

**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 Committee on Children, Families, and Elder Affairs

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BILL: CS/SB 1280

INTRODUCER: Senator Steube

SUBJECT: Involuntary Commitment

DATE: February 13, 2018

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Delia	Hendon	CF	<b>Fav/CS</b>
2.			AHS	
3.			AP	

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 1280 provides that the Agency for Persons with Disabilities (APD), rather than the courts, will make initial determinations as to the eligibility of individuals to receive services from the agency. The bill also revises the composition and qualifications of examining committee experts in involuntary admission/commitment cases. The bill implements new timeframes for courts in such cases, requires added consideration of, and notice to the individual's guardian or guardian advocate. The bill integrates the processes of involuntary admission under ch. 393, F.S., and involuntary commitment under ch. 916, F.S.

The bill will likely have an indeterminate fiscal impact on both APD and the state court system.

The bill is part of APD's legislative package, and provides an effective date of July 1, 2018.

**II. Present Situation:**

**Agency for Person with Disabilities**

APD is responsible for providing services to persons with developmental disabilities. A developmental disability is defined as a disorder or syndrome that is attributable to intellectual disability, 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.<sup>1</sup>

Individuals who meet Medicaid eligibility requirements may choose to receive services in the community through the state's Medicaid Home and Community-Based Services (HCBS) waiver for individuals with developmental disabilities administered by APD or in an Intermediate Care Facility for the Developmentally Disabled (ICF/DD).<sup>2</sup>

The HCBS waiver offers 27 supports and services to assist individuals to live in their community. Such services are not covered under the regular Medicaid program. Examples of services provided include residential habilitation, behavioral services, companion, adult day training, employment services, and physical therapy.<sup>3</sup> Services provided through the HCBS waiver enable children and adults to live in the community in their own home, a family home, or in a licensed residential setting, thereby avoiding institutionalization.<sup>4</sup>

While the majority of individuals served by APD live in the community, a small number live in Intermediate Care Facilities for the Developmentally Disabled (ICF/DD). ICF/DD's are defined in s. 393.063(22), F.S., as a residential facility licensed and certified by the Agency for Health Care Administration pursuant to part VIII of ch. 400. ICF/DD's are considered institutional placements and provide intermediate nursing care.

### **Guardianship**

Guardianship is a concept whereby a "guardian" acts for another, called a "ward," whom the law regards as incapable of managing his or her own affairs due to age or incapacity. Guardianships are generally disfavored due to the loss of individual civil rights, and a guardian may be appointed only if the court finds there is no sufficient alternative to guardianship.

There are two main forms of guardianship: guardianship over the person or guardianship over the property, which may be limited or plenary.<sup>5</sup> For adults, a guardianship may be established when a person has demonstrated that he or she is unable to manage his or her own affairs. If the adult is competent, this can be accomplished voluntarily. However, in situations where an individual's mental competence is in question, an involuntary guardianship may be established through the adjudication of incompetence which is based on the determination of a court appointed examination committee.<sup>6</sup>

Florida courts have long recognized the relationship between a guardian and his or her ward as a classic fiduciary relationship.<sup>7</sup> A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the

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

<sup>2</sup> Agency for Persons with Disabilities, Quarterly Report on Agency Services to Floridians with Developmental Disabilities and Their Costs: Third Quarter Fiscal Year 2016-17, May 2017.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Section 744.102(9)(a) and (b), F.S.

<sup>6</sup> Sections 744.102(12), 744.3201, 744.341, F.S.

<sup>7</sup> *Lawrence v. Norris*, 563 So. 2d 195, 197 (Fla. 1st DCA 1990). Section 744.361(1), F.S.

scope of that relationship.<sup>8</sup> The most basic duty of a fiduciary is the duty of loyalty: a fiduciary must refrain from self-dealing, must not take unfair advantage of the ward, must act in the best interest of the ward, and must disclose material facts.<sup>9</sup> In addition to the duty of loyalty, a fiduciary also owes a duty of care to carry out its responsibilities in an informed and considered manner.

