEN./SIM. BILLS:** SB 472

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Healthy Families Subcommittee	12 Y, 0 N, As CS	Entress	Schoolfield
2) Health Care Appropriations Subcommittee			
3) Health & Human Services Committee			

SUMMARY ANALYSIS

The bill creates a Developmental Disabilities Savings Program (DDSP) in an unnumbered section of law. The DDSP is a savings and investment program that offers access to certain services through individual savings deposited into the program. The program is limited to families who have children with developmental disabilities.

The bill creates the Developmental Disabilities Savings Program Board (board) to administer the savings program. The board consists of seven members 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 a well-diversified and beneficially administered savings program.

The bill provides an effective date which is the later of July 1, 2013, or upon the date that the federal "Achieving a Better Life Experience Act of 2011" or similar legislation, if the legislation becomes law. The bill provides a sunset date of June 30, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation:

Services Provided by the Agency for Persons with Disabilities

According to Florida law, a developmental disability "means a disorder or syndrome that is attributable to retardation, cerebral palsy, autism, spina bifida, or Prader-Willi syndrome that manifests before the age of 18, and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely."¹ In Florida, the Agency for Persons with Disabilities (APD) is the state agency primarily responsible for serving individuals with developmental disabilities.² To be eligible for services, a person must live in Florida, be at least three years old, and have a developmental disability that occurred before the age of 18.³

The Medicaid waiver program offers waivers to individuals with developmental disabilities.⁴ Most APD clients are served from the Medicaid Home and Community Based Services (HCBS) waiver. The waiver programs assist individuals in paying for medically necessary services, such as occupational and physical therapy, nursing, mental health counseling, personal care assistance, transportation, behavior therapy, in-home support, adult dental services, and respite care.⁵ Waiver enrollment is limited and subject to funding and availability.⁶ In addition, many enrollees are in the process of transitioning into the new ibudget system, which offers more flexibility.⁷ As of February 2012, 29,068 individuals were enrolled in the HCBS developmental disabilities waiver program and an additional 22,115 individuals were on the waiting list for the waiver programs.⁸ There are also two Developmental Disability service centers in Florida, where clients can receive services.⁹ APD serves more than 35,000 clients with developmental disabilities annually.¹⁰

Education for Persons with Developmental Disabilities

The Education for All Handicapped Children Act of 1975 (Act) ensures that children with disabilities have access to a free and appropriate public education, designed to meet their unique needs and prepare them for further education, employment, and independent living.¹¹ 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.¹² 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.¹³ 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.¹⁴

¹ S. 393.063(9), F.S.

² S. 393.063(1), F.S.

³ Florida Agency for Persons with Disabilities, APD Cares brochure. Accessible at <http://apd.myflorida.com/news/brochures>.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Florida Agency for Persons with Disabilities, Ibudget frequently asked questions, Ibudget Florida. Accessible at <http://apd.myflorida.com/ibudget/basics.htm>.

⁸ E-mail correspondence with Agency for Persons with Disabilities. On file with staff. (February 18, 2013)

⁹ *Id.*

¹⁰ *Id.*

¹¹ 20 U.S.C. s. 1400.

¹² 20 U.S.C. s. 1411.

¹³ 20 U.S.C. s. 1412.

¹⁴ 34 C.F.R. s. 300.149.

Florida law requires that specific services be available for exceptional students, which includes persons with disabilities.¹⁵ These requirements are services necessary for an exceptional student to benefit from education and may include a variety of services such as transportation, job placement, and mental health services.¹⁶ However, once the student leaves the school system, typically upon graduation or once the individual turns 22, the services offered to exceptional students are no longer available.¹⁷ Many of these individuals are then left without activities and services during the day, except for those offered by Medicaid.

Funding Options for Individuals with Developmental Disabilities

Special Needs Trusts

Special Needs trusts can be used to fund expenses for individuals with developmental disabilities. There are two common types of special needs trusts: qualified disabled trusts and qualified pooled trusts for the disabled. Neither type of trust is calculated into an individual's income when determining Social Security benefit eligibility or Medicaid eligibility.¹⁸ To be eligible for an individual trust, a parent, grandparent, legal guardian, or the court must establish a trust for a disabled individual under the age of 65.¹⁹ To be eligible for a pooled trust, the parent, grandparent, legal guardian, or the court must establish an account for an individual who is disabled; the trust must be established and managed by a nonprofit association; and there must be a separate account maintained for each beneficiary of the trust. For purposes of investment and management of funds, the trust pools these accounts, and the accounts must be established solely for the benefit of the individuals with disabilities.²⁰ For both the individual and pooled trust funds, the state must receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan.²¹

ABLE Act

In 2009, Representative Crenshaw introduced legislation called the Achieving a Better Life Experience (ABLE) Act in the United States House of Representatives to create a tax-free savings account for individuals with disabilities, in the form of a trust fund to pay for qualified disability expenses.²² Like special needs trusts, any money received in a savings account under the ABLE Act would be exempt from consideration as income when determining Medicaid benefit eligibility.²³ The ABLE Act was filed by both the United States House of Representatives and the United States Senate in 2013²⁴.

