

HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: CS/SB 82 Individuals with Disabilities

SPONSOR(S): Appropriations, Bean

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

FINAL HOUSE FLOOR ACTION: 78 Y's 37 N's **GOVERNOR'S ACTION:** Approved

SUMMARY ANALYSIS

CS/SB 82 passed the House on March 11, 2020. The bill includes the substance of CS/SB 1344.

CS/SB 82 amends laws related to programs and services for persons with developmental disabilities. Such persons eligible for Medicaid may choose to receive services in the community through the Medicaid Home and Community-Based Services waiver (also known as "iBudget") administered by the Agency for Persons with Disabilities (APD), or in an institutional setting known as an Intermediate Care Facility for the Developmentally Disabled (ICF/DD).

The bill makes operational changes to the iBudget program. Funding for iBudget services is set on an individual basis according to an algorithm, and clients may request additional funds. Waiver clients work with a waiver support coordinator to identify appropriate services and develop an individual care plan.

The bill:

- Eliminates the statutory criteria for authorizing supplemental funding for a client, and, instead, creates a standard definition of a "significant additional need" to judge supplemental funding requests,
- Centralizes the significant additional needs process at APD headquarters,
- Requires waiver support coordinators to be employed by qualified waiver support coordination agencies and establishes criteria for those agencies, and
- Requires all service providers to bill for services and submit all required documentation through the agency's electronic client data management system.

An ICF/DD provides intensive care and rehabilitative services in a residential setting to individuals with developmental disabilities. Medicaid is the only payer for ICF/DD services, so current law requires a need assessment and a certificate of need (CON) from the Agency for Health Care Administration (AHCA), to build a new ICF/DD or add beds to an existing ICF/DD.

The bill authorizes a certificate of need (CON) exemption, for applicants meeting certain criteria, for up to three new ICF/DDs with 24 beds, comprising three eight-bed homes, for individuals exhibiting severe maladaptive behaviors and co-occurring psychiatric diagnoses. The bill establishes certain continued licensure requirements for an ICF/DD with a CON exemption. The bill requires APD to offer choice counseling to iBudget clients regarding appropriate residential placement based on the needs of the individual.

The bill sunsets the choice counseling provision, the ICF/DD continued licensure requirements, and the authority for the ICF/DD CON exemption on July 1, 2022, unless reviewed and saved from repeal by the Legislature.

The bill has an indeterminate fiscal impact on APD, and may have a significant, indeterminate, negative fiscal impact on AHCA. The bill has no fiscal impact on local governments.

The bill was approved by the Governor on June 23, 2020, ch. 2020-71, L.O.F., and will become effective on July 1, 2021.

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

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I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

Agency for Persons with Disabilities

The Agency for Persons with Disabilities (APD) is responsible for providing Medicaid home and community-based 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, Down syndrome, Phelan-McDermid syndrome, or Prader-Willi syndrome; that manifests before the age of 18; and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely.¹ The overarching goal for APD is to prevent or reduce the severity of the developmental disability and implement community-based services that will help individuals with developmental disabilities achieve their greatest potential for independent and productive living in the least restrictive means.²

iBudget Florida Program

Individuals with specified developmental disabilities 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, known as iBudget Florida. Alternatively, they may choose to live in an institutional setting known as an Intermediate Care Facility for the Developmentally Disabled (ICF/DD) through traditional Medicaid administered by the Agency for Health Care Administration (AHCA).³

APD administers iBudget Florida pursuant to s. 393.0662, F.S. iBudget Florida uses an algorithm, or formula, to set individuals' funding allocations for waiver services. The statute authorizes APD to give individuals additional funding under certain conditions (such as a temporary or permanent change in need, or an extraordinary need that the algorithm does not address).⁴ APD phased in the implementation of iBudget Florida, with the final areas transitioned from the previous tiered waiver system on July 1, 2013.⁵

APD serves just over 35,000 individuals through iBudget Florida⁶, contracting with service providers to offer 27 supports and services to assist individuals to live in their community.⁷ Examples of waiver services enabling children and adults to live, learn, and work in their communities include residential habilitation, behavioral services, personal supports, adult day training, employment services, and occupational and physical therapy.⁸

iBudget waiver services are only one source of supports available to clients. Clients, families, legal representatives, support coordinators, and providers are responsible for seeking non-waiver supports to augment and replace waiver services. The iBudget waiver is the payer of last resort.⁹

¹ S. 393.063(9), F.S.

² S. 393.062, F.S.

³ S. 393.0662, F.S.

⁴ S. 393.0662(1)(b), F.S.

⁵ Agency for Persons with Disabilities, *Quarterly Report on Agency Services to Floridians with Developmental Disabilities and Their Costs: First Quarter Fiscal Year 2017-18*, November 2017, available at <http://apd.myflorida.com/publications/reports/docs/Quarterly%20Report%201st%20Quarter%20FY%202017-18%20FINAL%20v3.pdf> (last accessed March 17, 2020).

⁶ Agency for Persons with Disabilities, *Home and Community Based Services (HCBS) Waiver Monthly Surplus-Deficit Report for Waiver Program Expenditures – FY 2019-20*, February 29, 2020, available at <https://apd.myflorida.com/publications/reports/docs/FY%202019-20%20Surplus%20Deficit%20Worksheet%20-%20February.pdf> (last accessed March 17, 2020).

⁷ *Supra* note 5.

⁸ *Id.*

⁹ *Id.* at pg. 2-75.