### **Involuntary Commitment and Admission**

There are two processes by which individuals may be involuntarily committed to receive APD services: civil involuntary admission and an involuntary commitment through the criminal justice system. APD must provide services to clients admitted through either of these methods.

#### ***Involuntary Admission to Residential Services***

When the court receives a petition for involuntary admission, courts have jurisdiction to conduct a hearing and enter an order that a person with a developmental disability requiring involuntary admission to residential services receive care, treatment, habilitation, and rehabilitation services provided by the agency.<sup>10</sup> Upon filing of a petition, the agency and an examining committee must examine the person and provide a written report for the court. The examining committee must be comprised of at least three disinterested experts in the diagnosis, evaluation, and treatment of persons who have intellectual disabilities.<sup>11</sup> The report must explicitly document the extent to which the individual meets the criteria for involuntary admission.<sup>12</sup>

The individual must be represented by counsel at all stages of the judicial proceeding and, if the person is indigent and cannot afford counsel, a public defender must be appointed at least 20 days before the scheduled hearing.<sup>13</sup> The person must be physically present throughout the entire proceeding; however, if the person's attorney believes that the person's presence at the hearing is not in their best interest, their presence may be waived by the court once the court has seen the individual and the hearing has commenced.<sup>14</sup>

The court that enters the initial order for involuntary admission to residential services has continuing jurisdiction and must ensure the person is receiving adequate care, treatment, habilitation, and rehabilitation services.<sup>15</sup> The committing court may order a conditional release of the person based on an approved plan for providing community-based training. If at any time it is determined by the court that the person on conditional release no longer requires supervision or services, the court shall terminate its jurisdiction and discharge the person.<sup>16</sup>

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<sup>8</sup> *Doe v. Evans*, 814 So. 2d 370, 374 (Fla. 2002).

<sup>9</sup> *Capital Bank v. MVP, Inc.* 644 So. 2d 515, 520 (Fla. 3d DCA 1994).

<sup>10</sup> s. 393.11(1), F.S.

<sup>11</sup> *Id.*

<sup>12</sup> s. 393.11(4),(5), F.S.

<sup>13</sup> s. 393.11(6), F.S.

<sup>14</sup> s. 393.11(7), F.S.

<sup>15</sup> s. 393.11(11), F.S.

<sup>16</sup> *Id.*

At any time and without notice, a person involuntarily admitted into residential services, or the person's parent or guardian, is entitled to file a petition for a writ of habeas corpus to question the cause, legality, and appropriateness of the involuntary admission.<sup>17</sup>

***Involuntary Commitment: Mental Health Treatment for Criminal Defendants***

Chapter 916, F.S., governs the state forensic system, a network of state facilities and community services for persons with mental health issues involved with the criminal justice system. The forensic system serves defendants deemed incompetent to proceed or not guilty by reason of insanity. A defendant is deemed incompetent to proceed if he or she does not have sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding or if the defendant lacks both a rational and factual understanding of the proceedings against him or her.<sup>18</sup>

If a defendant is suspected of being incompetent, the court, defense counsel, or the State may file a motion to have the defendant's cognitive state assessed.<sup>19</sup> If the motion is granted, court-appointed experts will evaluate the defendant's cognitive state. The defendant's competency is then determined by the judge in a subsequent hearing.<sup>20</sup> If the defendant is found to be competent, the criminal proceeding resumes.<sup>21</sup> If the defendant is found to be incompetent to proceed, the proceeding may not resume unless competency is restored.<sup>22</sup> Competency restoration services teach defendants about the legal process, their charges, potential legal outcomes they might face, and their legal rights so as to prepare them to participate meaningfully in their own defense.<sup>23</sup>

To assess a defendant's competency, the court must appoint a panel of at least three experts:

