The Florida Senate

COMMITTEE MEETING EXPANDED AGENDA

RULES
Senator Thrasher, Chair
Senator Alexander, Vice Chair

MEETING DATE: Tuesday, April 26, 2011
TIME: 1:00 —5:30 p.m.
PLACE: *Toni Jennings Committee Room,* 110 Senate Office Building

MEMBERS: Senator Thrasher, Chair; Senator Alexander, Vice Chair; Senators Bullard, Flores, Gaetz, Gardiner, Jones, Margolis, Negron, Richter, Siplin, Smith, and Wise

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
	Consent Agenda		
1	**CS/CS/SB 416** Judiciary / Criminal Justice / Bogdanoff (Similar H 163, CS/H 411)	Public Records; Provides an exemption from public records requirements for photographs and video and audio recordings that depict or record the killing of a person. Authorizes access to such photographs or video or audio recordings by specified members of the immediate family of the deceased subject of the photographs or video or audio recordings. Provides for access to such records by local governmental entities or state or federal agencies in furtherance of official duties. Provides for future legislative review and repeal of the exemption, etc. CJ 03/28/2011 Fav/CS JU 04/12/2011 Fav/CS RC 04/26/2011	
2	**CS/CS/SB 786** Criminal Justice / Judiciary / Diaz de la Portilla	Landlord and Tenant; Allows a law enforcement officer to remove persons who trespass in a structure or conveyance or on property if the law enforcement officer receives an affidavit from an owner or mortgagee of the property. JU 03/22/2011 Fav/CS CJ 04/04/2011 Temporarily Postponed CJ 04/12/2011 Fav/CS RC 04/26/2011	
3	**SB 1990** Health Regulation	Ratification of Rules; Ratifies a specified rule for the sole and exclusive purpose of satisfying any condition on effectiveness established by a provision, which requires ratification of any rule that meets any of the specified thresholds that may likely have an adverse impact or excessive regulatory cost. HR 03/22/2011 Favorable BC 04/13/2011 Favorable RC 04/26/2011	
4	**SB 690** Richter (Compare CS/CS/H 119, H 1295, CS/H 4045, CS/S 1736)	Assisted Living Facilities; Removes an obsolete provision requiring the Department of Elderly Affairs to submit to the Legislature for review and comment a copy of proposed department rules establishing standards for resident care. CF 04/04/2011 Favorable HR 04/12/2011 Favorable RC 04/26/2011	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
5	**SB 692** Richter (Compare H 1295, CS/H 4045)	Assisted Living Facilities; Removes an obsolete reporting requirement. CF 04/04/2011 Favorable HR 04/12/2011 Favorable RC 04/26/2011	
6	**SB 722** Norman (Identical H 4075, S 1780)	Damage By Dogs; Redefines the term "dangerous dog" to exclude dogs trained or used for dog fighting from the term. AG 03/07/2011 Favorable CA 04/11/2011 Favorable RC 04/26/2011	
7	**CS/CS/SB 450** Judiciary / Military Affairs, Space, and Domestic Security / Bennett (Similar CS/H 215)	Emergency Management; Cites this act as the "Postdisaster Relief Assistance Act." Provides immunity from civil liability for providers of temporary housing and aid to emergency first responders and their immediate family members following a declared emergency. Provides definitions. Provides nonapplicability. Authorizes specified registration with a county emergency management agency as a provider of housing and aid for emergency first responders. MS 03/10/2011 Fav/CS JU 03/28/2011 Fav/CS RC 04/26/2011	
8	**SB 502** Oelrich (Identical H 645)	State Symbols; Designates the Barking Tree Frog as the official state amphibian. EP 03/17/2011 Favorable GO 04/05/2011 Favorable RC 04/26/2011	
9	**CS/SB 648** Banking and Insurance / Joyner (Similar CS/H 325, Compare S 708)	Estates; Creates a fiduciary lawyer-client privilege. Provides that the lawyer-client privilege applies to the communications between a lawyer and a client that is a fiduciary. Revises provisions relating to the intestate share of a surviving spouse. Provides a right to reform the terms of a will to correct mistakes. Provides a right to modify the terms of a will to achieve tax objectives. Clarifies that a revocation of a will is subject to challenge on the grounds of fraud, duress, mistake, or undue influence, etc. JU 03/09/2011 Favorable BI 03/22/2011 Fav/CS RC 04/26/2011	
10	**SB 726** Bullard (Identical H 681)	State Symbols/Official State Flagship; Designates the schooner Western Union as the official state flagship. GO 03/30/2011 Favorable EP 04/05/2011 Favorable RC 04/26/2011	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
	End of Consent Agenda		
11	**SB 42** Benacquisto (Similar H 1151, Identical H 57, Compare H 525)	Relief/Eric Brody/Broward County Sheriff's Office; Compensates Eric Brody for injuries sustained as a result of the negligence of the Broward County Sheriff's Office. Authorizes the Sheriff of Broward County, in lieu of payment, to execute to Eric Brody and his legal guardians an assignment of all claims that the Broward County Sheriff's Office has against its insurer arising out of the insurer's handling of the claim against the sheriff's office, etc. SM 04/07/2011 Recommendation: Unfavorable RC 04/15/2011 Temporarily Postponed RC 04/26/2011	
12	**SB 18** Jones (Identical H 545)	Relief/Estrada/USF Board of Trustees; Compensates Daniel and Amara Estrada, parents and guardians of Caleb Estrada, for the wrongful birth of Caleb Estrada and for damages sustained by Daniel and Amara Estrada as a result of negligence by employees of the University of South Florida Board of Trustees. Provides a limitation on the payment of fees and costs, etc. SM 04/20/2011 Recommendation: Unfavorable RC 04/26/2011	
13	**SB 54** Storms (Identical H 1315)	Relief/Melvin and Alma Colindres/City of Miami; Compensates Melvin and Alma Colindres for the wrongful death of their son, Kevin Colindres, sustained as a result of the negligence of police officers of the City of Miami. Provides a limitation on the payment of fees and costs, etc. SM 04/20/2011 Recommendation: Fav/1 Amendment RC 04/26/2011	
14	**SB 322** Flores (Identical H 1073)	Relief/Edwards & Roden/Lee County; Compensates Aaron Edwards, a minor, and his parents, Mitzi Roden and Mark Edwards. Compensates them for damages sustained as a result of the medical negligence by employees of Lee Memorial Health System of Lee County. Provides a limitation on the payment of fees and costs, etc. SM 04/20/2011 Recommendation: Fav/1 Amendment RC 04/26/2011	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
15	**CS/SB 1252** Budget / Smith (Compare CS/CS/H 967, CS/H 1087, CS/CS/S 1836, CS/S 1930)	Insurance; Allows the Division of Administrative Hearings to have final order authority with respect to certain license applicants. Authorizes the payment of workers' compensation benefits through the use of a prepaid card. Revises provisions relating to certain insurers serving nonresidents domiciled outside the United States who are exempt from requirements to obtain a certificate of authority. Requires a claimant's request about insurance coverage to be appropriately served upon the disclosing entity, etc. BI 03/16/2011 Favorable BC 04/15/2011 Fav/CS RC 04/26/2011	
16	**SJR 1438** Hays (Identical HJR 1103)	Sovereignty of the State; Proposes an amendment to the State Constitution to assert the sovereignty of the state and refuse to comply with unconstitutional federal mandates. JU 04/04/2011 Favorable GO 04/14/2011 Favorable RC 04/26/2011	
