

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL: CS/SB 1854

INTRODUCER: Children, families, and Elder Affairs and Senator Farmer

SUBJECT: Defendants with a Traumatic Brain Injury

DATE: March 29, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Delia</u>	<u>Cox</u>	<u>CF</u>	<u>Fav/CS</u>
2.	<u>Siples</u>	<u>Jones</u>	<u>CJ</u>	<u>Pre-meeting</u>
3.	_____	_____	<u>AP</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1854 modifies the definition of “intellectual disability” for the purpose of declaring criminal defendants deemed incompetent to proceed to include certain individuals with a traumatic brain injury (TBI). The bill provides a definition for TBI in the specific context of individuals with intellectual disabilities.

The bill also requires the Agency for Persons with Disabilities (APD) to assist individuals deemed incompetent to proceed due to a TBI with applying for the long-term care managed care program under ch. 409, F.S., if the criminal charges against such an individual have been dismissed.

The bill may have an indeterminate negative fiscal impact on the APD due to a potential increase in the number of individuals committed to state-operated, in-patient commitment facilities, and due to the provision that requires the APD to assist individuals with applying to the long-term care managed care program. See Section V. Fiscal Impact Statement.

The bill is effective July 1, 2021.

II. Present Situation:

Traumatic Brain Injury

A TBI is caused by a bump, blow, or jolt to the head or a penetrating head injury that disrupts the normal function of the brain.¹ TBIs vary in terms of severity; mild TBIs may cause headaches, fatigue, lethargy, dizziness, and lightheadedness,² while more serious TBIs can result in the same signs and symptoms as mild TBIs, as well as repeated nausea or vomiting, a persistent or worsening headache, seizures, numbness or weakness in the hands or feet, and loss of coordination.³ Regardless of the severity of the TBI, it can have adverse effects on all aspects of social functioning, including employment, social relationships, independent living, functional status, and leisure activities.⁴

TBI and the Criminal Justice System

Approximately 25-87 percent of incarcerated inmates reported sustaining at least one TBI, compared to 8 percent of the general population.⁵ This discrepancy between populations may suggest that individuals with TBIs are more susceptible to socially unacceptable behaviors, leading to an increase in the frequency of criminal behavior among such individuals.⁶ Research suggests that because individuals with frontal lobe injury are shown to have difficulty altering future behavior based on past consequences, sentencing that emphasizes punishment will be less successful than sentencing that involves teaching alternative coping strategies.⁷

Criminal Liability and Mental Health or Intellectual Disability

Chapter 916, F.S., governs the state forensic system, a network of state facilities and community services for persons with mental health issues involved with the criminal justice system. The forensic system serves defendants deemed incompetent to proceed or not guilty by reason of insanity.

If a defendant is suspected of being incompetent, the court, defense counsel, or the State may file a motion to have the defendant's cognitive state assessed.⁸ If the motion is granted, court-appointed experts will evaluate the defendant's cognitive state.⁹ The defendant's competency is then determined by the judge in a subsequent hearing.¹⁰ If the defendant is found to be

¹ The Centers for Disease Control and Prevention, *Basic Information about Traumatic Brain Injury and Concussion*, March 6, 2019, available at <http://www.cdc.gov/traumaticbraininjury/basics.html> (last visited March 25, 2021).

² Erin Bagalman, *Traumatic Brain Injury Among Veterans*, Congressional Research Service, January 4, 2013, p. 3, available at http://www.ncsl.org/documents/statefed/health/TBI_Vets2013.pdf (last visited March 25, 2021).

³ *Id.*

⁴ *Id.*

⁵ Maria E. St. Pierre, Rick Parente, *Not Guilty By Reason of Brain Injury: Perception of Guilty and Sentencing*, Applied Psychology in Criminal Justice, 2018, p. 1, available at http://dev.cjcenter.org/files/apcj/St%20Pierre%20-%20Not%20Guilty.pdf_1532553960.pdf (last visited March 25, 2021).