Eligibility for iBudget Services

The application process for individuals wishing to receive services through the iBudget program are detailed in section 393.065, F.S. APD must review applications for eligibility within 45 days for children under 6 years of age and within 60 days for all other applicants.¹⁰ Individuals who are determined to be eligible for the waiver program are either given a slot in the program or placed on a wait list. Currently, due to demand exceeding available funding, individuals with developmental disabilities who wish to receive HCBS services from APD are placed on a wait list for services in priority categories of need, unless they are in a crisis.¹¹

As of January 2020, approximately 21,300 individuals were on the HCBS wait list.¹² A majority of people on the wait list have been on the list for more than five years, though some are children receiving services through the school system and others are individuals who have been offered waiver services previously but refused them and chose to remain on the wait list.¹³

The needs of APD clients are prioritized as prescribed by section 393.065(5), F.S. There are seven categories listed below in decreasing order of priority:

- Category 1 – Clients deemed to be in crisis.
- Category 2 – Children from the child welfare system at the time of:
 - Finalization of an adoption with placement in a family home;
 - Reunification with family members with placement in a family home; or
 - Permanent placement with a relative in a family home.
- Category 3 – Includes, but not limited to, clients:
 - Whose caregiver has a documented condition that is expected to render the caregiver unable to provide care within the next 12 months and for whom a caregiver is required but no alternate caregiver is available;
 - Who are at substantial risk of incarceration or court commitment without supports;
 - Whose documented behaviors or physical needs place them or their caregiver at risk of serious harm and other supports are not currently available to alleviate the situation; or
 - Who are identified as ready for discharge within the next year from a state mental health hospital or skilled nursing facility and who require a caregiver but for whom no caregiver is available.
- Category 4 – Includes, but not limited to, clients whose caregivers are 70 years of age or older and for whom a caregiver is required but no alternate caregiver is available;
- Category 5 – Includes, but not limited to, clients who are expected to graduate within the next 12 months from secondary school and need support to obtain or maintain competitive employment, or to pursue an accredited program of postsecondary education to which they have been accepted.
- Category 6 – Clients 21 years of age or older who do not meet the criteria for categories 1-5.
- Category 7 – Clients younger than 21 years of age who do not meet the criteria for categories 1-4.¹⁴

Significant Additional Needs Criteria

¹⁰ S. 393.065(1), F.S.

¹¹ S. 393.065, F.S.

¹² Agency for Persons with Disabilities, *Corrective Action Plan*, February 2020, available at <https://apd.myflorida.com/publications/reports/docs/APD%20Corrective%20Action%20Plan%20-%20February.pdf> (last accessed March 17, 2020).

¹³ Id.

¹⁴ S. 393.065(5), F.S.

A waiver client can request supplemental funding, in addition to that allocated through the iBudget algorithm, when his or her needs increase and those needs cannot be met using other resources.¹⁵ This supplemental funding, known as a “significant additional need” or “SAN” funding, is available in response to an extraordinary need, a significant need for one time or temporary support or services, a significant increase in the need for services after the beginning of the service plan year, or a significant need for transportation services.¹⁶

An extraordinary need may include, but is not limited to:¹⁷

- A documented history of significant, potentially life-threatening behaviors, such as recent attempts at suicide, arson, nonconsensual sexual behavior, or self-injurious behavior requiring medical attention;
- A complex medical condition that requires active intervention by a licensed nurse on an ongoing basis that cannot be taught or delegated to a nonlicensed person;
- A chronic comorbid condition; or
- A need for total physical assistance with activities such as eating, bathing, toileting, grooming, and personal hygiene.

A significant need for one-time or temporary support or services may include, but is not limited to the need for:¹⁸

- Environmental modifications;
- Durable medical equipment;
- Services to address the temporary loss of support from a caregiver; or
- Special services or treatment for a serious temporary condition when the service or treatment is expected to ameliorate the underlying condition.

A significant increase in the need for services after the beginning of the service plan year may include, but is not limited to:¹⁹

- Permanent or long-term loss or incapacity of a caregiver;
- Loss of services authorized under the state Medicaid plan due to a change in age; or
- A significant change in medical or functional status that requires the provision of additional services on a permanent or long-term basis that cannot be accommodated within the client’s current iBudget.

If public transportation is not an option due to the unique needs of the client or other transportation resources are not reasonably available, supplemental funding may be approved for transportation services to a waiver-funded adult day training program or employment services.²⁰

APD approves requests for increases to the allocation amount if the request meets the Significant Additional Needs criteria.²¹ APD must document the information necessary to evaluate significant additional needs requests. This documentation may take many forms, including the following:²²

- Support plans;
- Needs assessment results;

¹⁵ Section 393.0662(1)(b), F.S.

¹⁶ Rule 65G-4.0213(23), F.A.C.

¹⁷ Section 393.0662(1)(b)1., F.S.

¹⁸ Section 393.0662(1)(b)2., F.S.

¹⁹ Section 393.0662(1)(b)3., F.S.

²⁰ Section 393.0662(1)(b)4., F.S.

²¹ Rule 65G-4.0216(3), F.A.C. Significant additional needs criteria can be found at Section 393.0662(1)(b), F.S. and Rule 65G-4.0218, F.A.C.

²² Rule 65G-4.0218(5), F.A.C.

- Cost plans;
- Expenditure history;
- Current living situation;
- Interviews with the client or the clients caregiver;
- Prescriptions;
- Data regarding the results of previous therapies and interventions;
- Assessments; and
- Provider documentation.

Currently, no additional funding for significant additional needs can be provided if the need for additional funding is not premised upon a need that arises after the implementation of the initial iBudget amount,²³ or is created by a client's failure to ensure that funding remained sufficient to cover previously authorized services.²⁴

Waiver Support Coordination

All individuals enrolled on the iBudget waiver must receive Waiver Support Coordination services. Waiver Support Coordination is the service of advocating for the individual and identifying, developing, coordinating, and accessing supports and services on the individual's behalf, regardless of the funding source.²⁵ Waiver support coordinators (WSCs) must use a person-centered approach to identify a client's goals and plan and implement supports and services to achieve those goals. This primarily involves working with an iBudget client to select appropriate support services and modify those selections as the needs of a client change over time.²⁶

WSCs may serve iBudget clients either as solo service providers or as employees of a support coordination agency. All WSCs must pass a level-two background screening and complete a Medicaid provider enrollment application. At a minimum, a WSC must also complete:

- A bachelor's degree from an accredited college or university, and,
- Two years of paid, supervised experience in developmental disabilities, special education, mental health, counseling, guidance, social work, or health and rehabilitative services. A master's degree in a related field can substitute for one year of the required experience.²⁷

Support coordination agencies have additional responsibilities to:²⁸

- Have a comprehensive internal quality assurance management plan (which should include a systematic method of inspecting and reviewing all required documentation and activities) to actively monitor and supervise WSCs employed by their agency;
- Provide ongoing technical assistance and training to their employees in order to ensure that they are adequately fulfilling their job requirements as a WSC and Medicaid provider; and,
- Maintain personnel files documenting the qualifications of all employees, completion of all required training, and background screening results.

