

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 369 Substance Abuse Services

**SPONSOR(S):** Health & Human Services Committee, Children, Families & Seniors Subcommittee, Caruso and others

**TIED BILLS:** **IDEN./SIM. BILLS:** CS/SB 900

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Children, Families & Seniors Subcommittee	14 Y, 0 N	Gilani	Brazzell
2) Health & Human Services Committee	17 Y, 0 N, As CS	Gilani	Calamas

### SUMMARY ANALYSIS

Substance abuse affects millions of people in the United States each year. The Florida Department of Children and Families (DCF) regulates substance abuse treatment through licensure. Individuals in recovery from substance abuse may reside in recovery residences (alcohol- and drug-free living environments). Florida offers voluntary certification for recovery residences and recovery residence administrators. Licensed treatment providers and non-certified recovery residences are limited in the referrals they may make to each other. The bill addresses issues related to recovery residences by:

- Allowing a licensed service provider to accept a referral from a noncertified recovery residence if the residence is democratically operated by its residents pursuant to a charter from a congressionally recognized or sanctioned entity;
- Amending the definition of “recovery residence” to include the community housing component of a licensed day or night treatment facility with community housing;
- Allowing a certified recovery residence that has a discharge policy approved by the credentialing entity to transfer or discharge residents from the recovery residence in accordance with that policy under certain circumstances;
- Strengthening provisions related to patient brokering and deceptive marketing practices in recovery residences; and
- Providing due process procedures for actions taken by an approved credentialing entity on a recovery residence’s certification.

Chapter 435, F.S., contains standard procedures for criminal history background screening of certain prospective employees, including some seeking employment with substance abuse treatment providers. If an individual has committed an offense listed in ch. 435, F.S., he or she is disqualified from certain employment, unless exempted by the appropriate agency. The bill amends background screening for substance abuse treatment provider personnel by:

- Expanding the screened offenses for owners, directors, and chief financial officers of a certified recovery residence seeking certification to include those enumerated in s. 408.809, F.S.;
- Requiring a level 2 background screening for peer specialists with direct contact with individuals receiving services, and including the screened offenses enumerated in s. 408.809, F.S.;
- Expanding the crimes for which an individual can receive an exemption from disqualification without the statutorily imposed waiting period, if they are working only with individuals 13 years of age and older;
- Requiring DCF to render a decision on an application for exemption from disqualification within 60 days after DCF receives the complete application;
- Allowing an individual to work under supervision for up to 90 days while DCF evaluates his or her application for an exemption from disqualification, so long as it has been five or more years, or three or more years for certain peer specialists, since the individual completed all non-monetary conditions associated with his or her most recent disqualifying offense; and
- Granting the head of the appropriate agency authority to grant an exemption from disqualification which is limited solely to employment related to providing mental health and substance abuse treatment.

CS/CS/HB 369 requires DCF to develop and implement a training program for peer specialist certification, and provides due process procedures for actions taken by the approved credentialing entity on a peer specialist’s certification. A peer specialist must be certified, except in limited circumstances, in order to provide DCF-funded support services.

The bill has a negative, likely insignificant, fiscal impact on DCF.

The bill provides an effective date of July 1, 2019.

**This document does not reflect the intent or official position of the bill sponsor or House of Representatives.**

**STORAGE NAME:** h0369b.HHS

**DATE:** 3/15/2019

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Background

##### Substance Abuse

Substance abuse refers to the harmful or hazardous use of psychoactive substances, including alcohol and illicit drugs.<sup>1</sup> Substance abuse disorders occur when the chronic use of alcohol or drugs causes significant impairment, such as health problems, disability, and failure to meet major responsibilities at work, school, or home.<sup>2</sup> Repeated drug use leads to changes in the brain's structure and function that can make a person more susceptible to developing a substance abuse disorder.<sup>3</sup> Brain imaging studies of persons with substance abuse disorders show physical changes in areas of the brain that are critical to judgment, decision making, learning and memory, and behavior control.<sup>4</sup>

According to the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, a diagnosis of substance abuse disorder is based on evidence of impaired control, social impairment, risky use, and pharmacological criteria.<sup>5</sup> The most common substance abuse disorders in the United States are from the use of alcohol, tobacco, cannabis, stimulants, hallucinogens, and opioids.<sup>6</sup>

##### Substance Abuse Treatment in Florida

In the early 1970s, the federal government furnished grants for states to develop continuums of care for individuals and families affected by substance abuse.<sup>7</sup> The grants provided separate funding streams and requirements for alcoholism and drug abuse. In response, the Florida Legislature enacted ch. 396, F.S., (alcohol) and ch. 397, F.S. (drug abuse).<sup>8</sup> In 1993, legislation combined ch. 396 and ch. 397, F.S., into a single law, the Hal S. Marchman Alcohol and Other Drug Services Act ("the Marchman Act").<sup>9</sup> The Marchman Act supports substance abuse prevention and remediation through a system of prevention, detoxification, and treatment services to assist individuals at risk for or affected by substance abuse.

Additionally, the Department of Children and Families (DCF) administers a statewide system of safety-net services for substance abuse and mental health (SAMH) prevention, treatment, and recovery. SAMH programs include a range of prevention, acute interventions (such as crisis stabilization or detoxification), residential, transitional housing, outpatient treatment, and recovery support services. Services are provided based upon state and federally-established priority populations.<sup>10</sup>

DCF provides treatment for substance abuse through a community-based provider system that offers detoxification, treatment and recovery support for adolescents and adults affected by substance misuse, abuse or dependence.<sup>11</sup>

- **Detoxification Services:** Detoxification services use medical and clinical procedures to assist individuals and adults as they withdraw from the physiological and psychological effects of substance abuse.<sup>12</sup>

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<sup>1</sup> WORLD HEALTH ORGANIZATION, *Substance Abuse*, [http://www.who.int/topics/substance\\_abuse/en/](http://www.who.int/topics/substance_abuse/en/) (last visited Feb. 16, 2019).

<sup>2</sup> SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, *Substance Use Disorders*, <http://www.samhsa.gov/disorders/substance-use> (last visited Feb. 16, 2019).

<sup>3</sup> NATIONAL INSTITUTE ON DRUG ABUSE, *Drugs, Brains, and Behavior: The Science of Addiction*, <https://www.drugabuse.gov/publications/drugs-brains-behavior-science-addiction/drug-abuse-addiction> (last visited Feb. 16, 2019).

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

<sup>5</sup> *Supra*, note 2.

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

<sup>7</sup> Department of Children and Families, *Baker Act and Marchman Act Project Team Report for Fiscal Year 2016-2017*, p. 4-5. (on file with Children, Families, and Seniors Subcommittee staff).

<sup>8</sup> *Id.*

<sup>9</sup> Ch. 93-39, s. 2, Laws of Fla., codified in ch. 397, F.S.

<sup>10</sup> These priority populations include, among others, persons diagnosed with co-occurring substance abuse and mental health disorders, persons who are experiencing an acute mental or emotional crisis, children who have or are at risk of having an emotional disturbance, and children at risk for initiating drug use.

<sup>11</sup> DEPARTMENT OF CHILDREN AND FAMILIES, *Treatment for Substance Abuse*, <http://www.myflfamilies.com/service-programs/substance-abuse/treatment-and-detoxification>, (last visited Feb. 16, 2019).

- **Treatment Services:** Treatment services<sup>13</sup> include a wide array of assessment, counseling, case management, and support that are designed to help individuals who have lost their abilities to control their substance use on their own and require formal, structured intervention and support. Some of these services may also be offered to the family members of the individual in treatment.<sup>14</sup>
- **Recovery Support:** Recovery support services, including transitional housing, life skills training, parenting skills, and peer-based individual and group counseling, are offered during and following treatment to further assist individuals in their development of the knowledge and skills necessary to maintain their recovery.<sup>15</sup>

DCF regulates substance abuse treatment by licensing individual treatment components under ch. 397, F.S., and rule 65D-30, F.A.C. Licensed service components include a continuum of substance abuse prevention,<sup>16</sup> intervention,<sup>17</sup> and clinical treatment services.<sup>18</sup>

Clinical treatment is a professionally directed, deliberate, and planned regimen of services and interventions that are designed to reduce or eliminate the misuse of drugs and alcohol and promote a healthy, drug-free lifestyle.<sup>19</sup> “Clinical treatment services” include, but are not limited to, the following licensable service components:<sup>20</sup>

- Addictions receiving facility.
- Day or night treatment.
- Day or night treatment with community housing.
- Detoxification.
- Intensive inpatient treatment.
- Intensive outpatient treatment.
- Medication-assisted treatment for opiate addiction.
- Outpatient treatment.
- Residential treatment.