- At least one, or at the request of any party, two experts to evaluate whether the defendant meets the definition of intellectual disability or autism, and if so, whether the defendant is competent to proceed;
- An APD-selected psychologist with experience in evaluating intellectual disabilities or autism to evaluate whether the defendant meets the definition of intellectual disability or autism, and if so, whether the defendant is competent to proceed; and
- A social services professional with experience working with intellectually disabled or autistic individuals to provide a social and developmental history of the defendant.<sup>24</sup>

If appropriate, the court will involuntarily commit these individuals to APD for competency training.<sup>25</sup> While individuals who are alleged to have committed violent crimes or otherwise prevent a public safety risk will receive forensic services in secure settings, in other circumstances, the court may order the conditional release of a defendant found incompetent to

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<sup>17</sup> s. 393.11(13), F.S.

<sup>18</sup> S. 916.12(1), F.S.

<sup>19</sup> Rule 3.210, Fla.R.Crim.P.

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

<sup>21</sup> Rule 3.212, Fla.R.Crim.P.

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

<sup>23</sup> OPPAGA, *Juvenile and Adult Incompetent to Proceed Cases and Costs*, Report. No. 13-04, Feb. 2013, p. 1., available at <http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/1304rpt.pdf> (last visited February 7, 2018).

<sup>24</sup> s. 916.301, F.S.

<sup>25</sup> s. 916.302, F.S.

proceed due to intellectual disability or autism based on an approved plan for providing community-based training.<sup>26</sup> At any time a defendant is deemed competent or no longer meets the requirements for commitment, the administrator of the facility must report this to the court so a hearing may be held to determine if the defendant should be released from APD's custody.<sup>27</sup>

Unlike involuntary admission to APD services under s. 393.11, F.S., involuntary commitment for purposes of competency restoration is not of indefinite duration. If a defendant remains incompetent after two years despite APD competency training, and there is reason to believe that he or she will not gain competency in the foreseeable future, the charges against the defendant must be dismissed.<sup>28</sup>

### **Implementation of 2016 Legislation**

Following a change in the law in 2016<sup>29</sup> requiring APD and the court to conduct annual hearings for all APD clients involuntarily admitted, APD conducted an audit of their client base and discovered approximately 150 to 200 clients who had been involuntarily admitted decades ago but no longer need or require court supervision because they have court-appointed guardians.<sup>30</sup> These clients are currently receiving services from APD despite having guardians who maintain decision-making authority on their behalf.

APD also found approximately three clients who may not have met the eligibility criteria for APD services at the time they were involuntarily admitted but to whom APD must provide services. For example, during FY 16-17, APD spent approximately \$100,000 in services on these three clients who have been involuntarily committed to APD but do not meet the eligibility requirements for APD services.<sup>31</sup>

Circuit courts around the state reportedly are having difficulty finding qualified individuals to serve as experts on the examining committees.<sup>32</sup> To promote efficiency in the court-appointed expert witness services, the Florida Supreme Court issued an administrative order directing the courts to initially only appoint one expert in adult competency proceedings despite the fact that such proceedings under ch. 916, F.S., require at least three expert evaluations of an individual with intellectual disabilities or autism.<sup>33</sup> If a party disagrees with the findings of the expert, then the order allows up to two additional experts to be appointed pursuant to statute.<sup>34</sup>

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<sup>26</sup> s. 916.304, F.S.

<sup>27</sup> s. 916.302(2)(a), F.S.

<sup>28</sup> s. 916.303(1), F.S. The state may refile charges if the defendant gains competency in the future.

<sup>29</sup> Ch. 16-140, Laws of Fla., resolving a constitutional right to due process lacking in the original law.

<sup>30</sup> Agency for Persons with Disabilities, Agency Analysis of 2018 HB 985, p. 2.

<sup>31</sup> *Id.*

<sup>32</sup> *Supra* at note 30.