At present, approximately 1,000 WSCs provide services across the state. There are 162 existing support coordination agencies and 476 solo service providers.²⁹

²³ The iBudget amount is the total amount of funds approved by the APD. See Rules 65G-4.0213, F.A.C., and 65G-4.0216, F.A.C.

²⁴ Rule 65G-4.0218(7), F.A.C.

²⁵ Agency for Persons with Disabilities, *Overview of Waiver Support Coordination – Supplemental Resources*, December 2019, available at <https://apd.myflorida.com/waiver/support-coordination/> (last accessed March 17, 2020).

²⁶ Agency for Health Care Administration, *Florida Medicaid Developmental Disabilities Individual Budgeting Waivers Services Coverage and Limitations Handbook* (2018), available at <https://apd.myflorida.com/ibudget/docs/iBudget%20Waiver%20Handbook%20June%202018.pdf> (last accessed March 17, 2020).

²⁷ Id at pg. 1-25.

²⁸ Id at pg. 2-84.

²⁹ Agency for Persons with Disabilities, *Agency Bill Analysis for CS/SB 82 of 2020*, March 27, 2020.

Support coordination agencies and solo coordinators are paid the same rates. iBudget clients can receive support coordination at 3 different levels – Full, Limited, and Enhanced. WSCs receive a monthly reimbursement for each client served³⁰:

Service Level	Description	Monthly Rate
Full	Significant support to a recipient to ensure the recipient's health, safety, and well-being. The WSC is accessible to the client 24-hour-per-day, 7-day-per-week.	\$148.69
Limited	Less intense than full support coordination. Limited support coordinators are not on-call 24/7, and services occur during times and dates prearranged by the recipient and the WSC.	\$74.35
Enhanced	Activities that assist the recipient in transitioning from a nursing facility or an ICF/DD to the community, or for assisting recipients who need a more intensive level of support coordination.	\$359.83

APD, AHCA, or an authorized representative of the state monitors support coordinators on an annual basis.³¹ The quality assurance process includes both a provider performance review, which is a review of regulatory compliance, and a person-centered review that focuses on an interview with the client receiving services to assure outcomes are being met, adequate follow through is being done, and services are satisfactory to the client.³²

APD Data Management System (iConnect)

APD must manage data to meet federal requirements for administering the iBudget HCBS waiver, such as tracking, measuring, reporting, and providing quality improvement processes for 32 specific program performance measures and claims processing. However, APD has previously relied on manual processes and disparate systems to collect, analyze, and report data, which can be inefficient and error-prone.

The Legislature appropriated funding in FY 2015-16 for APD to develop a client data management system, known as iConnect, for verifying service delivery by providers, billing waiver services, and processing claims.³³ This system will also be used for program quality improvement purposes.

Additionally, iConnect will include a mobile electronic visit verification (EVV) application, at no cost to providers, to prevent fraud and to comply with the federal 21st Century Cures Act.³⁴ The Act requires providers of personal care services and home health services to document those provision of those services electronically as a condition of reimbursement.³⁵ Personal care services under the iBudget waiver include personal supports and respite services. APD has until December 31st, 2020, to demonstrate full compliance with the EVV requirement.³⁶

APD is currently in the process of implementing iConnect. The Legislature appropriated more than \$2 million in Fiscal Year 2019-20 to continue the implementation of this statewide system for management, reporting, and trending of data for all Agency clients. Service providers currently bill for services in the AHCA Florida Medicaid Management Information System (FMMIS). Providers can render services, receive payment, then have up to ten days to provide documentation to the WSC. This process for

³⁰ Id.
³¹ Supra FN 25, at pg. A-9.
³² Id.
³³ Ch. 2015-232, L.O.F.
³⁴ P.L. 114-255, 42 U.S.C. 201 note. For more information on the 21st Century Cures Act, see U.S. Congress, "H.R.34 - 21st Century Cures Act", 114th Congress, available at <https://www.congress.gov/bill/114th-congress/house-bill/34> (last accessed March 27, 2020).
³⁵ 42 U.S.C. 1396b.
³⁶ Supra FN 28.

payment results in after-the-fact enforcement when providers submit the documentation late or do not submit the required documentation at all. In these instances, staff time is expended on obtaining the documentation or, in some cases, referring the provider to AHCA for the recoupment of funds for undocumented services.³⁷ The new iConnect system may reduce these inefficiencies and improve program integrity.

APD contracted with information technology vendor WellSky Corporation to develop the iConnect platform. Minimum hardware and software requirements for iConnect participation are located on APD's website. The iConnect platform is fully functional on devices equipped with Microsoft Windows operating systems, though it is unclear if the platform will be fully functional on devices using the Apple operating system.³⁸ Moreover, it is unclear whether iConnect will be capable of communicating with existing health data management systems used by service providers. APD is working with WellSky to develop a standardized interface that may address these limitations; however, it is unclear whether it will be available before APD requires providers to use the system.³⁹

APD recently issued a provider advisory to update providers on the implementation of iConnect.⁴⁰ The advisory bulletin indicates that all providers of respite and personal care services are expected to begin billing via iConnect beginning in the second half of calendar year 2020. Billing through iConnect is scheduled to begin in August for respite services and in October for personal supports. EVV through iConnect will also be launched later this year.⁴¹