### Recovery Residences

Recovery residences (also known as “sober homes” or “sober living homes”) are alcohol- and drug-free living environments for individuals in recovery who are attempting to maintain abstinence from alcohol and drugs.<sup>21</sup> These residences offer no formal treatment (though they may mandate or strongly encourage attendance at 12-step groups) and are self-funded through resident fees.<sup>22</sup>

Section 397.311(37), F.S., defines a recovery residence as a residential dwelling unit, or other form of group housing, offered or advertised through any means, including oral, written, electronic, or printed means, by any person or entity as a residence that provides a peer-supported, alcohol-free, and drug-free living environment.

### *Benefits of Recovery Residences*

<sup>12</sup> Id.

<sup>13</sup> Id. Research indicates that persons who successfully complete substance abuse treatment have better post-treatment outcomes related to future abstinence, reduced use, less involvement in the criminal justice system, reduced involvement in the child-protective system, employment, increased earnings, and better health.

<sup>14</sup> *Supra*, note 11.

<sup>15</sup> Id.

<sup>16</sup> S. 397.311(26)(c), F.S. Prevention is a process involving strategies that are aimed at the individual, family, community, or substance and that preclude, forestall, or impede the development of substance use problems and promote responsible lifestyles. See also, DEPARTMENT OF CHILDREN AND FAMILIES, *Substance Abuse: Prevention*, <http://www.myfamilies.com/service-programs/substance-abuse/prevention>, (last visited Feb. 16, 2019). Substance abuse prevention is best accomplished through the use of ongoing strategies such as increasing public awareness and education, community-based processes and evidence-based practices. These prevention programs are focused primarily on youth, and, recent years, have shifted to the local level, giving individual communities the opportunity to identify their own unique prevention needs and develop action plans in response. This community focus allows prevention strategies to have a greater impact on behavioral change by shifting social, cultural and community environments

<sup>17</sup> S. 397.311(26)(b), F.S. Intervention is structured services directed toward individuals or groups at risk of substance abuse and focused on reducing or impeding those factors associated with the onset or the early stages of substance abuse and related problems.

<sup>18</sup> S. 397.311(25), F.S.

<sup>19</sup> Id.

<sup>20</sup> S. 397.311(25)(a), F.S.

<sup>21</sup> Douglas L. Polcin, Ed.D., MFT, and Diane Henderson, B.A., *A Clean and Sober Place to Live: Philosophy, Structure, and Purported Therapeutic Factors in Sober Living Houses*, 40(2) J PSYCHOACTIVE DRUGS 153–159 (June 2008).

<sup>22</sup> Id.

Multiple studies have found that individuals in recovery benefit from residing in a recovery residence. For example, individuals in recovery residing in an Oxford House, a very specific type of recovery residence, had significantly lower substance use, significantly higher income, and significantly lower incarceration rates than those individuals who participate in usual group care.<sup>23</sup>

Oxford House (OH) is a non-profit organization that rents out single-family homes for individuals recovering from addiction. The OH model is a recovery residence of six to fifteen residents that is democratically run, self-supporting, and drug free.<sup>24</sup> Each OH recovery residence operates pursuant to a charter issued by the OH organization. Three or more OHs within a 100-mile radius make up one OH chapter. A representative from each house meets with the others on a monthly basis to exchange information, seek resolution of problems in a particular house, and express that chapter's vote on larger issues within the OH organization. The OH Board of Directors solely determines whether to grant or revoke an OH's charter and exercises authority over the policies and officers of the OH.<sup>25</sup> In 1988, Congress recognized OH as a model for recovery residences and required states to establish a recurring loan fund to support groups wishing to establish recovery residences like OH.<sup>26</sup>

A cost-benefit analysis regarding residing in Oxford Houses found variation in cost and benefits compared to other residences. The result suggests that the additional costs associated with OH treatment, roughly \$3,000, are returned nearly tenfold in the form of reduced criminal activity, incarceration, and substance use as well as increases in earning from employment.<sup>27</sup> Additionally, another study found that residents of a recovery residence were more likely to report abstaining from substance use at a much higher rate:

- Residents at six months were 16 times more likely to report being abstinent;
- Residents at 12 months were 15 times more likely to report being abstinent; and
- Residents at 18 months were six times more likely to report being abstinent.<sup>28</sup>

#### *Federal Law Applicable to Recovery Residences*

The Americans with Disabilities Act (ADA) prohibits discrimination against individuals with disabilities.<sup>29</sup> The ADA requires broad interpretation of the term "disability" so as to include as many individuals as possible under the definition.<sup>30</sup> The ADA defines disability as a physical or mental impairment that substantially limits one or more major life activities.<sup>31</sup> Disability also includes individuals who have a record of such impairment, or are regarded as having such impairment.<sup>32</sup> The phrase "physical or mental

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<sup>23</sup> An Illinois study found that those in the OHs had lower substance use (31.3% vs. 64.8%), higher monthly income (\$989.40 vs. \$440.00), and lower incarceration rates (3% vs. 9%). OH participants, by month 24, earned roughly \$550 more per month than participants in the usual-care group. In a single year, the income difference for the entire OH sample corresponds to approximately \$494,000 in additional production. In 2002, the state of Illinois spent an average of \$23,812 per year to incarcerate each drug offender. The lower rate of incarceration among OH versus usual-care participants at 24 months (3% vs. 9%) corresponds to an annual saving of roughly \$119,000 for Illinois. Together, the productivity and incarceration benefits yield an estimated \$613,000 in savings per year, or an average of \$8,173 per OH member. L. Jason, B. Olson, J., Ferrari, and A. Lo Sasso, *Communal Housing Settings Enhance Substance Abuse Recovery*, 96 AM. J. OF PUB. HEALTH 10, (2006), at 1727-1729.

<sup>24</sup> OXFORD HOUSE, *The Purpose and Structure of Oxford House*, [http://www.oxfordhouse.org/userfiles/file/purpose\\_and\\_structure.php](http://www.oxfordhouse.org/userfiles/file/purpose_and_structure.php) (last visited Feb. 23, 2019).

<sup>25</sup> *Id.*

<sup>26</sup> Oxford House, *History and Accomplishments*, [http://www.oxfordhouse.org/userfiles/file/oxford\\_house\\_history.php](http://www.oxfordhouse.org/userfiles/file/oxford_house_history.php) (last visited Feb. 24, 2019). See also The Anti-Drug Abuse Act, P.L. 100-690, sec. 1916A (1988). This mandate was subsequently changed to a permissive provision in 1990 and codified in 42 U.S.C. sec. 300x-25.

<sup>27</sup> "While treatment costs were roughly \$3,000 higher for the OH group, benefits differed substantially between groups. Relative to usual care, OH enrollees exhibited a mean net benefit of \$29,022 per person. The result suggests that the additional costs associated with OH treatment, roughly \$3000, are returned nearly tenfold in the form of reduced criminal activity, incarceration, and drug and alcohol use as well as increases in earning from employment... even under the most conservative assumption, we find a statistically significant and economically meaningful net benefit to OH of \$17,800 per enrollee over two years." A. Lo Sasso, E. Byro, L. Jason, J. Ferrari, and B. Olson, *Benefits and Costs Associated with Mutual-Help Community-Based Recovery Homes: The Oxford House Model*, 35 EVALUATION AND PROGRAM PLANNING (1), (2012).

<sup>28</sup> D. Polcin, R. Korcha, J. Bond, and G. Galloway, *Sober Living Houses for Alcohol and Drug Dependence: 18-Month Outcome*, 38 J. SUBSTANCE ABUSE TREATMENT 356-365 (2010).

<sup>29</sup> 42 U.S.C. § 12101. This includes prohibition against discrimination in employment, State and local government services, public accommodations, commercial facilities, and transportation. U.S. DEPARTMENT OF JUSTICE, *Information and Technical Assistance on the Americans with Disabilities Act*, [http://www.ada.gov/2010\\_regs.htm](http://www.ada.gov/2010_regs.htm) (last visited Feb. 16, 2019).

<sup>30</sup> 42 U.S.C. § 12102.