17	**CS/SB 2010** Criminal Justice / Braynon (Similar CS/CS/H 369, Compare H 4215, S 2018)	Faith- and Character-based Correctional Programs; Provides legislative intent with respect to expansion of the faith- and character-based initiative. Provides requirements for faith- and character-based programs. Deletes provisions relating to funding. Revises requirements for participation by inmates in such programs. Deletes provisions requiring the assignment of chaplains to community correctional centers. Provides for the faith- and character-based institutions within the state correctional system to allow peer-to-peer programming whenever appropriate, etc. CJ 04/04/2011 Fav/CS BC 04/15/2011 Favorable RC 04/26/2011	
18	**CS/SB 2088** Rules Subcommittee on Ethics and Elections / Rules (Compare H 1071, CS/S 86, S 1484, S 1692)	Ethics; Provides for an exception to a provision authorizing a state public officer to vote in an official capacity on any matter, to conform to changes made by the act. Prohibits a member of the Legislature from voting upon any legislation inuring to his or her special private gain or loss. Revises provisions relating to the requisite mental state for the offenses of unlawful compensation and reward for official behavior and official misconduct, to conform to changes made by the act, etc. EE 04/04/2011 Fav/CS RC 04/15/2011 Temporarily Postponed RC 04/26/2011 BC	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
19	**CS/CS/SB 1568** Budget / Banking and Insurance / Montford (Compare CS/CS/H 803, CS/H 1007, CS/H 1087, H 4081, CS/H 4099, CS/CS/CS/S 408, S 636)	Insurer Insolvency; Authorizes a residential property insurer to renegotiate a note issued by the Insurance Capital Build-Up Incentive Program under certain circumstances. Authorizes the Department of Financial Services to request appointment as ancillary receiver if necessary to obtain records to adjudicate covered claims. Provides for the State Risk Management Trust Fund to cover specified officers, employees, agents, and other representatives of the Department of Financial Services for liability under specified federal laws relating to receiverships, etc. BI 03/22/2011 Fav/CS BC 04/14/2011 Not Considered BC 04/15/2011 Fav/CS RC 04/26/2011	
20	**SB 474** Evers (Identical H 4023, Compare CS/H 5005)	Sales Representative Contracts; Repeals a provision relating to sales representative contracts, commissions, requirements, termination of agreements, and civil remedies. CM 04/05/2011 Favorable JU 04/25/2011 Favorable RC 04/26/2011	
21	**CS/CS/SB 1594** Budget Subcommittee on Finance and Tax / Regulated Industries / Sachs (Similar CS/CS/CS/H 1145, Compare CS/CS/S 666) **(If Received)** Will not receive - still in BC	Pari-mutuel Permitholders; Provides that a greyhound permitholder is not required to conduct a minimum number of live performances. Revises requirements for an application for a license to conduct performances. Provides an extended period to amend certain applications. Removes a requirement for holders of certain converted permits to conduct a full schedule of live racing to qualify for certain tax credits. Revises a condition of licensure for the conduct of slot machine gaming, etc. RI 03/16/2011 Fav/CS BFT 04/06/2011 Not Considered BFT 04/13/2011 Fav/CS BC 04/25/2011 BC 04/26/2011 RC 04/26/2011 If received	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
22	**CS/SB 1930** Banking and Insurance / Bogdanoff (Compare CS/CS/H 967, CS/H 1087, CS/H 1411, CS/S 1252) **(If Received)**	Motor Vehicle Personal Injury Protection Insurance; Revises provisions relating to the contents of written reports of motor vehicle crashes. Requires that an application for licensure as a mobile clinic include a statement regarding insurance fraud. Authorizes the Division of Insurance Fraud to establish a direct-support organization for the purpose of prosecuting, investigating, and preventing motor vehicle insurance fraud. Adds licensed acupuncturists to the list of practitioners authorized to provide, supervise, order, or prescribe services, etc. BI 03/29/2011 Temporarily Postponed BI 04/05/2011 Temporarily Postponed BI 04/12/2011 Fav/CS JU 04/25/2011 Not Considered RC 04/26/2011 If received	
23	**CS/SB 822** Judiciary / Bogdanoff (Similar CS/H 391) **(If Received)** Will not receive - still in BC	Expert Testimony; Provides that a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion as to the facts at issue in a case under certain circumstances. Requires the courts of this state to interpret and apply the principles of expert testimony in conformity with specified United States Supreme Court decisions, etc. JU 03/09/2011 Fav/CS BC 04/25/2011 Not Considered BC 04/26/2011 RC 04/26/2011 If received	
24	**CS/SB 1388** Education Pre-K - 12 / Flores (Similar CS/CS/H 965) **(If Received)** Will not receive - still in BC	Department of Revenue; Authorizes the department to release certain taxpayers' names and addresses to certain scholarship-funding organizations. Deletes a limitation on the amount of tax credit allowable for contributions made to certain scholarship-funding organizations. Extends the carry-forward period for the use of certain tax credits resulting from contributions to the Florida Tax Credit Scholarship Program. Deletes a restriction on a taxpayer's ability to rescind certain tax credits resulting from contributions to the program. ED 03/30/2011 Fav/CS BC 04/13/2011 Not Considered BC 04/14/2011 Not Considered BC 04/15/2011 Not Considered BC 04/25/2011 Not Considered BC 04/26/2011 RC 04/15/2011 Not Received RC 04/26/2011 If received	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
25	**SB 1620** Flores (Compare CS/CS/H 7197)	K-12 Educational Instruction; Adds statewide virtual providers to the list of public school choices. Authorizes the creation of a virtual charter school. Requires the virtual charter school to contract with an approved statewide virtual provider. Provides for funding of the virtual charter school. Provides for a blended-learning charter school. Provides that home education students may enroll in certain virtual education courses or courses offered in the school district in which they reside, etc. ED 04/05/2011 Favorable BC 04/13/2011 Not Considered BC 04/14/2011 Not Considered BC 04/15/2011 Not Considered BC 04/25/2011 Fav/1 Amendment RC 04/15/2011 Not Received RC 04/26/2011	
26	**CS/SB 1714** Banking and Insurance / Hays (Compare CS/CS/H 1243) **(If Received)**	Citizens Property Insurance Corporation; Discontinues policy discounts relating to the Citizens Property Insurance Corporation after a certain date. Directs the corporation to provide coverage to certain excluded residential structures but at rates deemed appropriate by the corporation. Provides that certain residential structures are not eligible for coverage by the corporation after a certain date. Prohibits the corporation from levying certain assessments with respect to a year's deficit until the corporation has first levied a specified surcharge, etc. BI 03/29/2011 Fav/CS BC 04/14/2011 Not Considered BC 04/15/2011 Temporarily Postponed BC 04/25/2011 Not Considered BC 04/26/2011 RC 04/26/2011 If received Will not receive - still in BC	
27	**SB 2170** Judiciary	Judicial Nominating Commissions; Provides for the Attorney General, rather than the Board of Governors of The Florida Bar, to submit nominees for certain positions on judicial nominating commissions. Provides for the termination of terms of all current members of judicial nominating commissions. Provides for staggered terms of newly appointed members. JU 04/12/2011 Not Considered JU 04/25/2011 Favorable RC 04/15/2011 Not Received RC 04/26/2011	

