

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

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

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Prepared By: The Professional Staff of the Appropriations Subcommittee on Health and Human Services

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BILL: SB 142

INTRODUCER: Senator Hays

SUBJECT: Sovereign Immunity for Dentists and Dental Hygienists

DATE: February 3, 2014

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Stovall</u>	<u>Stovall</u>	<u>HP</u>	<b>Favorable</b>
2.	<u>Munroe</u>	<u>Cibula</u>	<u>JU</u>	<b>Favorable</b>
3.	<u>Brown</u>	<u>Pigott</u>	<u>AHS</u>	<b>Pre-meeting</b>
4.	_____	_____	<u>AP</u>	_____

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**I. Summary:**

SB 142 expands the circumstances under which a volunteer dentist or dental hygienist is not personally liable for negligence. Under existing law, the liability protections apply to free dental services provided to low-income patients pursuant to a government contract. Under the bill, the dentist or dental hygienist may accept voluntary contributions for the cost of laboratory work and retain the protections from personal liability.

The bill does not change the liability of the government entity that contracts with the dentist or dental hygienist to provide the free dental services. The government entity remains liable, subject to the state's sovereign immunity limitations, for any negligent dental services.

**II. Present Situation:**

**Access to Health Care Act**

Section 766.1115, F.S., is entitled "The Access to Health Care Act" (the Act). The Act was enacted in 1992 to encourage health care providers to provide care to low-income persons.<sup>1</sup> This section extends sovereign immunity to health care providers who execute a contract with a governmental contractor and who provide volunteer, uncompensated health care services to low-income individuals as an agent of the state. These health care providers are considered agents of

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<sup>1</sup> Low-income persons are defined in the Act as a person who is Medicaid-eligible, a person who is without health insurance and whose family income does not exceed 200 percent of the federal poverty level, or any eligible client of the Department of Health who voluntarily chooses to participate in a program offered or approved by the department. Section 766.1115(3)(e), F.S. A single individual whose annual income does not exceed \$22,980 is at 200 percent of the federal poverty level using Medicaid data. See *2013 Poverty Guidelines, Annual Guidelines* at: <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Eligibility/Downloads/2013-Federal-Poverty-level-charts.pdf> (last visited December 13, 2013).

the state under s. 768.28(9), F.S., for purposes of extending sovereign immunity while acting within the scope of duties required under the Act.

Health care providers under the Act include:<sup>2</sup>

- A birth center licensed under ch. 383, F.S.<sup>3</sup>
- An ambulatory surgical center licensed under ch. 395, F.S.<sup>4</sup>
- A hospital licensed under ch. 395, F.S.<sup>5</sup>
- A physician or physician assistant licensed under ch. 458, F.S.<sup>6</sup>
- An osteopathic physician or osteopathic physician assistant licensed under ch. 459, F.S.<sup>7</sup>
- A chiropractic physician licensed under ch. 460, F.S.<sup>8</sup>
- A podiatric physician licensed under ch. 461, F.S.<sup>9</sup>
- A registered nurse, nurse midwife, licensed practical nurse, or advanced registered nurse practitioner licensed or registered under part I of ch. 464, F.S., or any facility that employs nurses licensed or registered under part I of ch. 464, F.S., to supply all or part of the care delivered under the Act.<sup>10</sup>
- A dentist or dental hygienist licensed under ch. 466, F.S.<sup>11</sup>
- A midwife licensed under ch. 467, F.S.<sup>12</sup>
- A health maintenance organization certificated under part I of ch. 641, F.S.<sup>13</sup>
- A health care professional association and its employees or a corporate medical group and its employees.<sup>14</sup>
- Any other medical facility the primary purpose of which is to deliver human medical diagnostic services or which delivers nonsurgical human medical treatment, and which includes an office maintained by a provider.<sup>15</sup>
- A free clinic that delivers only medical diagnostic services or nonsurgical medical treatment free of charge to all low-income recipients.<sup>16</sup>
- Any other health care professional, practitioner, provider, or facility under contract with a governmental contractor, including a student enrolled in an accredited program that prepares the student for licensure as a physician, physician assistant, nurse, or midwife.<sup>17</sup>
- Any nonprofit corporation qualified as exempt from federal income taxation under s. 501(a) of the Internal Revenue Code, and described in s. 501(c) of the Internal Revenue Code, that delivers health care services provided by the listed licensed professionals, any federally

<sup>2</sup> Section 766.1115(3)(d), F.S.

<sup>3</sup> Section 766.1115(3)(d)1., F.S.

<sup>4</sup> Section 766.1115(3)(d)2., F.S.

<sup>5</sup> Section 766.1115(3)(d)3., F.S.

<sup>6</sup> Section 766.1115(3)(d)4., F.S.

<sup>7</sup> Section 766.1115(3)(d)5., F.S.

<sup>8</sup> Section 766.1115(3)(d)6., F.S.