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

<sup>32</sup> *Id.*

impairment” includes, among others,<sup>33</sup> drug addiction and alcoholism.<sup>34</sup> However, this only applies to individuals in recovery: ADA protections are not extended to individuals who are actively abusing substances.<sup>35</sup>

Additionally, the Fair Housing Amendment Acts of 1988 (FHA) prohibits housing discrimination based upon an individual’s handicap.<sup>36</sup> A person is considered to have a handicap if he or she has a physical or mental impairment which substantially limits one or more of his or her major life activities.<sup>37</sup> This includes individuals who have a record of such impairment, or are regarded as having such impairment.<sup>38</sup> Drug and alcohol addictions are considered to be handicaps under the FHA.<sup>39</sup> However, current users of illegal controlled substances and persons convicted for illegal manufacture or distribution of a controlled substance are not considered handicapped under the FHA.

An individual in recovery from a drug addiction or alcoholism is protected from discrimination under the ADA and FHA. Based on this protected class status, federal courts have held that mandatory conditions placed on housing for people in recovery from either state or sub-state entities, such as ordinances, licenses, or conditional use permits, are overbroad in application and result in violations of the FHA and ADA.<sup>40</sup> Additionally, federal courts have invalidated regulations that require registry of housing for protected classes, including recovery residences.<sup>41</sup> Further, federal courts have enjoined state action that is predicated on discriminatory local government decisions.<sup>42</sup>

State and local governments have the authority to enact regulations, including housing restrictions, which serve to protect the health and safety of the community.<sup>43</sup> However, this authority may not be used as a guise to impose additional restrictions on protected classes under the FHA.<sup>44</sup> Further, these regulations must not single out housing for disabled individuals and place requirements that are different and unique from the requirements for housing for the general population.<sup>45</sup> Instead, the FHA and ADA require state and local governments to make reasonable accommodations necessary to allow a person with a qualifying disability equal opportunity to use and

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<sup>33</sup> 28 C.F.R. § 35.104(4)(1)(B)(ii). The phrase physical or mental impairment includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV (whether symptomatic or asymptomatic), and tuberculosis.

<sup>34</sup> 28 C.F.R. § 35.104(4)(1)(B)(ii).

<sup>35</sup> 28 C.F.R. § 35.131.

<sup>36</sup> 42 U.S.C. § 3604. Similar protections are also afforded under the Florida Fair Housing Act, s. 760.23, F.S., which provides that it is unlawful to discriminate in the sale or rental of, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of a person residing in or intending to reside in that dwelling after it is sold, rented, or made available. The statute provides that “discrimination” is defined to include a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.

<sup>37</sup> 42 U.S.C. § 3602(h).

<sup>38</sup> *Id.*

<sup>39</sup> *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179, 1182 (E.D.N.Y. 1993).

<sup>40</sup> Department of Children and Families, *Recovery Residence Report*, Oct. 1, 2013, available at <http://www.dcf.state.fl.us/programs/samh/docs/SoberHomesPR/DCFProvisoRpt-SoberHomes.pdf> (last visited Feb. 16, 2019). See, e.g., *Jeffrey O. v. City of Boca Raton*, 511 F. Supp. 2d 1339 (S.D. Fla. 2007); *Oxford House, Inc.*, 819 F. Supp. 1179; *Marbrunak v. City of Stow, OH.*, 947 F.2d 43 (6th Cir. 1992); *United States v. City of Baltimore, MD*, 845 F. Supp. 2d. 640 (D. Md. 2012); *Children’s Alliance v. City of Bellevue*, 950 F. Supp. 1491 (W.D. Wash. 1997); *Oxford House-Evergreen v. Plainfield*, 769 F. Supp. 1329 (D.N.J. 1991); *Potomac Group Home, Inc.*, 823 F. Supp. 1285 (D. Md. 1993).

<sup>41</sup> *Recovery Residence Report*, supra note 40. See, e.g., *Nevada Fair Housing Center, Inc., v. Clark County, et. al.*, 565 F. Supp. 2d 1178 (D. Nev. 2008); See, *Human Resource Research and Management Group*, 687 F. Supp. 2d 237 (E.D.N.Y. 2010); *Community Housing Trust et. al., v. Dep’t of Consumer and Regulatory Affairs et. al.*, 257 F. Supp. 2d 208 (D.C. Cir. 2003); *City of Edmonds v. Oxford House et. al.*, 574 U.S. 725 (1995); *Safe Haven Sober Houses, LLC, et. al., v. City of Boston, et. al.*, 517 F. Supp. 2d 557 (D. Mass. 2007); *United States v. City of Chicago Heights*, 161 F. Supp. 2d 819 (N.D. Ill. 2001).

<sup>42</sup> *Recovery Residence Report*, supra, note 40. See, e.g., *Larkin v. State of Mich.* 883 F. Supp. 172 (E.D. Mich. 1994), judgment *aff’d* 89 F.3d 285 (6th Cir. 1996); *Arc of New Jersey, Inc., v. State of N.J.*, 950 F. Supp. 637, (D.N.J. 1996); *North Shore-Chicago Rehab., Inc. v. Village of Skokie*, 827 F. Supp. 497 (N.D. Ill. 1993); *Easter Seal Soc. of New Jersey, Inc. v. Township of North Bergen*, 798 F. Supp. 228 (D.N.J. 1992); *Ardmore, Inc. v. City of Akron, Ohio*, 1990 WL 385236 (N.D. Ohio 1990).

<sup>43</sup> 42 U.S.C. § 3604(f)(9).

<sup>44</sup> *Recovery Residence Report*, supra, note 40. See, e.g., *Bangerter v. Orem City Corp.*, 46 F.3d 1491, (10th Cir. 1995); *Ass’n for Advancement of the Mentally Handicapped, Inc. v. City of Elizabeth*, 876 F. Supp. 614 (D.N.J. 1994); *Pulcinella v. Ridley Tp.*, 822 F. Supp. 204 (E.D. Pa. 1993).

<sup>45</sup> *Bangerter v. Orem City Corp.*, 46 F.3d 1491 (10th Cir. 1995); *Human Res. Research and Mgmt. Grp, Inc. v. County of Suffolk*, 687 F. Supp. 2d 237 (E.D.N.Y. 2010); *Potomac Grp. Home Corp. v. Montgomery Cnty., Md.*, 823 F. Supp. 1285 (D. Md. 1993).

enjoy a dwelling.<sup>46</sup> The governmental entity bears the burden of proving through objective evidence that a regulation serves to protect the health and safety of the community and is not based upon stereotypes or unsubstantiated inferences.<sup>47</sup>

### *Voluntary Certification of Recovery Residences in Florida*

Because federal law precludes it, Florida does not license recovery residences. Instead, Florida established voluntary certification programs for recovery residences and recovery residence administrators, implemented by private credentialing entities.<sup>48</sup> Under the voluntary certification program, DCF approved two credentialing entities to design the certification programs and issue certificates: the Florida Association of Recovery Residences certifies the recovery residences and the Florida Certification Board certifies recovery residence administrators.

While certification is voluntary, Florida law incentivizes certification. Since 2016, Florida has prohibited licensed substance abuse service providers from referring patients to a recovery residence unless the recovery residence holds a valid certificate of compliance and is actively managed by a certified recovery residence administrator.<sup>49</sup> There are certain exceptions that allow referrals to or from uncertified recovery residences:<sup>50</sup>

- A licensed service provider under contract with a behavioral health managing entity.
- Referrals by a recovery residence to a licensed service provider when the recovery residence or its owners, directors, operators, or employees do not benefit, directly or indirectly, from the referral.
- Referrals made before July 1, 2018, by a licensed service provider to that licensed service provider's wholly owned subsidiary.

DCF publishes a list of all certified recovery residences and recovery residence administrators on its website.<sup>51</sup> As of February 17, 2019, there were 396 certified recovery residences in Florida.<sup>52</sup>

### *Day-or-Night Treatment Facilities*

Day or night treatment is one of the licensable service components of clinical treatment services under ch. 397, F.S. This service is provided in a nonresidential environment with a structured schedule of treatment and rehabilitative services.<sup>53</sup> Some day or night treatment facilities have a community housing component, which is a program intended for individuals who can benefit from living independently in peer community housing while participating in treatment services at a day or night treatment facility for a minimum of 5 hours a day for a minimum of 25 hours per week.<sup>54</sup> As of February 19, 2019, there were 140 day or night treatment facilities with group housing components in Florida.<sup>55</sup>

These community housing components operate similarly to a recovery residence, as defined in statute, by providing a peer-supported, alcohol- and drug-free living environment. However, unlike recovery residences which operate independently and do not provide treatment to or otherwise have treatment requirements for their residents, community housing components operate directly under a licensed day or night treatment facility and are intended to house individuals while they are receiving treatment at the day or night treatment facility. As such, licensed day or night treatment facilities with group housing components are not required to obtain recovery residence certification to operate their group housing components.