<sup>33</sup> In Re: Court Appointed Expert Witness Services in Florida's Trial Courts, Fla. Admin. Order No. AOSC 17-12 (Feb. 6, 2017), available at: <http://www.floridasupremecourt.org/clerk/adminorders/2017/AOSC17-12.pdf> (last visited February 7, 2018). *See generally*, Joint Workgroup of the Trial Court Budget Commission and the Commission on Trial Court Performance, *Expert Witnesses in Florida's Trial Courts: Recommendations from the Joint Workgroup of the Trial Court Budget Commission and the Commission on Trial Court Performance and Accountability* (Nov. 2016), available at: <http://www.flcourts.org/core/fileparse.php/574/urlt/ReportExpertWitnessesInFloridasTrialCourts.pdf> (last visited February 7, 2018).

<sup>34</sup> *Id.*

### III. Effect of Proposed Changes:

**Section 1** amends s. 393.11, F.S., specifying that court-appointed expert committees must file a petition for involuntary admission to residential services unless the petition is filed pursuant to the involuntary commitment statute for criminal defendants. In the case of criminal defendants, APD, the state attorney's office, or a defense attorney can petition the court for involuntary commitment of the defendant.

The bill also revises the composition of court-appointed examining committees to have two members rather than three, and removing the requirement that the committee consist of one psychiatrist and one individual with at least a master's in social work, vocational rehabilitation, or special education. Rather, the bill requires that all members of the examining committee be either psychiatrists, psychologists, or any combination of the two, as long as they have expertise in diagnosing, evaluating and treating individuals with intellectual disabilities and/or autism. The bill also adds counsel for the agency, and, in cases of involuntary commitment under ch. 916, F.S., counsel for the state attorney's office, to the list of individuals who can challenge the qualifications of the experts on the committee.

The bill requires the court holding an involuntary admission hearing to pay reasonable fees to members of an examining committee for their evaluation and testimony. The reasonableness of the fees paid must be determined by the court. Additionally, the bill eliminates the requirement that fees paid to members of an examining committee be paid from the general revenue fund of the county in which the person who has the intellectual disability or autism resided when the petition for hearing was originally filed.

The bill requires each member of the committee to prepare a written report and provide expert testimony stating whether, because of the person's intellectual disability/autism, they lack capacity to consent to a voluntary application for APD services. The report must also state if the individual does not have a guardian or guardian advocate to consent to services on their behalf and that they lack basic survival and self-care skills and need to be placed in a residential setting. The report and testimony must also assess whether the individual presents a danger to others, and needs a secure placement. Each member of the committee must file a copy of their report with the court at least 10 working days before the date of the hearing, and the report must be served on the petitioner, the individual, and their guardian or guardian advocate.

The bill modifies petitions to involuntary admissions to residential services, requiring the petitioner to state whether the individual has a guardian or guardian advocate. The petition must also specify whether a secure or non-secure residential facility is the least restrictive and most appropriate setting.

The bill requires courts to give notice of a petition for involuntary admission to APD, and gives APD the authority to determine if the person is eligible for agency services. Following the eligibility determination exam, APD is required to provide a written report to the guardian or guardian advocate for the individual if one exists. If APD determines the individual is ineligible for services, the agency must provide written notice to the person or his or her attorney, and provide the individual the right to appeal the decision under the Medicaid fair hearing process pursuant to s. 393.125, F.S. APD must give notice of this right to the person and his or her

attorney, and the involuntary admission proceeding must be stayed pending the outcome of any appellate hearing.

The bill further requires the court to hold a hearing six months prior to any involuntarily admitted minor reaching age 18 to evaluate whether continued involuntary admission is appropriate. The court must also review an individualized support plan when considering whether to order further services, and hold an annual hearing within 30 days of receiving APD's evaluation of the appropriateness of involuntary admission. In an annual hearing on the matter, the court must consider whether the individual has been appointed a guardian or guardian advocate since the initial order and whether the individual is still eligible for APD services.

The bill allows for testimony via audio or video at the hearing on the petition for involuntary admission. The bill also allows for recording of the hearing and eliminates the requirement for a court reporter. The bill requires the court, when ordering involuntary admission, to state whether the recommended placement must be secure or non-secure, and requires the order to state that the individual does not have a guardian or guardian advocate to consent to services on their behalf. The bill adds the individual's guardian or guardian advocate to the list of persons the court must provide with a copy of the written order following the hearing.