⁶ *Id.*

⁷ *Id.* at p. 2.

⁸ Rule 3.210, Fla.R.Crim.Pro.

⁹ Section 916.12, F.S.

¹⁰ Rule 3.210, Fla.R.Crim.Pro.

competent, the criminal proceeding resumes.¹¹ If the defendant is found to be incompetent to proceed, the proceeding may not resume unless competency is restored.¹² A criminal defendant may be deemed incompetent to proceed based on mental health¹³ or intellectual disability or autism.¹⁴

Incompetent to Proceed Due to Intellectual Disability

A criminal defendant may be deemed incompetent to proceed if:

- The defendant's suspected mental condition is intellectual disability or autism;¹⁵ **and**
- The defendant does not have sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding; **or**
- The defendant has no rational, as well as factual, understanding of the proceedings against the defendant.¹⁶

Section 916.106(13), F.S., defines "intellectual disability" to have the same meaning as in s. 393.063, F.S., which defines the term to mean significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior which manifests before the age of 18 and can reasonably be expected to continue indefinitely.¹⁷

Further, s. 393.063, F.S., defines the following terms:

- "Adaptive behavior" means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community;¹⁸ and
- "Significantly subaverage general intellectual functioning" means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the agency.¹⁹

Experts in intellectual disability or autism appointed pursuant to s. 916.301, F.S., are required to consider whether the defendant meets the definition of intellectual disability or autism and, if so, consider the factors related to the issue of whether the defendant meets the criteria for competence to proceed as described above.²⁰

¹¹ Rule 3.212, Fla.R.Crim.Pro.

¹² *Id.*

¹³ This process is addressed in ss. 916.111-916.185, F.S.

¹⁴ This process is addressed in ss. 916.301-916.304, F.S.

¹⁵ Section 916.106(2), F.S., defines "autism" to have the same meaning as in s. 393.063, F.S., which is a pervasive, neurologically based developmental disability of extended duration which causes severe learning, communication, and behavior disorders with age of onset during infancy or childhood. Individuals with autism exhibit impairment in reciprocal social interaction, impairment in verbal and nonverbal communication and imaginative ability, and a markedly restricted repertoire of activities and interests.

¹⁶ Section 916.3012(1), F.S.

¹⁷ See s. 393.063(24), F.S. Additionally, s. 393.063(24), F.S., provides that, for purposes of the application of the criminal laws and procedural rules, to matters relating to pretrial, trial, sentencing, and any matters relating to the imposition and execution of the death penalty, the terms "intellectual disability" or "intellectually disabled" are interchangeable with and have the same meaning as the terms "mental retardation" or "retardation" and "mentally retarded" as defined before July 1, 2013.

¹⁸ Section 393.063(24)(a), F.S.

¹⁹ Section 393.063(24)(b), F.S.

²⁰ Section 916.3012(2), F.S.

When determining competency to proceed, an expert must consider any relevant factor including, at a minimum, the below listed factors and include in the report the defendant's capacity to:

- Appreciate the charges or allegations against the defendant;
- Appreciate the range and nature of possible penalties;
- Understand the adversarial nature of the legal process;
- Disclose to counsel facts pertinent to the proceedings;
- Manifest appropriate courtroom behavior; and
- Testify relevantly.²¹

If an expert finds a defendant incompetent to proceed, he or she must include the following in the report:

- The intellectual disability or autism causing incompetency;
- The training appropriate for the intellectual disability or autism of the defendant and an explanation of each of the possible training alternatives in order of choices;
- Availability of acceptable training and whether such training is available in the community; and
- The likelihood the defendant will attain competency under the recommended training and the probable duration of the training to restore competency, and the probability that the defendant will attain competence to proceed in the foreseeable future.²²

If appropriate, the court will involuntarily commit these individuals to the APD for competency training.²³ Individuals who present a public safety risk will receive forensic services in secure settings; in other circumstances, the court may order the conditional release of a defendant found incompetent to proceed due to intellectual disability or autism based on an approved plan for providing community-based training.²⁴