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<sup>46</sup> *Recovery Residence Report*, *supra*, note 40. 42 U.S.C. § 3604(f)(3)(B); 42 U.S.C. § 12131, *et. seq.*, 28 C.F.R. § 35.130(b)(7). To comply with the reasonable accommodation provisions of the ADA, regulations have been promulgated for public entities (defined by 28 C.F.R. § 35.104). This includes a self-evaluation plan of current policies and procedures and modify as needed (28 C.F.R. § 35.105). This is subject to the exclusions of 28 C.F.R. § 35.150. For judicial interpretation, see, *Jeffrey O.*, 511 F. Supp. 2d 1339; *Oxford House Inc., v. Township of Cherry Hill*, 799 F. Supp. 450 (D.N.J. 1992).

<sup>47</sup> *Oconomowoc Residential Programs, Inc., v. City of Milwaukee*, 300 F. 3d 775 (7th Cir. 2002); *Oxford House- Evergreen*, 769 F. Supp. 1329; *Cason v. Rochester Housing Auth.*, 748 F. Supp. 1002 (W.D.N.Y. 1990).

<sup>48</sup> Ss. 397.487–397.4872, F.S.

<sup>49</sup> S. 397.4873(1), F.S.

<sup>50</sup> S. 397.4873(2), F.S.

<sup>51</sup> S. 397.4872, F.S.

<sup>52</sup> FLORIDA ASSOCIATION OF RECOVERY RESIDENCES, *Certified Residences*, <http://farronline.org/certification/certified-residences/> (last visited Feb. 17, 2019).

<sup>53</sup> S. 397.311(26)(a)2., F.S.

<sup>54</sup> S. 397.311(26)(a)3., F.S.

<sup>55</sup> FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES, *Licensed Substance Abuse Providers/Components by City as of February 13, 2019*, <http://www.dcf.state.fl.us/programs/samh/substanceabuse/docs/LicensedSAProvidersByCity.pdf> (last visited Feb. 23, 2019). There are 386 day or night treatment facilities in total.

DCF confirmed this in an order, finding that a day or night treatment center with a community housing component is distinct from a recovery residence as defined in statute.<sup>56</sup> In its opinion, DCF states that unlike a recovery residence, a day or night treatment facility with a community housing component is a licensable service component monitored by DCF and is a program which requires its residents to participate in minimum treatment hours each week at the day or night treatment facility.

### Patient Brokering and Deceptive Marketing Practices

Patient brokering in the context of recovery residences is when a recovery residence pays a third party for referring individuals to the recovery residence.<sup>57</sup> The person in recovery generally does not know about this transaction and believes the referral is to a legitimate recovery residence that is concerned with his or her recovery. However, these businesses are often only operating as recovery residences to bill the individual's insurance for unnecessary treatments and assessments for personal financial gain. In other instances, these recovery residences provide economic incentives to residents to continually cycle through treatment and relapse, sometimes ending in the resident's overdose or death.<sup>58</sup> These entities often use deceptive or fraudulent marketing practices to admit more residents.

In recent years Florida has increased its efforts to eliminate patient brokering and deceptive marketing in recovery residences. Since 2016, the Legislature has strengthened the patient brokering statute, allowed the Office of Statewide Prosecution to prosecute patient brokering with enhanced penalties, and increased regulation of entities marketing substance abuse services.<sup>59</sup>

### *Patient Brokering*

Florida's patient brokering statute, s. 817.505, F.S., makes it a felony for any person to engage in patient brokering, subject to fines of up to \$500,000.<sup>60</sup> Since October 2016, the Office of the State Attorney in the Fifteenth Judicial Circuit has made at least 68 arrests for charges related to patient brokering.<sup>61</sup> Most recently, an owner of a recovery residence was charged with 35 counts of patient brokering for accepting kickbacks totaling approximately \$250,000.<sup>62</sup>

The patient brokering statute expressly applies to "substance abuse service providers" licensed under ch. 397, F.S., and to any person regulated, or statutorily exempt from regulation, by the Agency for Health Care Administration or the Department of Health, who has a Medicaid provider contract, or who has a contract with DCF to provide substance abuse or mental health services under part IV of ch. 394, F.S. However, one court has recently interpreted Florida's patient brokering statute to incorporate by reference the federal anti-kickback statute.<sup>63</sup> The federal provisions only apply to federally funded programs,<sup>64</sup> resulting in uncertainty on whether

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<sup>56</sup> *In the Matter of: Amethyst Recovery Center, LLC, Order on Petition for Declaratory Statement* (Case No. 18-064CF; Rendition No. DCF-18-196-DS, Aug. 21, 2018)(on file with the Children, Families, and Seniors Subcommittee staff). In June 2018, the facility filed a petition for declaratory judgment asking DCF to clarify whether a community housing component of a day or night treatment facility is required to obtain certification as a recovery residence in order for the day or night treatment facility to provide clinical services to its residents. DCF found that a licensed day or night treatment facility with a community housing component was not subject to the voluntary certification requirements for recovery residences.

<sup>57</sup> Patient brokering is paying to induce, or make a payment in return for, a referral of a patient to or from a health care provider or health care facility. Such payments include commissions, benefits, bonuses, rebates, kickbacks, bribes, split-fee arrangements, in cash or in kind, provided directly or indirectly, s. 817.505(1), F.S.

<sup>58</sup> Palm Beach County Sober Home Task Force Report to the Legislature, Jan. 1, 2017, available at: <http://www.sa15.state.fl.us/stateattorney/SoberHomes/content/SHTFReport2017.pdf> (last visited Mar. 3, 2019).

<sup>59</sup> ch. 2017-173, L.O.F.

<sup>60</sup> A person who violates the patient brokering statute commits a third-degree felony and must pay a \$50,000 fine. There are enhanced penalties for higher volumes of patient brokering. For brokering of 10 to 19 patients, the crime is a second-degree felony punishable as provided in ss. 775.082 or 775.084, F.S., and includes a \$100,000 fine. For brokering of 20 or more patients, the crime is a first-degree felony punishable as provided in ss. 775.082 or 775.084, F.S., and includes a \$500,000 fine. Private entities bringing an action under the patient brokering statute may recover reasonable expenses, including attorney fees.

<sup>61</sup> Alejandra Martinez and Chris Remington, *Palm Beach County State Attorney Explains Success in Reducing Opioid Related Deaths*, WLRN, Jan. 24, 2019, available at: <http://www.wlrn.org/post/palm-beach-county-state-attorney-explains-success-reducing-opioid-related-deaths> (last visited Mar. 3, 2019).

<sup>62</sup> <https://www.palmbeachpost.com/news/20190114/sober-home-task-force-kickbacks-for-north-palm-center-totaled-nearly-250000> (last visited Mar. 3, 2019).

<sup>63</sup> *Florida v. James Kigar*, No. 16-CF-10364 (15th Fla. Cir. Ct., Jan. 31, 2019)(order denying the state's motion in limine to prohibit defendant from asserting advice-of-counsel defense).

<sup>64</sup> S. 817.505(3)(a), F.S., Florida's patient brokering statute does not apply to any discount, payment, waiver of payment, or payment practice not prohibited by 42 U.S.C. sec. 1320a-7b(b). This federal provision relates to criminal penalties for acts involving federal health care programs, which includes federally approved or funded state programs. A federal health care program is defined as any plan or program that provides

Florida's patient brokering statute will apply to private insurance-related patient brokering if courts continue to use this interpretation.

### *Deceptive Marketing Practices*

Section 817.0345, F.S., makes it a felony offense for anyone to knowingly and willfully make materially false or misleading statements or provide false or misleading information about the identity, products, goods, services, or geographical location of a licensed service provider under ch. 397, F.S., in marketing, advertising materials, or other media or on a website with the intent to induce another person to seek treatment with that licensed service provider.

Entities that market substance abuse services must be licensed by the Department of Agriculture and Consumer Services in accordance with the Florida Telemarketing Act.<sup>65</sup> As such, these entities are subject to discipline and civil and criminal penalties for fraudulent or deceptive marketing practices. Additionally, a service provider, operator of a recovery residence, or a third party who provides any form of advertising or marketing to them cannot.<sup>66</sup>

- Make false or misleading statements;
- Include false information on its website;
- Engage in patient brokering; or
- Enter into a contract with a marketing provider who agrees to generate referrals to the recovery residence unless the service provider or operator of the recovery residence discloses instructions that allow the prospective patient to easily:
  - Determine whether the marketing provider represents specific licensed service providers or recovery residences that pay a fee to the marketing provider, and the identity of such service providers or recovery residences; and
  - Access lists of licensed service providers and recovery residences on the department website.

