

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

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

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Prepared By: The Professional Staff of the Committee on Appropriations

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BILL: CS/SB 670

INTRODUCER: Children, Families, and Elder Affairs Committee and Senator Gaetz

SUBJECT: Child Protection Teams

DATE: February 29, 2016

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Preston</u>	<u>Hendon</u>	<u>CF</u>	<b>Fav/CS</b>
2.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	<b>Favorable</b>
3.	<u>Brown</u>	<u>Kynoch</u>	<u>AP</u>	<b>Pre-meeting</b>

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

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 670 extends sovereign immunity protections to any physician licensed in this state who is a medical director for, or a member of, a child protection team, when carrying out duties as a team member. The bill adds those physicians to the definition of an “officer, employee, or agent” in the sovereign immunity statute.

A child protection team is a group of professionals within the Department of Health (DOH) which receives referrals, primarily from child protective investigators within the Department of Children and Families (DCF) and law enforcement officers, alleging child abuse, abandonment, or neglect. The medically directed team evaluates the allegations and also provides recommendations for child safety and support services.

The bill has an indeterminate fiscal impact.

The bill’s effective date is July 1, 2016.

**II. Present Situation:**

**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 those 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 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 may 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 committed 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>1</sup> The sovereign immunity recovery caps do not prevent a plaintiff from obtaining a judgment in excess of the caps, but the plaintiff is not entitled to recover the excess damages without action by the Legislature.<sup>2</sup>

### **Child Protection Teams**

A child protection team operates under the oversight of a medical director who is a board-certified pediatrician with special training in child abuse and neglect. The physician must be approved by Children's Medical Services (CMS) at the DOH. Teams consist of additional physicians, advanced registered nurse practitioners, physician assistants, team psychologists, social workers, clerical assistance, and support personnel.<sup>3</sup>

There are currently 22 child protection teams in the state.<sup>4</sup> Each team must be available 24 hours per day, every day, to provide immediate medical diagnosis and evaluation, for consultations by phone, or for other assessment services.<sup>5</sup> The cases they receive are reported to them primarily by investigators with the DCF and local sheriff's offices, but cases are also referred by hospitals and physicians. The groups that the teams target for assessments are children who may be physically abused, sexually abused, and those who lack health care, including medically neglected children.<sup>6</sup>

The child protection team program receives funding through the DOH, Division of Children's Medical Services. The DOH contracts with a variety of community-based organizations to

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<sup>1</sup> Section 768.28(5), F.S.

<sup>2</sup> *Id.*

<sup>3</sup> Florida Department of Health, Children's Medical Services, *Child Protection Team Program Handbook*, June 2014 available at <http://www.bing.com/search?q=child+protection+team+program+handbook+children's+medical+services&src=IE-TopResult&FORM=IETRO2&conversationid=>.

<sup>4</sup> Telephone interview with Bryan Wendel and Peggy Scheuermann, Department of Health, Office of Legislative Planning, in Tallahassee, Fla. (Feb. 11, 2016).

<sup>5</sup> *Supra* at note 3.

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

provide child protection team services statewide. These groups include non-profits, universities, hospitals, and county governments.<sup>7</sup>

### **Whether Sovereign Immunity Applies to Child Protection Team Physicians**

It is not definitively settled whether all child protection team physicians are covered under sovereign immunity. While case law suggests that, under certain circumstances, the physicians are covered, the DOH does not consistently agree with that conclusion.

According to the Child Protection Team Program Policy and Procedure Handbook, “medical providers *appear* to act under the color of law and are agents of the state when they examine children allegedly abused or neglected under Section 39, F.S.”<sup>8</sup> However, whether sovereign immunity applies is determined by the degree of control exercised or retained by the state.<sup>9</sup> In *Stoll v. Noel*, the Florida Supreme Court explained that, under the appropriate circumstances, 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>10</sup>

The *Stoll* Court examined the employment contract between the CMS 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>11</sup> The manuals and guides given to physician consultants demonstrated that CMS had final authority over all care and treatment provided to CMS patients, and that CMS could refuse to allow a physician consultant’s recommended course of treatment of any CMS patient for either medical or budgetary reasons.<sup>12</sup> Furthermore, the Court’s conclusion was supported by the state’s acknowledgement that the manual creates an agency relationship between CMS and its physician consultants, and the state acknowledged full financial responsibility for the physicians’ actions. The Court stated that the state’s interpretation of its manual is entitled to judicial deference and great weight.<sup>13</sup>

The DOH, however, has cautiously applied the legal findings of *Stoll* to its contract physicians, including the child protection team physicians. The Deputy State Health Officer for Children’s Medical Services, in a 2013 memorandum to all CMS physicians, did not issue a definitive statement as to whether CMS contract physicians are deemed to be agents of the state for sovereign immunity purposes. The memorandum stated that the *Stoll* decision “does not establish a bright line legal test to determine when a CMS contracted physician will be deemed to be an

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<sup>7</sup> *Id.*

<sup>8</sup> *Supra* note 3, at 74. Emphasis supplied.