The bill eliminates the requirement that APD provide copies of examinations and evaluations to the court and the individual or his or her counsel. Instead, APD may recommend special provisions for residential services and adequate supervision of the individual to ensure that he or she is placed in the least restrictive and most appropriate setting. The bill provides examples of these special provisions, and the court has discretion to order any of the provisions.

**Section 2** amends s. 916.301, F.S., to remove the requirement that the court appoint at least two experts to determine a developmentally disabled or autistic person's competency to proceed to trial. The bill further eliminates the requirement that APD annually provide the court with a list of qualified experts, and instead requires the agency to select the expert who will determine whether the defendant has an intellectual disability or autism. Instead, the bill only requires one expert to review the individual, provided that expert is a psychiatrist or psychologist with expertise in the diagnosis, evaluation, and treatment of persons with intellectual disabilities. The bill requires that the court appoint an additional expert, or direct the agency to do so, at the request of any party.

**Section 3** amends s. 916.3012, F.S., to require that when the experts determine a defendant is incompetent to proceed, they specifically report on what training is appropriate for the defendant to obtain competency and whether that training should occur in the community or in a forensic facility. The bill eliminates the requirement that the report state whether such training is available in the community.

**Section 4** amends s. 916.302, F.S., to mandate that a competency hearing be held within 30 days after a court receives notification that a defendant is competent to proceed or otherwise no longer meets the requirements for continued commitment. If the defendant is being held in a forensic facility, they must then be discharged and transported to the court's jurisdiction for the hearing. If recommended by the expert committee, the court may order maintenance competency training to occur in the jail while the defendant awaits trial.

**Section 5** amends s. 916.3025, F.S., to require a court have jurisdiction over involuntary admission petitions when the defendant has been deemed non-restorable to competency.

**Section 6** amends s. 916.303, F.S., to state that if criminal charges have been dismissed, a defendant may still be eligible for involuntary admission to APD if he or she lacks sufficient capacity to request residential services and does not have a guardian or guardian advocate who can request these services on his or her behalf.

The bill revises the procedures for applying for involuntary admission for a defendant and allows APD, the state attorney, or the defendant's attorney to file a petition for involuntary admission in lieu of a petitioning commission.

**Section 7** amends s. 916.304, F.S., to prohibit extensions of a defendant's placement in community-based training beyond two years. If the defendant remains incompetent after two years of competency training, then the provisions of s. 916.303, F.S., involving dismissal of charges and petitions for involuntary admissions shall apply.

**Section 8** provides an effective date of July 1, 2018.

#### **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:

There will likely be an impact on private facilities that house individuals receiving services from APD, if the agency decides fewer individuals need treatment than the courts. This impact is indeterminate.



C. Government Sector Impact:

**Local Government:**

The bill will likely have a positive impact on counties because the state court system will now pay for experts rather than the county for certain involuntary commitment proceedings.

**State Government:**

The agency anticipates avoiding costs associated with clients who are admitted to residential services who do not currently meet eligibility criteria.

The bill will likely have an indeterminate impact on the courts by revising deadlines for holding hearings related to agency clients and changing the eligibility requirements for experts at hearings.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 393.11, 916.301, 916.3012, 916.302, 916.3025, 916.303, and 916.304.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Children, Families, and Elder Affairs on February 12, 2018:**

- Requires the court holding an involuntary admission hearing to pay reasonable fees to members of an examining committee for their evaluation and testimony. The reasonableness of the fees paid must be determined by the court.
- Eliminates the requirement that fees paid to members of an examining committee be paid from the general revenue fund of the county in which the person who has the intellectual disability or autism resided when the petition for hearing was originally filed.
- Requires the court holding an involuntary commitment hearing for a criminal defendant to order the agency to select the expert to evaluate whether the defendant meets the definition of intellectual disability or autism pursuant to statute.

B. Amendments:

None.

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

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