### Peer Specialists

Research has shown that social support provided by peers is beneficial to those in recovery from a substance use disorder or mental illness.<sup>67</sup> DCF's Florida Peer Services Handbook defines a "peer" as an individual who has life experience with a mental health and/or substance use condition.<sup>68</sup> There are four primary types of social support provided by peers.<sup>69</sup>

- **Emotional:** where a peer demonstrates empathy, caring or concern to bolster a person's self-esteem. (i.e., peer mentoring or peer-led support groups).
- **Informational:** where a peer shares knowledge and information to provide life or vocational skills training. (i.e., parenting classes, job readiness training, or wellness seminars).
- **Instrumental:** where a peer provides concrete assistance to help others accomplish tasks. (i.e., child care, transportation, and help accessing health and human services).
- **Affiliational:** where a peer facilitates contacts with other people to promote learning of social skills, create a sense of community, and acquire a sense of belonging. (i.e., recovery centers, sports league participation, and alcohol or drug free socialization opportunities).

The most recognized form of peer support is the 12-step programs of Alcoholics Anonymous and Narcotics Anonymous. More recently, as the nation faces a shortage of mental health professionals, peers or peer

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health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States government, or any state health care program which is approved under Titles XIX or XXI or receives funding under Titles V or XX-A.

<sup>65</sup> S.501.605, F.S.

<sup>66</sup> S. 397.55, F.S.

<sup>67</sup> SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, CENTER FOR SUBSTANCE ABUSE TREATMENT, *What Are Peer Recovery Support Services?*, <https://store.samhsa.gov/system/files/sma09-4454.pdf> (last visited Feb. 23, 2019).

<sup>68</sup> DEPARTMENT OF CHILDREN AND FAMILIES, *Florida Peer Services Handbook*, 2016, available at: <http://www.dcf.state.fl.us/programs/samh/publications/peer-services/DCF-Peer-Guidance.pdf> (last visited Feb. 17, 2019).

<sup>69</sup> SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, CENTER FOR SUBSTANCE ABUSE TREATMENT, *What Are Peer Recovery Support Services?*, <https://store.samhsa.gov/system/files/sma09-4454.pdf> (last visited Feb. 23, 2019).



specialists have been used to fill the gap and assist persons with substance use disorders and mental illnesses.<sup>70</sup> In Florida, DCF and Medicaid both allow reimbursement for peer support services but only if provided by certified peer specialists.<sup>71</sup> DCF defines a peer specialist as an individual who:<sup>72</sup>

- Self-identifies as a person who has direct personal experience living in recovery from mental health and/or substance use conditions;
- Has a desire to use his or her experience to help others with their recovery;
- Is willing to publicly identify as a person living in recovery for the purpose of educating, role modeling, and providing hope to others about the reality of recovery; and
- Has had the proper training and experience to work in a provider role.

DCF guidelines recommend that an individual be in recovery for at least two years to be considered for peer training.<sup>73</sup> In Florida, family members or caregivers can also work and be certified as peer specialists.<sup>74</sup>

The Florida Certification Board currently oversees the competency examination and certification process for peer specialists, which requires the individual to have been in recovery for at least two years or have lived experience as a family member or caregiver to another in recovery.<sup>75</sup> To be certified, one must be at least 18 years of age, have a high school diploma or equivalent, complete 40 hours of training, undergo background screening, and pass a competency exam.<sup>76</sup> As of January 2019, there are 482 actively certified peer specialists.<sup>77</sup>

## Background Screening

### *Substance Use Disorder and Criminal History*

Certain individuals receiving substance abuse treatment may have a criminal or violent history. About 54% of state prisoners and 61% of sentenced jail inmates incarcerated for violent offenses met the Diagnostic and Statistical Manual of Mental Disorders, 4<sup>th</sup> Edition, (DSM-IV) criteria for drug dependence or abuse.<sup>78</sup> Additionally, individuals who use illicit drugs are more likely to commit crimes, and it is common for many offenses, including violent crimes, to be committed by individuals who had used drugs or alcohol prior to committing the crime, or who were using at the time of the offense.<sup>79</sup> As a result, individuals who have recovered from a substance use disorder or mental illness often have a criminal history.

Some of these individuals with criminal pasts, once in recovery, may contribute to the substance abuse treatment industry as a volunteer, peer, or other employee of a substance abuse treatment program that provides support. Social support services have been shown to facilitate recovery from a substance use disorder or mental illness.<sup>80</sup> Additionally, these individuals bring many “lived experiences,” including experience navigating the criminal justice system, which give them the ability to assist others in recovery.<sup>81</sup> However, the crimes committed during the period while these individuals were abusing substances may disqualify them from employment in the substance abuse treatment industry due to Florida’s background screening process.

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<sup>70</sup> Centers for Medicare & Medicaid Services, Guidance Letter to State Medicaid Directors, Aug. 15, 2007, available at: <https://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/SMD081507A.pdf> (last visited Feb. 23, 2019).

<sup>71</sup> Department of Children and Families, Agency Analysis of 2019 HB 369, p. 2 (Feb. 8, 2019)(on file with Children, Families, and Seniors Subcommittee staff). Florida’s Medicaid program currently covers peer recovery services; DCF allows the state’s behavioral health managing entities to reimburse for peer recovery services.

<sup>72</sup> *Supra* note 68.

<sup>73</sup> Department of Children and Families, Agency Analysis of 2019 HB 369, p. 2 (Feb. 8, 2019)(on file with Children, Families, and Seniors Subcommittee staff).

<sup>74</sup> *Supra* note 68.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Email from Lindsey Zander, Deputy Director of Legislative Affairs, Florida Department of Children and Families, *RE: Number of Certified Peer Specialists in Florida*, Mar. 4, 2019 (on file with Children, Families, and Seniors Subcommittee staff).

<sup>78</sup> Jennifer Bronson, et al., *Drug Use, Dependence, and Abuse Among State Prisoners and Jail Inmates, 2007-2009*, U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, June 2017, available at <https://www.bjs.gov/content/pub/pdf/dudaspi0709.pdf> (last visited Feb. 17, 2019).

<sup>79</sup> *Principles of Drug Abuse Treatment for Criminal Justice Populations: A Research-Based Guide*, NATIONAL INSTITUTE ON DRUG ABUSE, available at [https://d14rmqtrwzf5a.cloudfront.net/sites/default/files/txcriminaljustice\\_0.pdf](https://d14rmqtrwzf5a.cloudfront.net/sites/default/files/txcriminaljustice_0.pdf) (last visited Feb. 17, 2019).

<sup>80</sup> SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, CENTER FOR SUBSTANCE ABUSE TREATMENT, *What Are Peer Recovery Support Services?*, <https://store.samhsa.gov/system/files/sma09-4454.pdf> (last visited Feb. 17, 2019).

<sup>81</sup> *Supra* note 68, at p. 10.

## *Background Screening Process*

In 1995, the Legislature created standard procedures for criminal history background screening of prospective employees; ch. 435, F.S., outlines the screening requirements. There are two levels of background screening: level 1 and level 2. Level 1 screening includes, at a minimum, employment history checks and statewide criminal correspondence checks through the Florida Department of Law Enforcement (FDLE) and a check of the Dru Sjodin National Sex Offender Public Website,<sup>82</sup> and may include criminal records checks through local law enforcement agencies. A level 2 background screening includes, but, is not limited to, fingerprinting for statewide criminal history records checks through FDLE and national criminal history checks through the Federal Bureau of Investigation (FBI), and may include local criminal records checks through local law enforcement agencies.<sup>83</sup>

Every person required by law to be screened pursuant to ch. 435, F.S., must submit a complete set of information necessary to conduct a screening to his or her employer.<sup>84</sup> Such information for a level 2 screening includes fingerprints, which are taken by a vendor that submits them electronically to FDLE.<sup>85</sup>

For both level 1 and 2 screenings, the employer must submit the information necessary for screening to FDLE within five working days after receiving it.<sup>86</sup> Additionally, for both levels of screening, FDLE must perform a criminal history record check of its records.<sup>87</sup> For a level 1 screening, this is the only information searched, and once complete, FDLE responds to the employer or agency, who must then inform the employee whether screening has revealed any disqualifying information.<sup>88</sup> For level 2 screening, FDLE also requests the FBI to conduct a national criminal history record check of its records for each employee for whom the request is made.<sup>89</sup> As with a level 1 screening, FDLE responds to the employer or agency, and the employer or agency must inform the employee whether screening has revealed disqualifying information. If the employer or agency finds that an individual has a history containing one of these offenses, it must disqualify that individual from employment.