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28	**CS/CS/SB 1312** Budget / Agriculture / Siplin (Compare CS/CS/H 7219)	School Nutrition Programs; Cites this act as the "Healthy Schools for Healthy Lives Act." Transfers and reassigns functions and responsibilities, including records, personnel, property, and unexpended balances of appropriations and other resources for the administration of the school food and nutrition programs from the Department of Education to the Department of Agriculture and Consumer Services. Requires the Department of Agriculture and Consumer Services to conduct, supervise, and administer all school food and nutrition programs, etc. AG 03/28/2011 Fav/CS BGA 04/13/2011 Favorable BC 04/15/2011 Fav/CS RC 04/26/2011	
29	**CS/SB 1690** Rules Subcommittee on Ethics and Elections / Diaz de la Portilla	Elections; Revises the limitations on contributions made to certain candidates and political committees. Provides requirements and restrictions on the use of contributions received prior to a candidate changing his or her candidacy to a new office, to conform, etc. EE 03/21/2011 Fav/CS RC 04/26/2011 BC	
30	**CS/SJR 1954** Community Affairs / Garcia (Identical CS/HJR 1321)	Home Rule Charter of Miami-Dade County; Proposes an amendment to the State Constitution to authorize amendments or revisions to the home rule charter of Miami-Dade County by special law approved by a vote of the electors. Provides requirements for a bill proposing such a special law. CA 03/28/2011 Fav/CS JU 04/12/2011 Favorable RC 04/26/2011	

An electronic copy of the Appearance Request form is now available to download from any Senate Committee page on the Senate's website, www.flsenate.gov.

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 Rules Committee

BILL:	CS/CS/SB 416
INTRODUCER:	Judiciary Committee, Criminal Justice Committee, and Senator Bogdanoff
SUBJECT:	Public Records
DATE:	April 21, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Dugger	Cannon	CJ	**Fav/CS**
2.	Munroe	Maclure	JU	**Fav/CS**
3.	Munroe	Phelps	RC	**Pre-meeting**
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

This bill creates an exemption from public records requirements for photographs and video and audio recordings that depict or record the killing of a person. (The exemption is comparable to the public records exemption in s. 406.135, F.S., relating to photographs and video and audio recordings of an autopsy held by a medical examiner.) The exemption is subject to the Open Government Sunset Review Act and as such, will be repealed on October 2, 2016, unless reviewed and reenacted by the Legislature.