Within six months after a defendant is involuntarily admitted to a facility, the administrator of the facility must file a report with the court to determine whether the defendant should remain in the custody of the APD or at any time a defendant regains competency or no longer meets the requirements for commitment.²⁵ If a defendant remains incompetent after two years despite the APD competency training, and there is reason to believe that he or she will not gain competency in the foreseeable future, the charges against the defendant must be dismissed without prejudice.²⁶

Forensic Facilities for Individuals with Intellectual or Developmental Disabilities

The APD operates the Developmental Disabilities Defendant Program (DDDP), a 146 bed, co-ed, secure facility, located on the grounds of the Florida State Hospital in Chattahoochee,

²¹ Section 916.3012(3), F.S.

²² Section 916.3012(4), F.S.

²³ Section 916.302, F.S.

²⁴ Sections 916.302(1)(c) and 916.304(1), F.S.

²⁵ Section 916.302(2)(a), F.S.

²⁶ Section 916.303(1), F.S. When a case is dismissed without prejudice, the state may refile charges if the defendant gains competency in the future.

Florida.²⁷ The DDDP is for individuals charged with a felony crime and found to be incompetent to proceed to trial based on a developmental or intellectual disability.²⁸ Residents in the DDDP have been placed there by a court order to receive competency training and other services in accordance with their needs. This residential setting is not voluntary. During Fiscal Year 2018-19, the average daily population to whom the DDDP provided services was 145 individuals.²⁹

The mission and purpose of the DDDP is to “help the individuals acquire needed skills and supports to become competent to stand trial.”³⁰ The DDDP utilizes a progressive level (levels 1-4) and point system to assess and track the progress of residents.³¹ Residents advance through the levels based on the absence of socially inappropriate behavior and earn points for desired behaviors.³²

The APD operates a secure facility (Pathways in Marianna, FL) wherein individuals are committed when they are deemed incompetent to stand trial due to their disability, and have had their charges dismissed.³³ The program conducts training for residents to assist in their eventual return to the community.³⁴ Pathway’s active treatment process focuses on identifying service needs and developing training goals, and like the DDDP, utilizes progressive levels and a point system.³⁵ A wide variety of services are offered including behavioral, vocational, rehabilitation therapy and recreation, medical, dietary, dental, and religious services.³⁶

Statewide Medicaid Managed Care Long-Term Care Program

The Statewide Medicaid Managed Care Long-Term Care program (SMMC LTC) is a Medicaid waiver program which provides both home and community based services (HCBS) and nursing facility services. HCBS may be provided in a setting such as a recipient’s home, an assisted living facility, or an adult family care home.³⁷

The purpose of the SMMC LTC program is to provide services to eligible individuals age 18 or older who need long-term services and supports, including individuals over the age of 18 with a diagnosis of cystic fibrosis, AIDS, or a traumatic brain or spinal cord injury.³⁸ The SMMC LTC program is designed to delay or prevent institutionalization and allow enrollees to maintain

²⁷ See Office of Program Policy Analysis and Governmental Accountability, *Agency for Persons with Disabilities*, available at <https://oppaga.fl.gov/ProgramSummary/ProgramDetail?programNumber=5060> (last visited March 25, 2021).

²⁸ *Id.*

²⁹ *Id.*

³⁰ The APD, *Little known facts about APD’s Developmental Disabilities Defendant Program (DDDP)*, available at <https://apdcare.wordpress.com/tag/dddp/> (last visited March 25, 2021) (hereinafter cited as “DDDP Little Known Facts”).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Agency for Health Care Administration, *Facts About the 2017 Florida Medicaid Waiver Consolidation*, available at https://ahca.myflorida.com/medicaid/Policy_and_Quality/Policy/federal_authorities/federal_waivers/docs/2017_Waiver_Consolidation_Overview_FINAL_092817.pdf (last visited March 25, 2021).