The person whose background is being checked must supply any missing criminal or other necessary information upon request to the requesting employer or agency within 30 days after receiving the request for the information.<sup>90</sup>

## *Disqualifying Offenses*

Regardless of whether the screening is level 1 or level 2, the screening employer or agency must make sure that the applicant has good moral character by ensuring that the employee has not been arrested for and are awaiting final disposition of, have been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to, or have been adjudicated delinquent and the record has not been sealed or expunged for, any of the following 52 offenses prohibited under Florida law, or similar law of another jurisdiction:<sup>91</sup>

- Section 393.135, relating to sexual misconduct with certain developmentally disabled clients and reporting of such sexual misconduct.
- Section 394.4593, relating to sexual misconduct with certain mental health patients and reporting of such sexual misconduct.
- Section 415.111, relating to adult abuse, neglect, or exploitation of aged persons or disabled adults.
- Section 777.04, relating to attempts, solicitation, and conspiracy to commit an offense listed in this subsection.
- Section 782.04, relating to murder.
- Section 782.07, relating to manslaughter, aggravated manslaughter of an elderly person or disabled adult, or aggravated manslaughter of a child.
- Section 782.071, relating to vehicular homicide.
- Section 782.09, relating to killing of an unborn child by injury to the mother.
- Chapter 784, relating to assault, battery, and culpable negligence, if the offense was a felony.
- Section 784.011, relating to assault, if the victim of the offense was a minor.
- Section 784.03, relating to battery, if the victim of the offense was a minor.

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<sup>82</sup> The Dru Sjodin National Sex Offender Public Website is a U.S. government website that links public state, territorial, and tribal sex offender registries in one national search site. The website is available at <https://www.nsopw.gov/> (last visited Feb. 17, 2019).

<sup>83</sup> S. 435.04, F.S.

<sup>84</sup> S. 435.05(1)(a), F.S.

<sup>85</sup> Ss. 435.03(1) and 435.04(1)(a), F.S.

<sup>86</sup> S. 435.05(1)(b)-(c), F.S.

<sup>87</sup> Id.

<sup>88</sup> S. 435.05(1)(b), F.S.

<sup>89</sup> S. 435.05(1)(c), F.S.

<sup>90</sup> S. 435.05(1)(d), F.S.

<sup>91</sup> S. 435.04(2), F.S.

- Section 787.01, relating to kidnapping.
- Section 787.02, relating to false imprisonment.
- Section 787.025, relating to luring or enticing a child.
- Section 787.04(2), relating to taking, enticing, or removing a child beyond the state limits with criminal intent pending custody proceedings.
- Section 787.04(3), relating to carrying a child beyond the state lines with criminal intent to avoid producing a child at a custody hearing or delivering the child to the designated person.
- Section 790.115(1), relating to exhibiting firearms or weapons within 1,000 feet of a school.
- Section 790.115(2)(b), relating to possessing an electric weapon or device, destructive device, or other weapon on school property.
- Section 794.011, relating to sexual battery.
- Former s. 794.041, relating to prohibited acts of persons in familial or custodial authority.
- Section 794.05, relating to unlawful sexual activity with certain minors.
- Chapter 796, relating to prostitution.
- Section 798.02, relating to lewd and lascivious behavior.
- Chapter 800, relating to lewdness and indecent exposure.
- Section 806.01, relating to arson.
- Section 810.02, relating to burglary.
- Section 810.14, relating to voyeurism, if the offense is a felony.
- Section 810.145, relating to video voyeurism, if the offense is a felony.
- Chapter 812, relating to theft, robbery, and related crimes, if the offense is a felony.
- Section 817.563, relating to fraudulent sale of controlled substances, only if the offense was a felony.
- Section 825.102, relating to abuse, aggravated abuse, or neglect of an elderly person or disabled adult.
- Section 825.1025, relating to lewd or lascivious offenses committed upon or in the presence of an elderly person or disabled adult.
- Section 825.103, relating to exploitation of an elderly person or disabled adult, if the offense was a felony.
- Section 826.04, relating to incest.
- Section 827.03, relating to child abuse, aggravated child abuse, or neglect of a child.
- Section 827.04, relating to contributing to the delinquency or dependency of a child.
- Former s. 827.05, relating to negligent treatment of children.
- Section 827.071, relating to sexual performance by a child.
- Section 843.01, relating to resisting arrest with violence.
- Section 843.025, relating to depriving a law enforcement, correctional, or correctional probation officer means of protection or communication.
- Section 843.12, relating to aiding in an escape.
- Section 843.13, relating to aiding in the escape of juvenile inmates in correctional institutions.
- Chapter 847, relating to obscene literature.
- Section 874.05, relating to encouraging or recruiting another to join a criminal gang.
- Chapter 893, relating to drug abuse prevention and control, only if the offense was a felony or if any other person involved in the offense was a minor.
- Section 916.1075, relating to sexual misconduct with certain forensic clients and reporting of such sexual misconduct.
- Section 944.35(3), relating to inflicting cruel or inhuman treatment on an inmate resulting in great bodily harm.
- Section 944.40, relating to escape.
- Section 944.46, relating to harboring, concealing, or aiding an escaped prisoner.
- Section 944.47, relating to introduction of contraband into a correctional facility.
- Section 985.701, relating to sexual misconduct in juvenile justice programs.
- Section 985.711, relating to contraband introduced into detention facilities.

#### *Exemption from Disqualification*

If an individual is disqualified due to a pending arrest, conviction, plea of nolo contendere, or adjudication of delinquency to one or more of the disqualifying offenses, s. 435.07, F.S., allows the Secretary of the appropriate agency (in the case of substance abuse treatment, DCF) to exempt applicants from that disqualification under certain circumstances.<sup>92</sup> Receiving an exemption allows that individual to work despite the disqualifying crime in that person's past. However, an individual who is considered a sexual predator,<sup>93</sup> career offender,<sup>94</sup> or sexual offender (unless not required to register)<sup>95</sup> cannot ever be exempted from disqualification.<sup>96</sup>

<sup>92</sup> S. 435.07(1), F.S.

<sup>93</sup> S. 775.261, F.S.

<sup>94</sup> S. 775.261, F.S.

<sup>95</sup> S. 943.0435, F.S.

<sup>96</sup> S. 435.07(4)(b), F.S.

To seek exemption from disqualification, an employee must submit a request for an exemption from disqualification within 30 days after being notified of a pending disqualification.<sup>97</sup> However, the individual must first have paid all court-ordered payments (e.g., fees, fines, costs of prosecution or restitution) and three years must have passed since the individual's release from confinement and completion of supervision (e.g., probation) and satisfaction of all other nonmonetary conditions (e.g., community service) before DCF can consider his or her request.<sup>98</sup>

DCF sends the disqualified employee an exemption packet for the employee to complete to provide information for DCF to use in determining whether he or she meets the statutory standards for an exemption from disqualification.<sup>99</sup> This packet requests the employee to provide:<sup>100</sup>

- A certified copy from the court file of the petition (filing of information), and final disposition for each disqualifying criminal offenses.
- A copy of the arrest report for each disqualifying criminal offenses. If the report is not available, a statement from the court or law enforcement agency that the record does not exist or has been destroyed is acceptable.
- A copy of arrest reports and dispositions for any additional identified criminal offenses.
- Documentation from the probation department or court documenting release from supervision if probation or parole was given.
- Two or more original, signed letters of recommendation or letters of reference that attest to good moral character.
- Proof of rehabilitation.<sup>101</sup>
- Employment history record.
- Explanation of personal history, e.g., explain what happened with each arrest, current home life, education/training, family members, goals, and community involvement.