Intermediate Care Facilities for the Developmentally Disabled

An intermediate care facility for the developmentally disabled (ICF/DD) provides institutional care for individuals with developmental disabilities. A developmental disability is a disorder or syndrome that is attributable to intellectual disability, cerebral palsy, autism, spina bifida, Down syndrome, Phelan-McDermid syndrome, 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.⁴²

ICF/DDs are licensed and regulated by the Agency for Health Care Administration (AHCA) under Part VIII of ch. 400, F.S., and Chapter 59A-26, F.A.C. ICF/DDs provide the following services: nursing services, activity services, dental services, dietary services, pharmacy services, physician services, rehabilitative care services, room/bed and maintenance services and social services.⁴³

ICF/DD services are only covered by the Medicaid program. Individuals who have a developmental disability and who meet Medicaid eligibility requirements may receive services in an ICF/DD. ICF/DDs are institutional placements and are reimbursed for two levels of care⁴⁴, which are based on the client's mobility:

- ICF Level of Reimbursement One – for recipients who are ambulatory or self-mobile using mechanical devices and are able to transfer themselves without human assistance, but may require assistance and oversight to ensure safe evacuation;

³⁷ Supra FN 28.

³⁸ Agency for Persons with Disabilities, *APD iConnect*, available at <https://apd.myflorida.com/waiver/iconnect/> (last accessed March 27, 2020).

³⁹ Supra FN 28.

⁴⁰ Agency for Persons with Disabilities, *Provider Advisory #2020-002: APD iConnect Schedule & Requirements*, January 17, 2020, available at <https://apd.myflorida.com/providers/advisories.htm> (last accessed March 27, 2020).

⁴¹ Id.

⁴² See s. 393.063(12), F.S.

⁴³ Agency for Health Care Administration, *Intermediate Care Facility for Individuals with Intellectual Disabilities (ICF/DD) Services*, available at: https://ahca.myflorida.com/medicaid/Policy_and_Quality/Policy/behavioral_health_coverage/bhfu/Intermediate_Care.shtml (last visited March 17, 2020).

⁴⁴ Agency for Health Care Administration, *Intermediate Care Facility Rates*, available at https://ahca.myflorida.com/medicaid/cost_reim/icf_rates.shtml (last visited March 17, 2020).

- ICF Level of Reimbursement Two – for recipients who are capable of mobility only with human assistance or require human assistance to transfer to or from a mobility device or require continuous medical and nursing supervision; and
- ICF Level of Reimbursement Three – for recipients who have severe behavioral needs.⁴⁵

The average reimbursement rate for a resident in an ICF/DD in FY 2019-20 is \$395.27 per day.⁴⁶

While the majority of individuals who have a developmental disability live in the community, a small number live in ICF/DDs. Currently, there are 88 privately owned ICF/DD facilities in Florida, and 11 ICF/DDs that are operated by the state. As of January 2020, the ICF/DDs were 95.7 percent occupied, with 1,971 individuals in 2,060 possible beds.⁴⁷ There are also 11 ICF/DDs that are operated by the state.

Choice Counseling

APD is required to provide services to clients in the least restrictive setting appropriate for each client.⁴⁸ In 1999, the U.S. Supreme Court found the unjustified segregation of people with disabilities is a form of unlawful discrimination under the Americans with Disabilities Act (ADA).⁴⁹ The Court held that states are required to provide community-based services for people with disabilities who would otherwise be entitled to institutional services when:

- Such placement is appropriate;
- The affected person does not oppose such treatment; and,
- The placement can be reasonably accommodated, taking into account the resources available to the state and the needs of other individuals with disabilities.⁵⁰

These principles are reflected throughout chapter 393 of the Florida Statutes, which establishes a framework used by APD to match clients with appropriate services.

APD is required to provide a prospective waiver client information about all residential options available, and the potential to receive home and community-based services through the iBudget program.⁵¹ The process of providing a client with information on the full range of services from which the client may choose is otherwise known as choice counseling. The choice counseling process includes reviewing residential options, identifying options for meaningful daily activities, and identifying what services will be medically necessary in the community. If possible, the client should have opportunities to visit living settings of interest as part of their decision-making process.⁵²

APD provides choice counseling to current residents of ICF/DD facilities, to assist them in moving from the Medicaid institution to the community under the iBudget waiver.⁵³ Choice counseling is even more

⁴⁵ This is a new level of reimbursement created by the 2020 General Appropriations Act (HB 5001 specific appropriation 224), and it is subject to veto before it becomes law.

⁴⁶ Agency for Health Care Administration, *Agency Bill Analysis for HB 1163 of 2020*, January 4, 2020.

⁴⁷ Florida Medicaid ICF/IID Rate Study Report, prepared by Navigant for the Florida Agency for Health Care Administration, January 27, 2020 (on file with Health Market Reform Subcommittee staff).

⁴⁸ S. 393.13, F.S.

⁴⁹ *Olmstead v. L.C.*, 527 U.S. 581 (1999). For more information on the ADA, see 42 U.S.C. § 12101 et seq.

⁵⁰ U.S. Department of Health and Human Services, *Serving People with Disabilities in the Most Integrated Setting: Community Living and Olmstead*, available at <https://www.hhs.gov/civil-rights/for-individuals/special-topics/community-living-and-olmstead/index.html> (last accessed March 23, 2020).

⁵¹ Rule 59G-13.080, F.A.C.

⁵² *Supra* FN 28.

⁵³ *Id.* APD agreed to provide choice counseling to residents of ICF/DDs as part of the settlement agreement in *Dykes v. Dudek* (4:11cv116/RS-WCS, N.D. Fla. Oct. 14, 2011). If the client or legal representative expresses interest in moving to home and community-based services, APD has a process to facilitate transitioning to such services based upon the individualized needs of the client. The client or their legal representative may express interest in transitioning at any given time, not only during the annual choice counseling session. For individuals that are transitioning out of the ICF/DD into the community, follow up visits by regional staff are required at the two week and ninety-day interval from the date of discharge unless circumstances of the individual warrant more

important for clients considering a move into an institution – or whom APD thinks should be institutionalized. APD indicates the agency provides choice counseling to current waiver clients considering a move to an ICF/DD.⁵⁴ However, unlike the choice counseling APD provides for placements within the waiver, or for new waiver applicants, the agency has no rules, policies or procedures guiding or documenting this type of choice counseling. It is unclear whether and how APD actually provides this service to individuals currently receiving community-based services under the iBudget waiver.