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.²⁵ 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

¹⁵ S. 1003.01(3)(a), F.S.

¹⁶ S. 1003.01(3)(b), F.S.

¹⁷ 20 U.S.C. s. 1412.

¹⁸ 65A-1.702(15)(c); 1917(d)(4) of the Social Security Act.

¹⁹ 1917(d)(4)(a) of the Social Security Act.

²⁰ 1917(d)(4)(c) of the Social Security Act.

²¹ 1917(d)(4) of the Social Security Act

²² H.R. 1209, 2009

²³ *Id.*

²⁴ US Senate bill 313, US House bill 647 (2013).

²⁵ 2009-56, s. 4, Laws of Fla.

program.²⁶ 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.²⁷ However, the workgroup altered this plan, to provide a savings account, rather than a prepaid voucher program, which appeared in the study group's Final Report.

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."²⁸ The study group drafted a legislative proposal for consideration by the Legislature.²⁹ The proposed legislation created a Prepaid Developmental Disabilities Savings Program, to be administered and managed in conjunction with the Florida Prepaid College Program by the Florida Prepaid College Board.³⁰ This plan has been altered to the Developmental Disabilities Savings Program in the current legislation, which is a separate entity from the Florida Prepaid College Program.

Effect of the Bill

The bill creates the Developmental Disabilities Savings Program (DDSP), a savings and investment program for families with children with developmental disabilities and names the act the "C.V. Clay Ford/Gabriela Poole Developmental Disabilities Savings Plan." The bill recognizes that there is a need to provide sufficient access to educational, health, housing, employment and other support services for individuals with developmental disabilities once those individuals have become ineligible for previously provided services due to age.³¹ This would include the services of public school systems which terminate enrollment once you reach the age of 22. Services from Medicaid and other sources continue to be eligible regardless of the person's age.

The DDSP intends for families to save money through payments to the DDSP for persons with developmental disabilities under the age of 22. The savings could be used after the individual reaches the age of 22 to purchase services which are specified in the bill.

The bill defines the following terms:

- "Savings account" 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.
- "Developmental disability" has the same meaning as current law in s. 393.063, F.S., or any severe chronic disability.
- "Eligible services" may be health-related, housing-related, education-related, employment-related, or other specific services.
- "Contributor" means a resident of this state who is the parent or grandparent of a qualified beneficiary and who enters into a savings account.
- "Qualified beneficiary" means an individual with a developmental disability who is a resident of the state and who is younger than 22 years.
- "Savings program" means the Developmental Disabilities Savings Program.

The bill creates the DDSP and requires the program to offer an investment plan, where funds can be saved for a qualified beneficiary to purchase eligible services in the future. The bill requires the DDSP to provide information and training regarding the program and its benefits for a qualified beneficiary to

²⁶ Developmental Disabilities Prepaid Services, Florida Gap Plan, Prepaid Services for Parents of Children with Developmental Disabilities Study Group, Final Report, 9, <http://apd.myflorida.com/publications/reports/docs/dd-prepaid-2010-access-ver.pdf> (last visited February 12, 2013).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Services provided by public schools are the only services that a person with developmental disabilities is no longer qualified for at the age of 22.

advance his or her goals and become a contributing member of society. Also, information regarding the potential impact of plan participation on eligibility for Medicaid or other state or federally funded programs must be provided to the contributor by the DDSP.

The bill specifies that the DDSP cannot be implemented until the board obtains:

- 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 allows the DDSP to rely on the legal opinion of the qualified attorney specializing in tax law.

The bill specifies that the DDSP is not a promise or guarantee that a qualified beneficiary or 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. Medicaid eligibility considers both income and assets, including savings accounts, to determine income eligibility.³² DDSP accounts could disqualify some individuals from Medicaid eligibility.

Developmental Disabilities Savings Program Board

The bill creates the Developmental Disabilities Savings Program Board (board) to administer the DDSP, and the board has all the powers of a body corporate. The board consists of seven members:

- The Chief Financial Officer of Florida.
- The director of the Office of Financial Responsibilities.
- The president of the Arc of Florida.
- The chair of the Family Care Council of Florida, or his or her designee.
- Three members, appointed by the governor for 3-year terms, who possess knowledge, skill, and experience in areas of accounting, actuary, risk management, or investment management.

The bill requires the board to meet at least quarterly and members to serve without compensation. The bill grants the board 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 by the board. The executive director's compensation must be provided from revenue generated by the program.
- Delegating responsibility for administration of the DDSP to persons the board determines are qualified.
- Adopting an official seal and procedures.
- 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 on its own behalf before boards, commissions, or other governmental 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. The materials must be submitted to the board for review and are unavailable to the public until they are approved. The state and board are not liable for misrepresentation of the savings program by a marketing agent.