<sup>9</sup> Section 766.1115(3)(d)7., F.S.

<sup>10</sup> Section 766.1115(3)(d)8., F.S.

<sup>11</sup> Section 766.1115(3)(d)9., F.S.

<sup>12</sup> Section 766.1115(3)(d)10., F.S.

<sup>13</sup> Section 766.1115(3)(d)11., F.S.

<sup>14</sup> Section 766.1115(3)(d)12., F.S.

<sup>15</sup> Section 766.1115(3)(d)13., F.S.

<sup>16</sup> Section 766.1115(3)(d)14., F.S.

<sup>17</sup> Section 766.1115(3)(d)15., F.S.

funded community health center, and any volunteer corporation or volunteer health care provider that delivers health care services.

A governmental contractor is defined in the Act as the Department of Health (DOH), a county health department, a special taxing district having health care responsibilities, or a hospital owned and operated by a governmental entity.<sup>18</sup>

A contract under the Act must pertain to volunteer, uncompensated services. For services to qualify as volunteer, uncompensated services, the health care provider must receive no compensation from the governmental contractor for any services provided under the contract and must not bill or accept compensation from the recipient or any public or private third-party payor for the specific services provided to the low-income recipients covered by the contract.<sup>19</sup>

The Act further specifies additional contract requirements. The contract must provide that:

- The governmental contractor retains the right of dismissal or termination of any health care provider delivering services under the contract.
- The governmental contractor has access to the patient records of any health care provider delivering services under the contract.
- The health care provider must report adverse incidents and information on treatment outcomes.
- The governmental contractor or the health care provider must make patient selection and initial referrals.
- Patient care, including any follow-up or hospital care, is subject to approval by the governmental contractor.
- The health care provider is subject to supervision and regular inspection by the governmental contractor.<sup>20</sup>
- The health care provider must accept all referred patients; however, the contract may specify limits on the number of patients to be referred.<sup>21</sup>

The governmental contractor must provide written notice to each patient, or the patient's legal representative, receipt of which must be acknowledged in writing, that the provider is covered under s. 768.28, F.S., for purposes of actions related to medical negligence.<sup>22</sup>

The individual accepting services through this contracted provider cannot have medical or dental care insurance coverage for the illness, injury, or condition for which medical or dental care is sought.<sup>23</sup> Services not covered under the Act include experimental procedures and clinically unproven procedures. The governmental contractor must determine whether a procedure is covered.

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<sup>18</sup> Section 766.1115(3)(c), F.S.

<sup>19</sup> Section 766.1115(3)(a), F.S.

<sup>20</sup> Section 766.1115(4), F.S.

<sup>21</sup> Rule 64I-2.003(2), F.A.C.

<sup>22</sup> Section 766.1115(5), F.S.

<sup>23</sup> Rule 64I-2.002(2), F.A.C.

The health care provider may not subcontract for the provision of services under this chapter.<sup>24</sup>

According to the DOH, from July 1, 2011, through June 30, 2012, 12,867 licensed health care volunteers (plus an additional 9,949 clinic staff volunteers) provided 433,191 health care patient visits with a total value of \$231,530,324 under the Act.<sup>25</sup> The Florida Department of Financial Services, Division of Risk Management, reported on March 26, 2012, that nine claims had been filed against the Volunteer Health Care Provider Program under s. 766.1115, F.S., since February 15, 2000.<sup>26</sup>

Interpretation of s. 766.1115, F.S., varies across the state. In certain parts of the state, the statute is interpreted to mean that as long as there is transparency and clear proof that the volunteer provider is providing services, without receiving personal compensation, then the patient can pay a nominal amount per visit to assist in covering laboratory fees. In other parts of the state, the statute is interpreted to mean that if any monetary amount is accepted, then sovereign immunity is lost. Patients sometimes offer to pay a nominal contribution to cover some of the cost of laboratory fees that providers incur to pay third parties for items such as dentures for the patient. In many areas, the dentist is paying the cost of these fees from his or her own resources.<sup>27</sup>

### **Sovereign Immunity**

The term “sovereign immunity” originally referred to the English common law concept that the government may not be sued because “the King can do no wrong.” Sovereign immunity bars lawsuits against the state or its political subdivisions for the torts of officers, employees, or agents of such governments unless the immunity is expressly waived.

Article X, s. 13, of the Florida Constitution recognizes the concept of sovereign immunity and gives the Legislature the power to waive such immunity in part or in full by general law. Section 768.28, F.S., contains the limited waiver of sovereign immunity applicable to the state. Under this statute, officers, employees, and agents of the state will not be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function. However, personal liability may result from actions in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

Instead, the state steps in as the party litigant and defends against the claim. The recovery by any one person is limited to \$200,000 for one incident and the total for all recoveries related to one incident is limited to \$300,000.<sup>28</sup> The sovereign immunity recovery caps do not prevent a plaintiff from obtaining a judgment in excess of the caps, but the plaintiff cannot recover the excess damages without action by the Legislature.<sup>29</sup>

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<sup>24</sup> Rule 64I-2.004(2), F.A.C.