The exemption permits a surviving spouse to view, listen, and copy these photographs and video and audio recordings that depict or record the killing of a person. If there is no surviving spouse, then the deceased's surviving parents may view and copy them. If there are no surviving parents, then an adult child of the deceased may view and copy them. The surviving relative who has the authority to view and copy these records is authorized to designate in writing any other person to view, copy, or publish them.

Additionally, federal, state, and local governmental agencies, upon written request, may have access to these records in the performance of their duties. Other than these exceptions, the

custodian is prohibited from releasing the records to any other person not authorized under the exemption without a court order. Knowingly violating these provisions is a third degree felony.

The public records exemption created in the bill is given retroactive application, with exceptions. The public records exemption created in the bill does not apply to any order in effect on July 1, 2011, which was duly entered by a court of this state and which restricts or limits access to any photograph or video or audio recording that depicts or records the killing of a person.

This bill creates an unnumbered section of the Florida Statutes.

II. Present Situation:

During the 2001 Legislative Session, the Legislature enacted s. 406.135, F.S., which provides a public records exemption for photographs, video and audio recordings of an autopsy held by a medical examiner.[1] These photographs, video and audio recordings are confidential and exempt from public disclosure except that a surviving spouse and other enumerated family members may obtain them.[2] In addition to the family members, local governmental entities and state and federal agencies may have access to these autopsy records by requesting in writing to view and copy them when such records are necessary in furtherance of that governmental agency's duties. Other than these exceptions, the custodian of the photographs or video and audio recordings is prohibited from releasing them to any other person not authorized under the exemption without a court order.

The Office of the Attorney General has issued a couple of opinions relating to the exemption for autopsy photographs, video and audio recordings. In one of the opinions, the Attorney General concluded that a medical examiner is authorized under s. 406.135, F.S., to show autopsy photographs or videotapes to public agencies for purposes of professional training or educational efforts if the identity of the deceased is protected, and the agency has made a written request.[3]

Another opinion reiterated this finding and expressly concluded that these photographs or videotapes may not be shown to private entities unless a court has made the requisite finding that good cause exists, and the family of the deceased has received the proper notification and opportunity to be heard at any hearing on the matter.[4]

The Attorney General Opinion, citing the Fifth District Court of Appeal case of *Campus Communications, Inc., v. Earnhardt*,[5] concluded that the court can allow any person access to the autopsy photographs or videotapes when good cause is established, after evaluating the following criteria:

- whether disclosure is necessary to assess governmental performance;
- the seriousness of the intrusion on the deceased's family's right to privacy;

[1] Chapter 2001-1, s. 1, L.O.F.
[2] Chapter 2003-184, s. 1, L.O.F.
[3] 2001-47 Fla. Op. Att'y Gen. 4 (2001).
[4] 2003-25 Fla. Op. Att'y Gen. (2003).
[5] 821 So. 2d 388 (Fla. 5th DCA 2002), *review dismissed* 845 So. 2d 894 (Fla. 2003), *review denied*, 848 So. 2d 1153 (Fla. 2003) *certiorari denied* 540 U.S. 1049 (2003).

- whether disclosure is the least intrusive means available; and
- the availability of similar information in other public records.[6]

In *Earnhardt*, the Fifth District Court of Appeal upheld the law exempting autopsy photographs against an unconstitutional overbreath challenge brought by a newspaper. The court held that the newspaper had not established good cause to view or copy the photographs and that the exemption applied retroactively.[7] The court found that s. 406.135, F.S., met constitutional and statutory requirements that the exemption is no broader than necessary to meet its public purpose, even though not all autopsy recordings are graphic and result in trauma when viewed. The court also found that the Legislature stated with specificity the public necessity justifying the exemption in ch. 2001-1, L.O.F.[8]

Furthermore, the court found the statute provides for disclosure of written autopsy reports, allows for the publication of exempted records upon good cause if the requisite statutory criterion is met, and is supported by a thoroughly articulated public policy to protect against trauma that is likely to result upon disclosure to the public.[9]

The court concluded that it is the prerogative of the Legislature to determine that autopsy photographs are private and need to be protected and that this privacy right prevails over the right to inspect and copy public records. The court also stated that its function is to determine whether the Legislature made this determination in a constitutional manner. Finding that the statute was constitutionally enacted and that it was properly applied to the facts in this case, the Fifth District Court of Appeal affirmed the lower court's finding of constitutionality.[10]

The Fifth District Court of Appeal certified the question of constitutionality to the Florida Supreme Court. On July 1, 2003, the Florida Supreme Court, per curiam, denied review of this case, leaving in place the appellate court's holding.[11]

Article I, s. 23 of the Florida Constitution provides that every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. Article I, s. 23 of the Florida Constitution also expressly states that the section "shall not be construed to limit the public's right of access to public records and meetings as provided by law." The public's right of access to public records and meetings in Florida is based in Article I, s. 24 of the Florida Constitution and is difficult to compare to the statutory federal right of access to public records and meetings under the Freedom of Information Act.[12]

Despite the substantial differences between state and federal law on the public's right of access to records and meetings, it is significant to note that relational or derivative privacy of families has also been asserted under federal law. The United States Supreme Court held that the Freedom of Information Act recognizes surviving family members' right to personal privacy