³⁸ Agency for Health Care Administration, *Florida Medicaid’s Covered Services and Waivers*, available at https://ahca.myflorida.com/medicaid/policy_and_quality/policy/federal_authorities/federal_waivers/LTC.shtml (last visited March 25, 2021).

stable health while receiving services at home and in the community.³⁹ Individuals in the program may also be served in a nursing facility setting.⁴⁰

Individuals with traumatic brain injuries or spinal cord injuries desiring to receive services under the SMMC LTC program must meet the following criteria:

- Be age 65 or older and eligible for Medicaid; or
- Be age 18 or older and eligible for Medicaid due to a disability; and
- Be determined by the Comprehensive Assessment and Review for Long-Term Care Services to be at nursing home level of care or hospital level of care for persons with cystic fibrosis.⁴¹

III. Effect of Proposed Changes:

The bill expands the category of defendants that may be evaluated and determined to be incompetent to proceed based on an intellectual disability by amending the definition of “intellectual disability” in s. 916.106, F.S. The bill removes the cross-reference of s. 393.063, F.S., found in the current definition, incorporates the entire substance of the cross-referenced term, and expands the definition to include certain traumatic brain injuries.

Specifically, the bill modifies the definition of “intellectual disability” to mean “significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior which manifests before the age of 18, or significantly deficient adaptive functioning resulting from a traumatic brain injury, which can reasonably be expected to continue indefinitely.”

For the purposes of the modified definition of “intellectual disability,” the bill defines several additional terms as follows:

- “Adaptive behavior” means “the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community;”
- “Significantly deficient in adaptive functioning” means “the extreme limitation of one, or marked limitation of two, of the following areas of mental functioning:
 - Understanding, remembering, or applying information;
 - Interacting with others;
 - Concentrating, persisting, or maintaining pace; or
 - Adapting or managing oneself;”
- “Significantly subaverage general intellectual functioning” means “performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the agency;” and
- “Traumatic brain injury” means “a disruption in the normal function of the brain which can be caused by a bump, blow, or jolt to the head or a penetrating head injury.”

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ The AHCA, *Who Can Receive Long-Term Care Services*, available at https://ahca.myflorida.com/Medicaid/statewide_mc/ltc_who.shtml (last visited March 25, 2021).

Therefore, any criminal defendant who meets the expanded definition of intellectual disability described above and who is found by experts and the court to be incompetent to proceed may be committed to the APD, retained, and provided competency restoration training. This will include defendants who have traumatic brain injuries that result in significant deficiencies in adaptive functioning who would not currently be eligible to receive treatment or have his or her charges dismissed as a result of incompetency in accordance with ch. 916, F.S.

The bill also requires the APD to assist intellectually disabled defendants with a TBI to apply for the long-term care managed care program under ch. 409, F.S., once the criminal charges against such a defendant have been dismissed.

The bill is effective July 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill does not appear to require cities and counties to expend funds or limit their authority to raise revenue or receive state-shared revenues as specified by Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill may have a negative fiscal impact on the APD and state-operated inpatient commitment treatment facilities who will be required to accept defendants deemed incompetent to proceed due to a TBI. The number of defendants and the cost to inpatient facilities are both unknown. Therefore, the fiscal impact of the bill on these facilities is indeterminate.

The bill may have a further negative fiscal impact to the APD as it may incur costs related to assisting individuals apply to the long-term care managed care program. The fiscal impact of this requirement is indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill amends sections 916.106 and 916.303 of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)**CS by Children, Families, and Elder Affairs on March 23, 2021:**

The Committee Substitute:

- Modifies the definition of “intellectual disability” for the purpose of declaring criminal defendants deemed incompetent to proceed to include certain individuals with a TBI;
- Provides a definition for TBI in the specific context of individuals with intellectual disabilities; and
- Requires the Agency for Persons with Disabilities to assist individuals deemed incompetent to proceed due to a TBI with applying for the long-term care managed care program under ch. 409, F.S., if the criminal charges against such an individual have been dismissed.

B. Amendments:

None.