³² Phone conversation with the Department of Children and Families staff (February 21, 2013).

- 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 annually evaluate the actuarial soundness of the investment plan.
- 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 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 contract. The limitations must be specified in contract.
- Delineating the terms and conditions under which payments may be withdrawn from the investment plan and impose reasonable fees and charges for such withdrawal. These terms and conditions must be specified in contract.
- Establishing other policies, procedures, and criteria to implement and administer the savings program.

Solicit Proposals and Contracts

The bill also requires the board to solicit proposals and contract for investment managers, investment consultants, trustee service firms, and the services of records administrators.

Investment Managers

The bill requires the board to solicit proposals and contract for investment managers to provide investment portfolios for the DDSF. Investment managers are limited to:

- Registered insurers. These insurers must be duly registered by a subsisting certificate of authority issued by the Office of Insurance Regulation to transact insurance in this state.
- Banks. A bank is any person having a subsisting charter or other lawful authorization, under the laws of this or any other jurisdiction, authorizing such person to conduct a general commercial banking business.
- Associations. The associations must be a capital stock association subject to the provisions of chapter 655.
- Registered Securities and Exchange Commission investment advisers and investment companies as defined in the Investment Company Act of 1940.

Investment managers must have their principal place of business and corporate charter located and registered in the United States. Each registered insurer must evidence superior performance overall on an acceptable level of surety in meeting its obligations to its policyholders and other contractual obligations. Only custodians approved by the Chief Financial Officer are eligible for board consideration. Each investment company must provide investment plans as specified in the request for proposals.

Each investment manager must agree to meet the obligations of the board to qualified beneficiaries if the money in the fund fails to offset the obligations of the board due to imprudent investing by the investment manager.

Investment Consultants

The bill requires the board to solicit proposals and contract for investment consultants to review the performance of the board's investment managers and advise the board on investment management and performance and investment policy, including the contents of investment plans.

Trustee Service Firms

The bill requires the board to solicit proposals and contract for trustee service firms to provide trustee and related services to the board. The trustee services firm must agree to meet the obligations of the board to qualified beneficiaries if moneys in the plan fail to offset the obligations of the board as a result of imprudent selection or supervision of investment plans by the trustee service firms.

In procuring investment services, the board must have the goals of providing all purchasers and benefactors with well-diversified and beneficially administered savings program possible. The procurement processes are subject to Ch. 287, F.S.

Evaluations of proposals submitted must consider:

- Fees and other costs that are charged to purchasers or benefactors that affect account values, or that impact the operational costs of the DDSP;
- Past experience and past performance in providing the required services;
- Financial history and current financial strength and capital adequacy to provide the required services; and
- Capabilities and experience of proposed personnel who will provide the required services.

The board may adopt procedures necessary for the DDSP 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. The board must inform participants in the DDSP of changes to the tax or securities status of the investment plan. While special needs trust are exempt from calculations of Medicaid eligibility, the DDSP would not be exempt. The savings in the DDSP would count as income for eligible recipients and, if enough money was saved, those individuals could become ineligible for Medicaid. However, if the ABLE Act is passed in Congress, the money saved in the DDSP could be exempt from calculations of Medicaid eligibility.

Effective Date: The bill is effective on July 1, 2013 or on the date the Federal ABLE Act or similar legislation passes. The bill sunsets on June 30, 2016.

B. SECTION DIRECTORY:

Section 1: Creates an unnumbered section of law, relating to the Developmental Disabilities Savings Program.

Section 2: Provides for an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill grants the board the authority to require and collect administrative fees and charges associated with DDSP transactions.

D. FISCAL COMMENTS:

The bill specifies that the executive director's compensation will be provided from revenue generated by the DDSP, but does not specify who will provide the compensation during the start-up period. The funding source for any additional start-up costs is also not specified.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to affect county or municipal governments

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 13, 2013, the Healthy Families Subcommittee adopted a strike-all amendment for House Bill 339. The strike-all amendment made the following changes to the bill:

- Names the act the "C.V. Clay Ford/ Gabriela Poole Developmental Disabilities Savings Plan."
- Removes language suggesting that the savings program is a prepaid program.
- Clarifies that the state is not responsible for and does not make assurances regarding the performance of the savings program or associated investment plans.
- Appoints the Chief Financial Officer of Florida and the director of the Office of Financial Responsibility to the board instead of the director of the Agency for Persons with Disabilities and the director of the Division of Vocational Rehabilitation.
- Provides appropriate terms for investment personnel.
- Clarifies that the board and investment companies owe a fiduciary duty to the DDSP.
- Requires that the procurement processes under the bill are subject to ch. 287, F.S.
- Gives the board the authority to adopt procedures instead of rules
- Clarifies that the effective date is contingent upon the passage of the federal "ABLE Act" or similar legislation.
- Adds a sunset provision of June 30, 2016.