[6] 2003-25 Fla. Op. Att'y Gen. 2, 3 (2003).
[7] *Campus Communications, Inc., supra* note 5.
[8] *Id.* at 395.
[9] *Id.* at 394.
[10] *Id.* at 403.
[11] 848 So. 2d 1153 (Fla. 2003).
[12] 5 U.S.C.A. § 552.

with respect to their close relative's death-scene images and that the decedent's family's privacy interest outweighed public interest in disclosure.[13] The Freedom of Information Act provides an exemption for information if disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy."[14] The U.S. Supreme Court articulated a two-prong test for a person requesting disclosure under the Freedom of Information Act when privacy concerns addressed by the exemption are present: 1) the person requesting the information must show that a significant public interest in the requested information exists, and 2) the person requesting the information must demonstrate that disclosure of the information is likely to advance that significant public interest.[15] If the requester fails to meet the test, "the invasion of privacy is unwarranted."[16]

III. Effect of Proposed Changes:

This bill creates an exemption from public records requirements for photographs and video and audio recordings that depict or record the killing of a person. The exemption is comparable to the public record exemption in s. 406.135, F.S., relating to photographs and video and audio recordings of an autopsy held by a medical examiner.

Section 1 of the bill:

- Defines "killing of a person" to mean "all acts or events that cause or otherwise relate to the death of any human being, including any related acts or events immediately preceding or subsequent to the acts or events that were the proximate cause of death."

- Permits a surviving spouse to view, listen to, and copy these photographs and video and audio recordings. If there is no surviving spouse, then the deceased's surviving parents may view, listen to, and copy them. If there are no surviving parents, then an adult child of the deceased may view, listen to, and copy them. The surviving relative who has the authority to view, listen to, and copy these records is authorized to designate in writing any person to view, copy, or publish them.

- Allows access to these records by federal, state, and local governmental agencies, upon written request, in the performance of their duties. Other than these exceptions, the custodian is prohibited from releasing the records to any other person not authorized under the exemption without a court order.

- Allows other persons who are not covered by the exceptions above to have access to the photos and recordings only with a court order upon a showing of good cause, and limited by any restrictions or stipulations that the court deems appropriate. In determining good cause, the court must consider the following:

[13] *National Archives and Records Admin. v. Favish*, 541 U.S. 157 (2004). See Samuel A. Terilli and Sigman L. Splichal, *Public Access to Autopsy and Death-Scene Photographs: Relational Privacy, Public Records and Avoidable Collisions*, 10 COMM. L. & POL'Y 313, 323-26 (Summer 2005).
[14] 5 U.S.C.A. § 552(b)(7).
[15] *National Archives and Records Administration*, 541 U.S. at 172.
[16] *Id.*

- whether such disclosure is necessary for the public evaluation of governmental performance;
- the seriousness of the intrusion into the family's right to privacy and whether such disclosure is the least intrusive means available; and
- the availability of similar information in other public records, regardless of form.

- Requires that specified family members are given reasonable notice of a petition for access to photographs, video and audio recordings that depict or record the killing of a person, as well as a copy of the petition and the opportunity to be heard. Such access, if granted by the court, must be performed under the direct supervision of the custodian of the record or his or her designee.

- Provides that it is a third degree felony for any custodian of a photo, video or audio recording that depicts or records the killing of a person to willingly and knowingly violate the provisions of this section. It also provides a third degree felony penalty for anyone who willingly and knowingly violates a court order issued under this section. (A third degree felony is punishable by imprisonment not to exceed five years and/or a fine up to $5,000.)

- Provides that criminal and administrative proceedings are exempt from this section, but shall be subject to all other provisions of ch. 119, F.S.; however, nothing prohibits a court in a criminal or administrative proceeding from restricting the disclosure of a killing, crime scene, or similar photograph or video or audio recording.

- Provides for retroactive application of the exemption because it is remedial in nature.

- Provides an exception to the retroactive application of the public records exemption created in the bill for any order in effect on July 1, 2011, which was duly entered by a court of this state and which restricts or limits access to any photograph or video or audio recording that depicts or records the killing of a person.

- Makes the exemption subject to the Open Government Sunset Review Act and, as such, repeals it on October 2, 2016, unless reviewed and reenacted by the Legislature.

Section 2 of the bill provides a similar public necessity statement justifying the exemption as was used when creating the autopsy photographs and recordings exemption. The justification statement is as follows:

> … photographs or video or audio recordings that depict or record the killing of any person render a visual or aural representation of the deceased in graphic and often disturbing fashion. Such photographs or video or audio recordings provide a view of the deceased in the final moments of life, often bruised, bloodied, broken, with bullet wounds or other wounds, cut open, dismembered, or decapitated. As such, photographs or video or audio recordings that depict or record the killing of any person are highly sensitive representations of the deceased which, if heard, viewed, copied, or publicized, could result in trauma, sorrow, humiliation, or emotional injury to the immediate family of the deceased, as well as injury to the memory of the deceased. The Legislature recognizes

that the existence of the World Wide Web and the proliferation of personal computers throughout the world encourages and promotes the wide dissemination of such photographs and video and audio recordings 24 hours a day and that widespread unauthorized dissemination of photographs and video and audio recordings would subject the immediate family of the deceased to continuous injury. The Legislature further recognizes that there continue to be other types of available information, such as crime scene reports, which are less intrusive and injurious to the immediate family members of the deceased and which continue to provide for public oversight.

The Legislature additionally finds that the exemption provided in this act should be given retroactive application, except as otherwise provided in the act, because it is remedial in nature.