<sup>9</sup> *Stoll v. Noel*, 694 So. 2d 701, 703 (Fla. 1997).

<sup>10</sup> *Id.* at 703, quoting from the *Restatement (Second) of Agency* s. 14N (1957).

<sup>11</sup> *Id.* at 703.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

agent of the state as a matter of law” and the department would choose to evaluate each case on its own merits.<sup>14</sup> In the following year, an internal DOH memorandum stated:

Although they furnish services to children within the CMS Network, CMS providers are independent contractors and consequently are not employees or agents of the Department of Health and are personally responsible for their negligent acts.<sup>15</sup>

Accordingly, there is uncertainty at DOH as to whether all physicians working on child protection teams are protected by sovereign immunity. According to the DOH, this uncertainty has made recruiting and retaining physicians difficult and has resulted in long-term vacant positions around the state. If a physician is not covered under sovereign immunity, then he or she would likely need to obtain private medical malpractice insurance. Because the cost of obtaining medical malpractice insurance is expensive, the part-time salary one receives would be substantially diminished to the point that some physicians would not consider it worthwhile to undertake the very stressful job.<sup>16</sup>

Information supplied in support of this legislation states that no pediatrician living in Florida or elsewhere has ever applied to be the medical director of a child protection team, which means the medical directors must be proactively recruited. Recruiting staff has found that being able to offer pediatricians sovereign immunity would be a powerful tool in convincing them to accept the medical director positions.<sup>17</sup>

### III. Effect of Proposed Changes:

The bill extends sovereign immunity protection to a physician licensed in this state who is a medical director for a child protection team or a member of a child protection team. The immunity only extends to the physician while he or she is carrying out duties as a child protection team member. By expanding the definition of an “officer, employee, or agent” in the sovereign immunity statute to include these physicians, they may not be held personally liable for torts committed while working with the child protection team. In contrast, the state may be held liable up to the limits provided in statute under the state’s waiver of sovereign immunity.

The bill is effective July 1, 2016.

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<sup>14</sup> Memorandum from Dennis V. Cookro, MD, MPH, Interim Deputy Secretary for Health, Deputy State Health Officer for CMS, to All CMS Physicians, *Subject: Liability Update* (Feb. 6, 2013) (on file with the Senate Judiciary Committee).

<sup>15</sup> Memorandum from Kimberly A. Tendrich, Senior Attorney, Children’s Medical Services, to Charlotte Curtis, Interim CMS Division Director, *Subject: Applicability of Section 768.28, Florida Statutes to CMS Contractors* (Feb. 14, 2014) (on file with the Senate Committee on Judiciary).

<sup>16</sup> Correspondence and supplemental materials from Randell C. Alexander, M.D., Ph.D., Chair, Child Abuse and Injury Prevention Committee to Sen. Don Gaetz (Dec. 30, 2015) (on file with the Senate Committee on Judiciary).

<sup>17</sup> *Id.*

**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:

Under CS/SB 670, physicians who are licensed in this state and are medical directors for, or members of, a child protection team would be provided sovereign immunity. The sovereign immunity protections will eliminate the need for the physicians to obtain private insurance coverage.

## C. Government Sector Impact:

The DOH provided an initial fiscal estimate for the original bill which included a rough estimate of the state's general liability premium with the child protection teams' non-physician staff included. However, because the scope of the bill was significantly reduced to cover only the physicians on the team, those estimates are no longer accurate.<sup>18</sup> Nonetheless, the exposure to additional liability should cause the DOH's liability insurance premiums to rise by an indeterminate amount.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 768.28 of the Florida Statutes.

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<sup>18</sup> Florida Department of Health, *2016 Agency Legislative Bill Analysis of SB 670* (Nov. 3, 2015) (on file with the Senate Committee on Judiciary).

**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 January 14, 2016:**

The committee substitute limits individuals being granted sovereign immunity under the bill to physicians licensed in this state who are medical directors for or members of a child protection team, when carrying out his or her duties as a team member.

- B. **Amendments:**

None.