<sup>25</sup> Department of Health, *Volunteer Health Services 2011-2012 Annual Report*, available at: <http://www.floridahealth.gov/provider-and-partner-resources/getting-involved-in-public-health/volunteerism-volunteer-opportunities/vhsreportfinal12.pdf>, (last visited December 13, 2013).

<sup>26</sup> *Id.* at Appendix B.

<sup>27</sup> Conversation with representatives of the Florida Dental Association on December 11, 2013.

<sup>28</sup> Section 768.28(5), F.S.

<sup>29</sup> *Id.*

Whether sovereign immunity applies turns on the degree of control of the agent of the state retained by the state.<sup>30</sup> In *Stoll v. Noel*, the Florida Supreme Court explained that independent contractor physicians may be agents of the state for purposes of sovereign immunity:

One who contracts on behalf of another and subject to the other's control except with respect to his physical conduct is an agent and also independent contractor.<sup>31</sup>

The court examined the employment contract between the physicians and the state to determine whether the state's right to control was sufficient to create an agency relationship and held that it did.<sup>32</sup> The court explained:

Whether the [Children's Medical Services] CMS physician consultants are agents of the state turns on the degree of control retained or exercised by CMS. This Court has held that the right to control depends upon the terms of the employment contract. . . . CMS requires each consultant, as a condition of participating in the CMS program, to agree to abide by the terms published in its HRS<sup>33</sup> Manual and CMS Consultant's Guide which contain CMS policies and rules governing its relationship with the consultants. The Consultant's Guide states that all services provided to CMS patients must be authorized in advance by the clinic medical director. The language of the HRS Manual ascribes to CMS responsibility to supervise and direct the medical care of all CMS patients and supervisory authority over all personnel. The manual also grants to the CMS medical director absolute authority over payment for treatments proposed by consultants. The HRS Manual and the Consultant's Guide demonstrate that CMS has final authority over all care and treatment provided to CMS patients, and it can refuse to allow a physician consultant's recommended course of treatment of any CMS patient for either medical or budgetary reasons.

Our conclusion is buttressed by HRS's acknowledgement that the manual creates an agency relationship between CMS and its physician consultants, and despite its potential liability in this case, HRS has acknowledged full financial responsibility for the physicians' actions. HRS's interpretation of its manual is entitled to judicial deference and great weight.<sup>34</sup>

### III. Effect of Proposed Changes:

The bill expands the circumstances in which a volunteer dentist or dental hygienist is not personally liable for negligence. Under existing law, the liability protections apply to free dental services provided to low-income patients pursuant to a government contract. Under the bill, the dentist or dental hygienist may accept voluntary contributions for the cost of laboratory work and retain the protections from personal liability, provided such contributions do not exceed the actual cost of the laboratory work.

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<sup>30</sup> *Stoll v. Noel*, 694 So. 2d 701, 703 (Fla. 1997).

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

<sup>32</sup> *Id.* at 703.

<sup>33</sup> Florida Department of Health and Rehabilitative Services, *Senate Bill 1016 (2013) Fiscal Analysis* (on file with the Senate Committee on Judiciary).

<sup>34</sup> *Stoll*, 694 So. 2d at 703 (Fla. 1997) (internal citations omitted).

The bill does not change the liability of the government entity that contracts with the dentist or dental hygienist to provide the free dental services. The government entity remains liable, subject to the state's sovereign immunity limitations, for any negligent dental services.

The bill takes effect July 1, 2014.

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

#### **V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The DOH anticipates that a small number of dental laboratories will receive compensation for laboratory work for indigent patients.<sup>35</sup>

A dentist or dental hygienist may need to prepare additional documentation showing that any voluntary contribution for laboratory is reimbursement for costs, not compensation.<sup>36</sup>

C. Government Sector Impact:

None.

#### **VI. Technical Deficiencies:**

None.

#### **VII. Related Issues:**

The bill does not provide a definition of the "costs of dental laboratory work" and does not indicate what may be included as part of those costs, e.g. whether a dentist's compensation to his

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<sup>35</sup> See Department of Health, *Bill Analysis for SB 1016 (2013)*, March 13, 2013, (on file with the Senate Committee on Judiciary Committee).

<sup>36</sup> *Id.*

or her staff to coordinate laboratory work may be considered part of the costs of dental laboratory work related to the services provided to the patient.<sup>37</sup> The Legislature may wish to consider whether reimbursable costs for laboratory work should be defined.

**VIII. Statutes Affected:**

This bill substantially amends section 766.1115, Florida Statutes.

**IX. Additional Information:**

- A. **Committee Substitute – Statement of Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

None.

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

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<sup>37</sup> *Id.*