Section 3 of the bill provides an effective date of July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

In *Campus Communications, Inc., v. Earnhardt*,[17] the Fifth District Court of Appeal upheld a similar law exempting autopsy photographs and video and audio recordings against an unconstitutional overbreath challenge brought by a newspaper (see details in Present Situation). The court went on to certify the question of constitutionality to the Florida Supreme Court. On July 1, 2003, the Florida Supreme Court, per curiam, denied review of this case, leaving in place the appellate court's holding.[18]

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

[17] Campus Communications, *Inc.*, 821 So. 2d at 403.
[18] *Campus Communications, Inc. v. Earhardt*, 845 So. 2d 894 (Fla. 2003), *review denied*, 848 So. 2d 1153 (Fla. 2003) *certiorari denied* 540 U.S. 1049 (2003).

C. Government Sector Impact:

Senate Bill 416 was on the March 2nd Criminal Justice Impact Conference agenda, and the fiscal impact was deemed insignificant because of low volume and because of the unranked third degree felonies.[19]

The Office of the State Courts Administrator has indicated that the bill will likely increase the number of hearings where parties will attempt to gain access to the material exempted under the bill. An additional workload is expected in providing surviving family members with notice of the hearing on disclosure. The fiscal impact of the bill cannot be accurately determined because it unclear how many hearings may be requested for the material exempt from disclosure under the bill.[20]

VI. Technical Deficiencies:

None.

VII. Related Issues:

The First Amendment Foundation has expressed concerns with the bill, primarily that it will result in restricted oversight of governmental action and less accountability:

> As you may recall, in January of 2006, Martin Lee Anderson, a resident of the Bay County Boot Camp, which was operated by the Bay County Sheriff's Office, died a day after entering boot camp from suffocation. A videotape of the events surrounding his death, specifically the activities of boot camp employees, resulted in the Legislature closing boot camps, but only after the news media and others made the video public. Also, in 1990, the execution of Jesse Joseph Tafero was botched causing his head to catch fire. Videos or photos of this event would be protected under this bill, also limiting oversight. Further, under the bill, traffic stops by law enforcement officers which end up with the officer, driver or other passengers being killed would be protected, making it more difficult to determine what really resulted in any of their deaths….
>
> While we do not wish to disparage government officers or employees, experience has shown us that private citizens and the news media are sometimes required to ensure that bad actors are caught and punished or policies changed. This bill restricts that opportunity by requiring activists and the media to have to go to court to view or copy the records, to rely upon a judge to grant them their right to view or copy the record, and by requiring requestors to have to pay court costs and fees to exercise a constitutional right of access.[21]

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[19] Office of Economic and Demographic Research, The Florida Legislature, Criminal Justice Impact Conference (Mar. 2, 2011) (The Criminal Justice Impact Conference Results are available at: http://edr.state.fl.us/Content/conferences/criminaljusticeimpact/index.cfm (last visited on Apr. 10, 2011).

[20] Office of the State Courts Administrator, Judicial Impact Statement on SB 416, (Feb. 3, 2011) (on file with the Senate Committee on Judiciary)). (Subsequent amendments adopted on SB 416 do not appear to significantly change the fiscal impact of the legislation on the courts).

[21] Letter from the First Amendment Foundation to Senator Bogdanoff Re SB 416, dated February 25, 2011 (on file with the Senate Committee on Criminal Justice).

VIII. Additional Information:

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

CS/CS by Judiciary on April 12, 2011:
The committee substitute provides an exception to the retroactive application of the public records exemption created in the bill. The public records exemption does not apply to any order in effect on July 1, 2011, which was duly entered by a court of this state and which restricts or limits access to any photograph or video or audio recording that depicts or records the killing of a person.

CS by Criminal Justice on March 28, 2011:
Allows the surviving relative who has the authority to view, listen to, and copy these records to designate in writing any other person to view, copy, or publish them (rather than the current authorization to designate an agent to obtain the records for the surviving relative).

B. Amendments:

None.

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 Rules Committee

BILL:	CS/CS/SB 786
INTRODUCER:	Criminal Justice Committee, Judiciary Committee, and Senators Diaz de la Portilla and Lynn
SUBJECT:	Landlord and Tenant
DATE:	April 22, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Maclure	JU	**Fav/CS**
2.	Cellon	Cannon	CJ	**Fav/CS**
3.	Cellon	Phelps	RC	**Pre-meeting**
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

The bill provides that a law enforcement officer may remove a person from property, a structure or a conveyance, if the person is trespassing and the officer has an affidavit from an owner or mortgagee that presumably confirms that the trespass is in fact occurring.

This bill amends sections 810.08 and 810.09 of the Florida Statutes.

II. Present Situation:

Mortgage Foreclosure Crisis

The mortgage foreclosure crisis has left many homes vacant and abandoned. According to data released by the Mortgage Bankers Association, Florida has the nation's highest inventory of homes in distress.[1] Cities and other communities are taking steps to manage vacant and abandoned residential properties as a result of the mortgage foreclosure crisis. In a recent report prepared by the U.S. Conference of Mayors, 71 percent of survey cities reported that the

[1] Toluse Olorunnipa, *Florida's Foreclosure Rate is Nation's Highest*, The Miami Herald (Feb. 17, 2011).

mortgage foreclosure crisis has affected their approach to managing and disposing of vacant and abandoned properties, prompting the cities to modify protocols and procedures, ordinances, and policies.[2] Fifty-five local governments in Florida have adopted ordinances to address the management of vacant and abandoned properties.[3] In October 2008, the City of Miami, Florida, enacted an ordinance that requires the owner or deed holder of vacant or abandoned property to register the property and provide a phone number and address where the owner or agent can be reached within 24 hours.[4] If the property is blighted, unsecured, or abandoned, the owner must pay an annual registration fee of between $250 and $500 and provide the names, addresses, and contact numbers of anyone with a lien on or interest in the property. The Miami ordinance includes an authorization for police to enforce trespassing laws for properties considered vacant or abandoned and a requirement for owners of abandoned properties to submit a plan for correcting all code violations within no more than 90 days.