Maladaptive Behaviors

Maladaptive behaviors are those behaviors by persons with developmental disabilities that are disruptive, destructive, aggressive, or significantly repetitive.⁵⁵

The Agency for Persons with Disabilities (APD) developed a Global Behavioral Service Need Matrix (Matrix) to classify the severity of a person’s maladaptive behavior for purposes of its home and community based waiver services, or iBudget, program, which is the Medicaid waiver program for persons with developmental disabilities.⁵⁶ The Matrix categorizes symptoms of maladaptive behaviors such as behavior frequency, behavioral impact, physical aggression to others, police involvement, property destruction, and elopement/wandering, among others. Each symptom is ranked on a scale of one to six, with one being the least severe and six being the most severe. If a symptom is not present, it is ranked as a zero. Based on a person’s behavior score, the person will be evaluated for services. The initial evaluation period is 12 months and then the frequency of evaluations afterwards depends on the severity of the person’s score, with a need level of six being evaluated more frequently than a need level of one.⁵⁷

According to APD, 661 people within its iBudget program have higher level Matrix scores of 4, 5 or 6. The table below shows the average annual cost for individuals at these levels within the APD home-and-community-based services program.⁵⁸

Global Behavioral Service Need Matrix Level	Average Annual APD Cost
4	\$132,777.73
5	\$138,476.51
6	\$158,823.46

Certificates of Need (CON)

In Florida, a CON is a written statement issued by AHCA evidencing community need for a new, converted, expanded, or otherwise significantly modified health care facility or health service.⁵⁹

Florida’s CON program was created in 1973. From 1974 through 1986, the specifics of the program were largely dictated by the federal National Health Planning and Resources Development Act of 1974

frequent visits. The WSC is required to have frequent face-to-face contact during the ninety-day transition period and are required to provide ongoing monitoring of the service delivery to ensure the individual’s needs are met.

⁵⁴ Supra FN 28.

⁵⁵ Fulton, Elizabeth et al. “Reducing maladaptive behaviors in preschool-aged children with autism spectrum disorder using the early start denver model.” *Frontiers in pediatrics* vol. 2 40. available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4023017/> (last visited March 17, 2020).

⁵⁶ Available at <http://apdcares.org/news/news/2011/ib-matrix-instructions.pdf> (last visited March 17, 2020). ICF/DD services are not included in this program, which was created to provide home and community-based services, not institutional services. APD waiver clients who require or choose institutionalization can leave the waiver program and be placed in an ICF/DD covered by the traditional Medicaid program.

⁵⁷ Id.

⁵⁸ Agency for Persons with Disabilities, email from Jeff Ivey, Legislative Affairs Director, Feb. 3, 2020 (on file with staff of the Health Market Reform Subcommittee).

⁵⁹ S. 408.036, F.S.

(“the Act”), which established minimum requirements regarding the type of services subject to CON review, review procedures, and review criteria.⁶⁰ Each state was required to have a CON program in compliance with the Act as a condition for obtaining federal funds for health programs. The Act was repealed in 1986. Florida has repealed CON for various programs; the current CON program only applies to nursing homes, hospices, and ICF/DDs.

A CON is predicated on a determination of need. The future need for services and projects is known as the “fixed need pool”⁶¹, which AHCA publishes for each batching cycle. A batching cycle is a means of grouping, for comparative review, CON applications submitted for beds, services or programs having a like CON need methodology, or licensing category in the same planning horizon and the same applicable district or sub-district.⁶²

Upon determining that a need exists, AHCA accepts applications for CON based on batching cycles for each district. Section 408.032(5), F.S., establishes the 11 district service areas in Florida.⁶³ The CON review process consists of two batching cycles each year for ICFDDs, nursing homes, hospice programs, and hospice inpatient facilities.

At least 30 days prior to the application deadline for a batch cycle, an applicant must file a letter of intent with AHCA.⁶⁴ A letter of intent must describe the proposal, specify the number of beds sought, and identify the services to be provided and the location of the project.⁶⁵ Applications for CON review must be submitted by the specified deadline for the particular batch cycle.⁶⁶ AHCA must review the application within 15 days of the filing deadline and, if necessary, request additional information for an incomplete application.⁶⁷ The applicant then has 21 days to complete the application or it is deemed withdrawn from consideration.⁶⁸

Within 60 days of receipt of the completed applications for that batch, AHCA must issue a State Agency Action Report and Notice of Intent to Award a CON for a project in its entirety, to award a CON for identifiable portions of a project, or to deny a CON for a project.⁶⁹ AHCA must then publish the decision within 14 days.⁷⁰ If no administrative hearing is requested within 21 days of the publication, the State Agency Action Report and the Notice of Intent to Award the CON become a final order of AHCA.⁷¹

An applicant for CON review must pay a fee to AHCA when the application is submitted. The minimum CON application filing fee is \$10,000.⁷² In addition to the base fee, an applicant must pay a fee of 1.5

⁶⁰ Pub. L. No. 93-641, 42 U.S.C. §§ 300k et seq.

⁶¹ Rule 59C-1.002(19), F.A.C., defines “fixed need pool” as the identified numerical need, as published in the Florida Administrative Register, for new beds or services for the applicable planning horizon established by AHCA in accordance with need methodologies which are in effect by rule at the time of publication of the fixed need pools for the applicable batching cycle.

⁶² Rule 59C-1.002(5), F.A.C.