To be exempted from disqualification and thus be able to work, the applicant must demonstrate by clear and convincing evidence that he or she should not be disqualified from employment.<sup>102</sup> Clear and convincing evidence is a heavier burden than the preponderance of the evidence standard but less than beyond a reasonable doubt.<sup>103</sup> This means that the evidence presented is credible and verifiable, and that the memories of witnesses are clear and without confusion.<sup>104</sup> This evidence must create a firm belief and conviction of the truth of the facts presented and, considered as a whole, must convince DCF representatives without hesitancy that the requester will not pose a threat if allowed to hold a position of special trust relative to children, vulnerable adults, or to developmentally disabled individuals.<sup>105</sup> Evidence that may support an exemption includes, but is not limited to:<sup>106</sup>

- Personal references.
- Letters from employers or other professionals.
- Evidence of rehabilitation, including documentation of successful participation in a rehabilitation program.
- Evidence of further education or training.
- Evidence of community involvement.
- Evidence of special awards or recognition.
- Evidence of military service.
- Parenting or other caregiver experiences.

DCF states on the exemption review request checklist form that an applicant's failure to provide all relevant documentation will delay the review process and may leave DCF with insufficient evidence of rehabilitation to support an exemption from disqualification.<sup>107</sup>

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<sup>97</sup> S. 397.4073(1)(f), F.S.

<sup>98</sup> Department of Children and Families, Exemption Package, p. 1 (on file with Children, Families, and Seniors Subcommittee staff).

<sup>99</sup> *Id.*

<sup>100</sup> Department of Children and Families, CF Operating Procedure 60-18, Personnel: Exemption from Disqualification, Appendix B, (Aug. 1, 2010), (on file with Children, Families, and Seniors Subcommittee staff).

<sup>101</sup> Proof of rehabilitation may take the form of letters from employers, or community members, records of successful participation in a rehabilitation program, further education or training certifications, special awards of recognition, or information, which indicates that the applicant is not a danger to the safety or well being of others.

<sup>102</sup> S. 435.07(3)(a), F.S.

<sup>103</sup> *Supra*, note 100 at 1.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 3-4.

<sup>107</sup> *Supra*, note 100 at Appendix B.

After DCF receives a complete exemption request package from the applicant, the background screening coordinator searches available data, including, but not limited to, a review of records and pertinent court documents including case disposition and the applicant's plea in order to determine the appropriateness of granting the applicant an exemption.<sup>108</sup> These materials, in addition to the information provided by the applicant, form the basis for a recommendation as to whether the exemption should be granted.<sup>109</sup>

After all reasonable evidence is gathered, the background screening coordinator consults with his or her supervisor, and after consultation with the supervisor, the coordinator and the supervisor will recommend whether the exemption should be granted.<sup>110</sup> The regional legal counsel's office reviews the recommendation to grant or deny an exemption to determine legal sufficiency; the criminal justice coordinator in the region in which the background screening coordinator is located also reviews the exemption request file and recommendation and makes an initial determination whether to grant or deny the exemption.<sup>111</sup>

If the regional criminal justice coordinator makes an initial determination that the exemption should be granted, the exemption request file and recommendations are forwarded to the regional director, who has delegated authority from the DCF Secretary to grant or deny the exemption.<sup>112</sup> After an exemption request decision is final,<sup>113</sup> the background screener provides a written response to the applicant as to whether the request is granted or denied.<sup>114</sup>

If DCF grants the exemption, the applicant and the facility or employer are notified of the decision by regular mail.<sup>115</sup> However, if the request is denied, notification of the decision is sent by certified mail, return receipt requested, to the applicant, addressed to the last known address and a separate letter of denial is sent by regular mail to the facility or employer.<sup>116</sup> If the application is denied, the denial letter must set forth pertinent facts that the background screening coordinator, the background screening coordinator's supervisor, the criminal justice coordinator, and regional director, where appropriate, used in deciding to deny the exemption request.<sup>117</sup> It must also inform the denied applicant of the availability of an administrative review<sup>118</sup> pursuant to ch. 120, F.S.<sup>119</sup>

#### *Individuals Requiring Background Screening Under Ch. 397, F.S.*

Only certain individuals affiliated with substance abuse treatment providers require background screening. Section 397.4073, F.S., requires all owners, directors, chief financial officers, and clinical supervisors of service providers, as well as all service provider personnel who have direct contact with children receiving services or with adults who are developmentally disabled receiving services to undergo level 2 background screening. However, certain personnel are excluded from background screening requirements:

- Persons who volunteer at a program for less than 40 hours per month and who are under direct and constant supervision by persons who meet all screening requirements;
- Service providers who are exempt from licensing; and
- Persons employed by the Department of Corrections in a substance abuse service program who have direct contact with unmarried inmates under the age of 18 or with inmates who are developmentally disabled.<sup>120</sup>

Other statutory provisions are tailored to facilitate individuals in recovery who have disqualifying offenses being able to work in substance abuse treatment. For example, DCF may grant exemptions from disqualification that

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<sup>108</sup> *Id.* at 5.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> At no point during the evaluation process may an evaluator rely on criminal history reports with an effective date that is more than 60 days old. If the most recent criminal history report is more than 60 days old at the time of review, new criminal history reports must be generated prior to the final decision being made.

<sup>114</sup> *Supra*, note 100 at 5.

<sup>115</sup> *Id.* at 6.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> All notices of denial of an exemption shall advise the applicant of the basis for the denial, that an administrative hearing pursuant to s. 120.57, F.S., may be requested, and that the request must be made within 21 days of receipt of the denial letter or the applicant's right to an appeal will be waived.

<sup>119</sup> *Supra*, note 100 at 6.

<sup>120</sup> S. 435.07(2), F.S.

would limit service provider personnel to working with adults in substance abuse treatment facilities.<sup>121</sup> DCF may also grant exemptions for service providers which treat adolescents 13 years of age and older, whose background checks indicate certain drug crimes<sup>122</sup> may be granted an exemption without the usual three-year waiting period for felonies.<sup>123</sup>

Similarly, if five or more years or more have elapsed since the most recent disqualifying offense, employees may work with adults with substance use disorders until DCF makes a final determination regarding the request for an exemption from disqualification.<sup>124</sup> These individuals must work under the supervision of a qualified psychologist, clinical social worker, marriage and family therapist, mental health counselor, or a master's level certified addiction professional until DCF makes a final determination regarding the request for an exemption from disqualification.

Regarding recovery residences, ss. 397.487 and 397.4871, F.S., require level 2 background screening for all recovery residence owners, directors and chief financial officers and for administrators seeking certification. DCF may exempt an individual from the disqualifying offenses of a level 2 background screening if the individual meets certain criteria and the recovery residence attests that it is in the best interest of the program.<sup>125</sup>

## **Effect of Proposed Changes**

### Recovery Residences

CS/HB 369 revises the definition of recovery residence to include the community housing component of a licensed day or night treatment facility with community housing. Currently, such community housing is not required to be certified as recovery residences in order to be licensed by DCF. Under the bill, these day or night treatment facilities would need to obtain certification for their community housing components in order to continue referring individuals from the treatment portion of their program to their housing component. Additionally, the housing components would need a certified administrator to actively manage them and they would be subject to the referral restrictions of s. 397.4873, F.S.

The bill expands the statutory findings on who may benefit from living in a recovery residence to include not only those individuals who have completed treatment, but also those who are continuing to receive substance abuse treatment.

The bill allows a certified recovery residence that has a discharge policy approved by the credentialing entity to transfer or discharge residents from the recovery residence in accordance with that policy under the following circumstances:

- The discharge or transfer is necessary for the resident's welfare.
- The resident's needs cannot be met at the recovery residence.
- The health and safety of other residents or recovery residence employees are at risk or would be at risk if the resident continues to live at the recovery residence.

This right to discharge or transfer a resident will supersede any landlord and tenant rights and obligations under ch. 83, F.S.

Current law prohibits a licensed service provider from making referrals to or accepting referrals from a recovery residence that has not been certified under s. 397.487, F.S., with certain exceptions. The bill creates a new exception for a provider that is democratically operated by its residents pursuant to a charter from a congressionally recognized or sanctioned entity. Under the bill, licensed service providers will be able to make referrals to or accept referrals from these entities provided the residence or any resident of the residence does not receive a benefit, directly or indirectly, for the referral. This exception would apply to recovery residences such as the Oxford House.

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<sup>121</sup> S. 397.4073 (4)(c), F.S.

<sup>122</sup> Specifically, ss. 817.563, 893.13, or 893.147, F.S.

<sup>123</sup> S. 397.4073 (4)(b), F.S., provides exemptions for crimes under ss. 817.563, 893.13, and 893.147, F.S. These exemptions only apply to providers who treat adolescents age 13 and older; as well as personnel who work exclusively with adults.

<sup>124</sup> S. 397.4073(1)(f), F.S.

<sup>125</sup> S. 397.4872, F.S.