Squatters have started moving into foreclosed property without any legal right to occupy the premises.[5] In order to evict squatters, law enforcement officers need authorization from the property's owner, usually a bank or other financial institution, and certainty that the squatter's right of possession has been settled under the Florida Residential Landlord and Tenant Act.[6] Law enforcement officials may be liable for wrongful ejectment or eviction if the owner has not settled his or her right of possession to the property in an action for possession in the county court of the county where the property is located pursuant to the Florida Residential Landlord and Tenant Act, which is discussed below.

Florida Residential Landlord and Tenant Act

The Florida Residential Landlord and Tenant Act (Act) governs residential landlord tenant law. The Act provides remedies to a tenant and landlord and applies to the rental of a dwelling unit.[7] If a tenant holds over and continues in possession of the dwelling unit after the expiration of the rental agreement without the permission of the landlord, the landlord may recover possession of the dwelling unit by seeking a right of action for possession in the county court of the county where the premises are situated stating the facts that authorize its recovery.[8] The landlord may not recover possession of the dwelling unit except: in an action for possession or other civil action in which the issue of the right of possession is determined; when the tenant has surrendered possession of the dwelling unit to the landlord; or when the tenant has abandoned the dwelling unit.[9] It is presumed that the tenant has abandoned the dwelling unit if he or she is absent from the premises for a period of time equal to one-half the time for periodic rental payment.

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[2] The United States Conference of Mayors, *Impact of the Mortgage Foreclosure Crisis on Vacant and Abandoned Properties in Cities, A 77-City Survey* (June 2010), http://www.usmayors.org/publications/2010%20VAP%20Report.pdf (last visited Mar. 17, 2011).
[3] American Financial Services Association, *Vacant and Abandoned Property Municipal Ordinances*, http://www.afsaonline.org/library/files/sga_resources/AFSA%20Vacant%20and%20Abandoned%20Property%20Ordinances%20Dec%202010%20FINAL.pdf (last visited Mar. 17, 2011).
[4] MIAMI, FL, CHAPTER 10, ARTICLE IV (10-16-2008).
[5] See Natalie O'Neill, *Squatters Don't Cry. Just Move Into One of Those Empty Homes Around the Corner*, Miami New Times (Nov. 20, 2008); John Leland, *With Advocates' Help, Squatters Call Foreclosures Home*, N.Y. Times (Apr. 10, 2009).
[6] Telephone interview with City of Miami, Florida attorneys.
[7] Section 83.41, F.S.
[8] Section 83.59, F.S.
[9] *Id.*

The Act also provides for the restoration of possession of the premises to the landlord.[10] In an action for possession, after entry of judgment in favor of the landlord, the clerk must issue a writ to the sheriff describing the premises and commanding the sheriff to put the landlord in possession after 24 hours' notice is conspicuously posted on the premises. The landlord or the landlord's agent may remove any personal property found on the premises to or near the property line.

The Act does not apply to:

- Residency or detention in a public or private facility (when detention is incidental to medical, geriatric, educational, counseling, religious, or similar services);
- Occupancy under a contract of sale;
- Transient occupancy in a hotel, condominium, motel, roominghouse, or similar public lodging, or transient occupancy in a mobile home park;
- Occupancy by a holder of a proprietary lease in a cooperative apartment; or
- Occupancy by an owner of a condominium unit.[11]

Criminal Trespass

Section 810.08, F.S., specifies the elements for trespass in a structure or conveyance. Whoever, without being authorized, licensed, or invited, willfully enters or remains in any structure or conveyance, or, having been authorized, licensed, or invited, is warned by the owner or lessee of the premises, or by a person authorized by the owner or lessee, to depart and refuses to do so, commits the offense of trespass in a structure or conveyance. Trespass in a structure or conveyance is a second-degree misdemeanor punishable by jail time up to 60 days and the imposition of a fine up to $500.[12] The section provides for enhanced penalties if there is a human being in the structure or conveyance at the time the offender trespassed, attempted to trespass, or was in the structure or conveyance or if the offender is armed with a firearm or other dangerous weapon, or arms himself or herself with such while in the structure or conveyance.[13] As used in s. 810.08, F.S., the term "person authorized" means any owner or lessee, or his or her agent, or any law enforcement officer whose department has received written authorization from the owner or lessee, or his or her agent, to communicate an order to depart the property in the case of a threat to public safety or welfare.

Section 810.09, F.S., outlines the elements for trespass on property other than a structure or conveyance which is punishable as a first-degree misdemeanor. A person who, without being authorized, licensed, or invited, willfully enters upon or remains in any property other than a structure or conveyance as defined in the law and:

- has been given notice against entering or remaining as required by law; or
- enters or remains with the intent to commit an offense on the unenclosed land surrounding a house or dwelling

[10] Section 83.62, F.S.
[11] Section 83.42, F.S.
[12] Section 810.08, F.S.
[13] *Id.*

commits trespass on property other than a structure or conveyance. A first-degree misdemeanor is punishable by jail time up to 1 year and the imposition of a fine of up to $1,000.