⁶³ District 1.—Escambia, Santa Rosa, Okaloosa, and Walton Counties; District 2.—Holmes, Washington, Bay, Jackson, Franklin, Gulf, Gadsden, Liberty, Calhoun, Leon, Wakulla, Jefferson, Madison, and Taylor Counties; District 3.—Hamilton, Suwannee, Lafayette, Dixie, Columbia, Gilchrist, Levy, Union, Bradford, Putnam, Alachua, Marion, Citrus, Hernando, Sumter, and Lake Counties; District 4.—Baker, Nassau, Duval, Clay, St. Johns, Flagler, and Volusia Counties;

District 5.—Pasco and Pinellas Counties; District 6.—Hillsborough, Manatee, Polk, Hardee, and Highlands Counties;

District 7.—Seminole, Orange, Osceola, and Brevard Counties; District 8.—Sarasota, DeSoto, Charlotte, Lee, Glades, Hendry, and Collier Counties; District 9.—Indian River, Okeechobee, St. Lucie, Martin, and Palm Beach Counties.

District 10.—Broward County; District 11.—Miami-Dade and Monroe Counties.

⁶⁴ S. 408.039(2)(a), F.S.

⁶⁵ S. 408.039(2)(c), F.S.

⁶⁶ Rule 59C-1.008(1)(g), F.A.C.

⁶⁷ S. 408.039(3)(a), F.S.

⁶⁸ Id.

⁶⁹ S. 408.039(4)(b), F.S.

⁷⁰ S. 408.039(4)(c), F.S.

⁷¹ S. 408.039(4)(d), F.S.

⁷² S. 408.038, F.S.

percent of each dollar of the proposed expenditure; however, the total fee may not exceed \$50,000.⁷³ A request for a CON exemption must be accompanied by a \$250 fee payable to AHCA.⁷⁴

CON for ICF/DDs

Prior to obtaining a license, an ICF/DD applicant must obtain CON approval from AHCA. CON is required for new ICF/DDs, and for adding beds to existing ICF/DDs.⁷⁵ Since Medicaid is the only payer, and because ICF/DD services are expensive, the CON requirement is used to manage the Medicaid provider network of ICF/DD services.

Rule 59C-1.034, F.A.C., requires the proposal of a CON applicant for a new ICF/DD to:

- Be justified in context with current legislative Medicaid appropriations for ICF/DD placements;
- Be determined by AHCA to be justified in context with the applicable review criteria; and
- Have not more than 60 beds divided into living units of not more than 15 beds.

Since 2010, there have been six ICF/DD CON applications, of which five were to replace an existing facility. The one CON application for a new ICF/DD project was submitted by Sunrise Community, Inc., in 2018, to establish a new 24-bed facility in Hardee County. AHCA denied the application, finding:⁷⁶

- The applicant failed to demonstrate the new ICF/DD project would work in harmony with APD's efforts to meet the needs of APD's clients;
- The applicant failed to demonstrate the stated need could be met by the proposed new ICF/DD beds on the timeline of the stated need; and
- Funding for the new ICF/DD is doubtful and awarding a CON cannot be justified in the context of legislative appropriations.

Effect of the Bill

iBudget Florida Program

Significant Additional Needs

The bill creates a new definition of "significant additional need" under the iBudget program, which is intended to standardize the process by which SANs are judged by APD. The bill defines a significant additional need as an additional need for medically necessary services which would place the health and safety of the client, the client's caregiver, or the public in serious jeopardy if not met. The term does not exclude services for an additional need that the client requires in order to remain in the least restrictive setting, including, but not limited to, employment services and transportation services. The bill specifies that a SAN request may only be approved after determination of a client's initial allocation, and after a waiver support coordination organization has determined that non-waiver resources are not available to support the demonstrated need. The definition of significant additional need included in the bill replaces current law language outlining patient needs that may be considered as part of a SANs determination.

The bill also dictates that all SANs determinations be made by staff housed at APD's headquarters, rather than by staff in regional or local offices. The bill requires APD to use this centralized approach to

⁷³ Id.

⁷⁴ S. 408.036(4), F.S., and Rule 59C-1.005(2)(g), F.A.C.

⁷⁵ S. 408.036(1)(a), F.S.

⁷⁶ AHCA, State Agency Action Report on Application for Certificate of Need, Sunrise Community, Inc., August 17, 2018, CON #10541, available at https://ahca.myflorida.com/MCHQ/CON_FA/Batching/pdf/10541.pdf (last visited March 17, 2020).

ensure consistent application of medical necessity criteria, and provide relevant staff with opportunities for targeted training, quality assurance, and inter-rater reliability.

Waiver Support Coordination

The bill requires all WSCs to be employed by a qualified organization to be reimbursed for services, meaning that APD will no longer allow independent WSCs to serve iBudget clients. In order to be qualified, a waiver support coordination organization must:

- Employ at least 4 WSCs;
- Maintain a code of ethics and a disciplinary process that apply to all WSCs;
- Comply with APD cost-containment initiatives;
- Require WSCs to ensure that client budgets are linked to need;
- Require WSCs to perform all duties and meet all standards outlined in the waiver coverage handbook;
- Prohibit outside employment of WSCs if such employment limits availability of a WSC to waiver clients;
- Educate clients and their families about neglect, abuse, and exploitation;
- Instruct clients and their families about mandatory reporting requirements for neglect, abuse, and exploitation;
- Submit within set timeframes all documentation for SANs requests;
- Require WSCs to complete training and professional development approved by APD;
- Require WSCs to complete a competency-based exam approved by APD; and,
- Implement a mentoring program approved by APD for WSCs with less than 12 months of direct experience.

The bill requires APD to require a qualified organization to report any violations of ethical or professional conduct by employed WSCs to the agency. The bill requires the agency to establish a publicly-accessible registry of all WSCs, which must include information on any reported conduct violations.