Additionally, the bill revises the definition for a “clinical supervisor” to also include a person who maintains lead responsibility for the overall coordination and provision of clinical services, and to specify that one must be a qualified professional to serve as a clinical supervisor. Currently, clinical supervisors are not required to be qualified professionals. This revised definition would require clinical supervisors to meet the requirements of a qualified professional under s. 397.311(34), F.S., meaning only a licensed physician, physician assistant, psychologist, mental health professional, or advanced practice registered nurse, or a certified substance abuse treatment services provider with a bachelor’s degree could hold this title and serve in this role.

#### Patient Brokering and Deceptive Marketing Practices

Currently, the patient brokering statute does not apply to any discount, payment, waiver of payment, or payment practice not prohibited by the federal anti-kickback statute. The bill amends this provision so that the patient brokering statute does not apply to any such payment scheme expressly permitted under the federal anti-kickback statute. This may address instances where a court interprets Florida’s patient brokering statute to only apply to federally funded programs.

For entities that contract with a marketing provider that provides referral services to the recovery residence, the bill makes it a contractual requirement for the marketing provider to disclose the nature of the referral and the list of DCF’s licensed service providers and certified recovery residences. This will provide people in recovery with greater protections from deceptive marketing practices.

#### Peer Specialists

Currently there is no statutory definition of or requirements for a peer specialist as it relates to mental health and substance abuse. The bill creates a definition for peer specialists consistent with DCF’s guidelines and guidance documents, and requires peer specialists to be certified, except in limited circumstances, to provide DCF-funded support services. The bill defines “peer specialist” as a person who has been in recovery from a substance abuse disorder or mental illness for at least two years and who uses his or her lived experience to deliver services in behavioral health settings to support others in their recovery, or as a person who has two years’ experience as a family member or a caregiver of a person with a substance abuse disorder or mental illness. The bill allows a peer specialist who is not yet certified to provide support services for up to a year while he or she is working towards certification; such peer specialists must be supervised by a qualified professional or a certified peer specialists with at least three years of full-time experience at a licensed behavioral health organization.

The bill requires DCF to approve training and continuing education programs for peer specialist certification. DCF must designate one or more credentialing entities that have met nationally-recognized standards for developing and administering certification programs to handle the training and certification of peer specialists.

#### Background Screening

Beginning July 1, 2019, peer specialists will be subject to level 2 background screenings, and, along with recovery residence owners, directors, chief financial officers, and clinical supervisors, will also be subject to background screenings for the offenses in s. 408.809, F.S. in addition to those in ch. 435, F.S.

In addition to the offenses listed in s. 435.04, F.S. for level 2 screenings, s. 408.809(4), F.S. requires screening for the following offenses or any similar offense of another jurisdiction:

- Any authorizing statutes, if the offense was a felony.
- Chapter 408, F.S., if the offense was a felony.
- Section 409.920, F.S., relating to Medicaid provider fraud.
- Section 409.9201, F.S., relating to Medicaid fraud.
- Section 741.28, F.S., relating to domestic violence.
- Section 777.04, F.S., relating to attempts, solicitation, and conspiracy to commit an offense listed in this subsection.
- Section 817.034, F.S., relating to fraudulent acts through mail, wire, radio, electromagnetic, photoelectronic, or photooptical systems.
- Section 817.234, F.S., relating to false and fraudulent insurance claims.
- Section 817.481, F.S., relating to obtaining goods by using a false or expired credit card or other credit device, if the offense was a felony.
- Section 817.50, F.S., relating to fraudulently obtaining goods or services from a health care provider.

- Section 817.505, F.S., relating to patient brokering.
- Section 817.568, F.S., relating to criminal use of personal identification information.
- Section 817.60, F.S., relating to obtaining a credit card through fraudulent means.
- Section 817.61, F.S., relating to fraudulent use of credit cards, if the offense was a felony.
- Section 831.01, F.S., relating to forgery.
- Section 831.02, F.S., relating to uttering forged instruments.
- Section 831.07, F.S., relating to forging bank bills, checks, drafts, or promissory notes.
- Section 831.09, F.S., relating to uttering forged bank bills, checks, drafts, or promissory notes.
- Section 831.30, F.S., relating to fraud in obtaining medicinal drugs.
- Section 831.31, F.S., relating to the sale, manufacture, delivery, or possession with the intent to sell, manufacture, or deliver any counterfeit controlled substance, if the offense was a felony.
- Section 895.03, F.S., relating to racketeering and collection of unlawful debts.
- Section 896.101, F.S., relating to the Florida Money Laundering Act.

In addition, the bill expands the crimes for which an individuals may receive an exemption from disqualification without the statutorily imposed waiting period, if they are working with adolescents 13 years of age and older and adults with substance use disorders, to include:

- Prostitution.
- Burglary (3rd degree felony).
- Grand theft of the third degree (3rd degree felony).
- Forgery (3rd degree felony).
- Uttering forged instruments (3rd degree felony).
- Related attempt, solicitation, or conspiracy crimes.

For individuals who seek an exemption from disqualification for employment in substance abuse treatment following a level 2 background screening, the bill requires DCF to render a decision on the application for exemption from disqualification within 60 days after DCF receives the complete application. Additionally, the bill allows individuals to work under supervision for up to 90 days while DCF evaluates their applications for an exemption from disqualification, so long as it has been five or more years, or three or more years in the case of a certified peer specialist or peer specialist seeking certification, since the individuals have completed all non-monetary conditions associated with their most recent disqualifying offense.

The bill also gives AHCA or DCF, as appropriate, the authority to grant an exemption from disqualification to work solely in mental health treatment programs and facilities, in recovery residences, or in those programs or facilities that treat co-occurring substance use and mental health disorders, to an employee otherwise disqualified from employment under s. 435.07, F.S.

The bill increases criminal penalties relating to personnel from a first-degree misdemeanor to a third-degree felony. Additionally, the bill creates a new offense for anyone who willfully, knowingly, or intentionally makes false statements, misrepresents, impersonates, fails to disclose, or otherwise fraudulently discloses inaccurate information on a licensure application when such fact is material to determining one's qualifications to be an owner, director, volunteer, or other personnel of a service provider. Currently, it is only a criminal offense to make these inaccurate disclosures on applications for voluntary or paid employment in these areas.

The bill makes various technical and conforming changes.

The bill provides an effective date of July 1, 2019.

#### B. SECTION DIRECTORY:

- Section 1:** Amends s. 394.4572, F.S., relating to screening of mental health personnel.
- Section 2:** Amends s. 397.311, F.S., relating to definitions.
- Section 3:** Amends s. 397.321, F.S., relating to duties of the department.
- Section 4:** Amends s. 397.4073, F.S., relating to background checks of service provider personnel.
- Section 5:** Amends s. 397.4075, F.S., relating to unlawful activities relating to personnel; penalties.
- Section 6:** Creates s. 397.417, F.S., relating to peer specialists.
- Section 7:** Amends s. 397.487, F.S., relating to voluntary certification of recovery residences.
- Section 8:** Amends s. 397.4873, F.S., relating to referrals to or from recovery residences; prohibitions; penalties.



- Section 9:** Amends s. 397.55, F.S., relating to prohibition of deceptive marketing practices.  
**Section 10:** Amends s. 435.07, F.S., relating to exemptions from disqualification.  
**Section 11:** Amends s. 817.505, F.S., relating to patient brokering prohibited; exceptions; penalties.  
**Section 12:** Amends s. 212.055, F.S., relating to discretionary sales surtaxes; legislative intent; authorization and use of proceeds.  
**Section 13:** Amends s. 397.416, F.S., substance abuse treatment services; qualified professional.  
**Section 14:** Amends s. 440.102, F.S., Drug-free workplace program requirements.  
**Section 15:** Provides an effective date of July 1, 2019.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The fiscal impact to DCF is likely insignificant as the department's Background Screening Office currently processes level 2 background screenings for personnel and volunteers of recovery residences. The addition of peer specialists is not expected to be a significant workload increase.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Indeterminate.

### D. FISCAL COMMENTS:

None.

## 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:

DCF has sufficient rulemaking authority in current law to implement the bill.

### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On March 14, 2019, the Health and Human Services Committee adopted an amendment that allows certified peer specialists or peer specialists seeking certification to work under supervision for up to 90 days while DCF considers their request for exemption from disqualification if three or more years have passed since they completed the non-monetary conditions of their most recent disqualifying offense.

The bill was reported favorably as a committee substitute. The analysis is drafted to the committee substitute as passed by the Health and Human Services Committee.