Solo WSCs will no longer qualify to perform this work. Similarly, some existing WSCs or support coordination agencies may not meet the criteria of a qualified organization. In such cases, APD clients would need to choose a different support coordinator who is employed by a qualified organization. APD will need to ensure that all waiver clients have WSCs through a qualified organization.⁷⁷

The bill also authorizes APD to impose penalties on a qualified waiver support coordination organization that is noncompliant with any applicable laws or rules. These penalties may include a moratorium on new client assignments, an administrative fine, a plan of remediation, or termination of the organization's waiver services agreement.

iConnect Data Management System

The bill requires all service providers contracted with APD to use the iConnect data management system to bill for services. All service documentation will need to be submitted via iConnect before a provider may be reimbursed for services furnished to an iBudget client. By using a single billing and records management platform, APD may be able to improve administrative efficiency within the iBudget program.

Four-Tiered Waiver System

⁷⁷ Supra FN 28.

The bill repeals portions of s. 393.0661, F.S., which required AHCA, in consultation with APD, to develop and seek federal approval for a four-tier waiver system serving clients with developmental disabilities whose needs are ranked based on living situations. This requirement was established by the Legislature in 2007, as part of a comprehensive redesign to prioritize services for individuals with the greatest demonstrated needs and manage expenditures.⁷⁸

This four-tiered waiver structure was later superceded by legislation establishing the current iBudget waiver program.⁷⁹ Accordingly, the statutory references to the four-tier waiver program are now obsolete.

iBudget Overspending

The bill repeals a portion of s. 393.0661, F.S. requiring APD to redesign the iBudget waiver in response to program funding deficits. APD expenditures for the waiver have consistently and significantly exceeded legislative appropriations. In Fiscal Year 2017-2018, APD exceeded its legislative appropriation by \$57 million.⁸⁰ In Fiscal Year 2018-2019, excess spending totaled \$108 million⁸¹, and APD is projected to exceed Fiscal Year 2019-2020 appropriations by \$134 million.⁸² The Legislature has appropriated funds to cover these overexpenditures, while also directing APD to develop cost-containment initiatives preventing future deficits.

The bill repeals a directive from the Legislature, first adopted in 2011⁸³, requiring APD to develop and submit a waiver redesign plan if program deficits continue in the current fiscal year. This section of law has been updated on several occasions, with the most recent revision in 2019. APD was required to submit a waiver redesign report to the Legislature by September 30, 2019, including a plan to rein in excessive spending.⁸⁴

APD submitted the waiver redesign plan timely in 2019.⁸⁵ The APD proposals center on mechanisms to reduce deficit spending by increasing legislative appropriations and shifting APD costs to other state agencies.⁸⁶ The bill includes various, other, components of the APD plan,⁸⁷ and eliminates the requirement to submit a plan to address spending deficits in future.

The bill preserves the remainder of current law language in s. 393.0661, F.S., relating to premiums and cost sharing, rate adjustments, the ability of AHCA to seek federal approval to amend waivers as needed, and the responsibility of APD to submit certain reports to the Governor and the Legislature. The bill moves these provisions to s. 393.0662, F.S., which outlines the administration of individual allocations under iBudget.

Intermediate Care Facilities for the Developmentally Disabled

⁷⁸ Ch. 2007-64, L.O.F.

⁷⁹ Ch. 2010-157, L.O.F.

⁸⁰ Agency for Persons with Disabilities, *Home and Community Based Services (HCBS) Waiver Monthly Suplus-Deficit Report for Waiver Program Expenditures: FY 2018-19*, October 31, 2019 (On file with staff of the Health & Human Services Committee).

⁸¹ Id.

⁸² Agency for Persons with Disabilities, *Home and Community Based Services (HCBS) Waiver Monthly Suplus-Deficit Report for Waiver Program Expenditures: FY 2019-20*, March 31, 2020, available at <https://apd.myflorida.com/publications/reports/> (last accessed March 31, 2020).

⁸³ Ch. 2011-135, L.O.F.

⁸⁴ Ch. 2019-116, L.O.F. The report was required to include: budget recommendations designed to restrict spending to budgeted amounts based on alternatives to the iBudget and four-tiered waiver models; identification of core services essential for securing client health and safety; recommendations for eliminating services not affordable based on available resources; and, modifications to waiver support coordination services designed to improve management of service utilization and increase accountability.

⁸⁵ Agency for Persons with Disabilities, *2019 iBudget Waiver Redesign*, September 30, 2019, available at <https://www.apd.myflorida.com/docs/Waiver%20Redesign%20Plan%20Final.pdf> (last viewed March 31, 2020).

⁸⁶ Id. at 22-24.

⁸⁷ For example, the centralization of SANs decisions and the restructuring of WSC contract qualifications were proposed in the APD plan. Id. at 22-24; 42-43; 49-50.

The bill amends s. 408.036, F.S., to create a CON exemption for a new ICF/DD which has a total of 24 beds, comprising three eight-bed homes, for use by individuals exhibiting severe maladaptive behaviors and co-occurring psychiatric diagnoses requiring increased levels of behavioral, medical, and therapeutic oversight.

The bill limits the number of CON exemptions authorized under the bill to three.

The bill includes sunset provisions to repeal the continued licensure requirements and the statutory authority for AHCA to grant the CON exemption created by the bill on July 1, 2022, unless reviewed and saved from repeal by the Legislature.

To obtain the exemption, the applicant must not have had a license denied, revoked, or suspended within the 36 months preceding the request for exemption and must have at least 10 years of experience serving individuals with severe maladaptive behaviors in this state. It is unknown how many providers would meet these two criteria, and be eligible to apply for a CON exemption under the bill.

The bill also amends s. 400.962, F.S., to establish additional licensure and application requirements for an ICF/DD with a CON exemption under the bill, including:

- Each eight-bed home must be co-located on the same property with two other eight-bed homes and must serve individuals with severe maladaptive behaviors and co-occurring psychiatric diagnoses.
- The total number of beds per home within the facility may not exceed eight, with each resident having his or her own bedroom and bathroom.
- A minimum of 16 beds within the facility must be designated for individuals with severe maladaptive behaviors who have been assessed using the Matrix with a score of at least Level 4 through Level 6, or assessed using criteria deemed appropriate by the AHCA regarding the need for a specialized placement in an ICF/DD.
- A state-approved staff training curriculum and monitoring requirements specific to the individuals whose behaviors require higher intensity, frequency, and duration of services.
- Available medical and nursing services 24 hours per day, 7 days per week.
- Demonstration of a history of using interventions that are least restrictive and that follow a behavioral hierarchy.
- Maintenance of a policy prohibiting the use of mechanical restraints.

The bill specifies that the exemption does not require a specific appropriation. This overrides the AHCA rule requirement that a CON for an ICF/DD be issued only if AHCA can justify the new CON in light of legislative Medicaid appropriations for ICF/DD services; that is, a determination that Medicaid has the funds to cover services in the new ICF/DD beds.

Finally, the bill requires APD to offer choice counseling to all waiver clients considering placement in an ICF/DD regarding appropriate residential placement based on the needs of the individual. This counseling is an extension of APD practices aimed at placing each client in the least restrictive setting for the client. The choice counseling requirement may prevent APD from steering a client to an institutional care setting when services may be provided in a community setting.

Subject to the Governor's veto powers, the bill takes effect on July 1, 2021.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill has an indeterminate fiscal impact on APD, and will have a significant, negative fiscal impact on AHCA.

APD

It is unclear how the provisions of the bill will impact iBudget waiver expenditures. The centralization of the SANs process could lead to either a reduction or an increase in SANs approvals. The requirement for WSCs to be employed by a qualified waiver support coordination organization could reduce operational costs if it increases fidelity to cost-containment initiatives.

AHCA

The bill's ICF/DD CON exemptions will have a significant, but indeterminate, negative fiscal impact on the Medicaid program, within AHCA. The bill limits the number of CON exemptions that may be granted under the bill to three.

The Legislature appropriates specific allocations for Medicaid ICF/DD payments, so the establishment of new ICF/DDs under the bill would be paid for with the existing allocation unless the Legislature appropriates additional funds. According to AHCA, if more facilities and recipients are added to the program, the per day reimbursement rate for facilities would decrease without an additional appropriation.⁸⁸

The following estimates assume that all the patients of the new ICF/DDs are not currently served in the APD home and community-based care waiver. The estimates also assume a 95% occupancy rate of 3 new ICF/DDs with 24 beds each.

The weighted average rate for a resident in an ICF/DD in FY 2019-20 is \$395.27 per day, and facilities currently have an average occupancy rate of 95%. Based on these figures, the additional estimated annual funding for each new, 24 bed facility is \$3,289,437. (24 beds x .95 occupancy = 22.8 beds x \$395.27 per day = \$9,012.16 x 365 days = \$3,289,436.94.) The bill may result in additional annual Medicaid **expenditures** of \$9,868,311. (\$3,289,437 per facility x 3 facilities = **\$9,868,311.**)

The House proposed budget for FY 2020-21 includes a new payment rate to ICF/DDs of \$562 per day for individuals with severe behavioral needs.⁸⁹ If this provision is adopted in the budget for FY 2020-21, the additional estimated annual funding for a 24 bed facility is \$4,676,964. (24 beds x .95 occupancy = 22.8 beds x \$562 per day = \$12,813.60 x 365 days = \$4,676,964.) At most, the bill may result in additional annual Medicaid **expenditures** of \$14,030,892. (\$4,676,964 per facility x 3 facilities = **\$14,030,892.**)

The following estimates assume that all of the new ICF/DD beds will be utilized by current APD iBudget clients. The estimates also assume a 95% occupancy rate of 3 new ICF/DDs with 24 beds each.

The average annual cost for the 661 APD iBudget clients with scores of 4 or higher on the global behavioral matrix is \$143,359.23.⁹⁰

The annual cost for a Medicaid recipient in an ICF/DD under the current daily reimbursement rate is \$137,059.87. (\$395.27 daily rate x 365 days = \$144,273.55 x .95 occupancy = \$137,059.87.) If passed, the bill would result in annual savings in Medicaid expenditures of \$6,299.36 for each individual that switches from home and community-based care to institutional ICF/DD care. (\$143,359.23 APD iBudget recipients - \$137,059.87 ICF/DD residents = +\$6,299.36.) The bill may result in annual **savings** of \$453,553.92. (3 facilities x 24 beds = 72 beds x \$6,299.36 annual savings per individual = **\$453,553.92.**)

The annual cost for a Medicaid recipient in an ICF/DD under the new daily reimbursement rate in House budget is \$194,873.50.⁹¹ (\$562 daily rate x 365 days = \$205.130 x .95 occupancy = \$194,873.50. If passed, the bill would result in additional Medicaid expenditures of \$57,813.63 for each individual that switches from home and community-based care to institutional ICF/DD care. (\$194,873.50 ICF/DD residents - \$143,359.23 APD iBudget recipients = \$57,813.63). The

⁸⁸ Supra FN 46.

⁸⁹ 2020 General Appropriations Act, HB 5001, specific appropriation 224.

⁹⁰ Supra FN 58.

⁹¹ Supra FN 89.

bill may result in additional annual Medicaid **expenditures** of \$4,162,581.36. (3 facilities x 24 beds = 72 beds x \$57,813.63 annual cost increase per individual = **\$4,162,581.36**.)

As detailed above (see bold totals), the bill could have a fiscal impact ranging from annual savings of \$453,553.92 to annual expenditures of \$14,030,892.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Service providers contracted with APD may incur new information technology-related expenses in order to seek reimbursement for services through the iConnect platform. While APD is working to make the platform interoperable with existing data management systems, providers may still be required to invest in compatible software or hardware.

Changes to waiver support coordination services will impact the employment status of support coordinators. Solo waiver support coordinators would need to join an existing support coordination agency or join with other support coordinators to create a new qualified organization to continue providing services, which may reduce their income.

D. FISCAL COMMENTS:

None.