If the offender defies an order to leave, personally communicated to the offender by the owner of the premises or by an authorized person, or if the offender willfully opens any door, fence, or gate or does any act that exposes animals, crops, or other property to waste, destruction, or freedom; unlawfully dumps litter on property; or trespasses on property other than a structure or conveyance, the offender commits the offense of trespass on property other than a structure or conveyance. If the offender is armed with a firearm or other dangerous weapon during the commission of the offense of trespass on property other than a structure or conveyance, he or she is guilty of third-degree felony. A third-degree felony is punishable by imprisonment of up to 5 years and imposition of a fine of up to $5,000.

If the offender trespasses on a construction site that is greater than 1 acre or as otherwise described in the section or trespasses on commercial horticulture property with the required notice, the offender is liable for a third-degree felony. The section describes additional elements of the offense of trespass on property other than a structure or conveyance that are punishable as a third-degree felony.

III. Effect of Proposed Changes:

The bill amends ss. 810.08 and 810.09, F.S., which prohibit trespass in a structure or conveyance, or on property other than a structure or conveyance, as described above in the Present Situation section.

The bill provides for a law enforcement officer who has an affidavit from an owner or mortgagee of the property to remove a person who is trespassing.

In essence, the affidavit provides one element of the offense of trespass, that the person is not authorized to be on or in the property. The affidavit should also provide the law enforcement officer a means by which he or she can lawfully convey notice to someone that they are trespassing and therefore, direct them to leave.

The bill provides an effective date of July 1, 2011.

Other Potential Implications:

It is suggested that law enforcement agencies require specific and verifiable information in affidavits they use as a basis for ejecting a suspected trespasser from another's property. The content of the affidavit is not specified in the bill.

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:

To the extent that law enforcement officials may eject persons unlawfully occupying a dwelling without requiring the owner to quiet his, her, or its (individual or bank) right of possession of the property, the owner may save associated costs associated with recovering possession of a dwelling.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

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

CS/CS by Criminal Justice on April 12, 2011:
Removed the provisions of the bill from Chapter 83, relating to Landord-Tenant Law, and created the statutory authority for law enforcement to remove persons from the property of another under ss. 810.08 and 810.09, F.S., which prohibit trespass.

In order to remove trespassers under the provisions of the bill, a law enforcement officer must be in possession of an affidavit from an owner or mortgagee of the property.

CS by Judiciary on March 22, 2011:
The committee substitute revises the exemption to the Florida Residential Landlord and Tenant Act so that it applies to an occupancy for less than 30 days by a person not legally entitled to occupy the premises, rather than an occupancy for less than 60 days under the original bill.

The committee substitute adds s. 810.08, F.S., criminal trespass in a structure or conveyance, to the criminal trespass provisions that law enforcement may enforce in the case of a person unlawfully occupying the premises who refuses to depart the premises.

B. Amendments:

None.

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 Rules Committee

BILL:	SB 1990
INTRODUCER:	Health Regulation Committee
SUBJECT:	Ratification of Rule
DATE:	April 22, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stovall	Stovall	HR	**Favorable**
2.	Bradford	Meyer, C.	BC	**Favorable**
3.	Bradford	Phelps	RC	**Pre-meeting**
4.				
5.				
6.				

I. Summary:

The bill ratifies a rule relating to Standards of Practice for Physicians Practicing in Pain Management Clinics that has been filed for adoption by the Department of Health, Board of Medicine.

This bill has no fiscal impact on state or local government but will result in increased costs to the private sector of $64.459 million in the first year, with $60.912 million in costs expected in the following years (please see fiscal impact statement for details.)

This bill does not amend, create, or repeal any section of the Florida Statutes.

II. Present Situation:

Current Law

Chapter 2010-279, Laws of Florida (L.O.F.), became effective on November 17, 2010,[1] when the Legislature over-rode the Governor's veto of CS/CS/HB 1565, which was passed during the 2010 Regular Session. This law requires a proposed administrative rule that has an adverse impact or regulatory costs that exceed certain thresholds to be submitted to the Legislature for ratification before the rule can take effect. The Legislature provided for a statement of estimated regulatory costs (SERC) as the tool to assess a proposed rule's impact.

[1] House Joint Resolution 9-A passed during the 2010A Special Session on November 16, 2010.

An agency proposing a rule is required to prepare a SERC of the proposed rule if the proposed rule:[2]

- Will have an adverse impact on small business; or
- Is likely to directly or indirectly increase regulatory costs in excess of $200,000 in the aggregate in this state within 1 year after the implementation of the rule.

A SERC is required to include:[3]

- An economic analysis showing whether the rule directly or indirectly:
  - Is likely to have an adverse impact on economic growth, private sector job creation or employment, or private sector investment in excess of $1 million in the aggregate within 5 years after the implementation of the rule;
  - Is likely to have an adverse impact on business competitiveness, including the ability of persons doing business in the state to compete with persons doing business in other states or domestic markets, productivity, or innovation in excess of $1 million in the aggregate within 5 years after the implementation of the rule; or
  - Is likely to increase regulatory costs, including any transactional costs, in excess of $1 million in the aggregate within 5 years after the implementation of the rule.

If the adverse impact or regulatory costs of the rule exceed any of these criteria, then the rule may not take effect until it is ratified by the Legislature;

- A good faith estimate of the number of individuals and entities likely to be required to comply with the rule, together with a general description of the types of individuals likely to be affected by the rule;

- A good faith estimate of the cost to the agency, and to any other state and local government entities, of implementing and enforcing the proposed rule, and any anticipated effect on state or local revenues;

- A good faith estimate of the transactional costs likely to be incurred by individuals and entities, including local government entities, required to comply with the requirements of the rule. "Transactional costs" are direct costs that are readily ascertainable based upon standard business practices, and include filing fees, the cost of obtaining a license, the cost of equipment required to be installed or used or procedures required to be employed in complying with the rule, additional operating costs incurred, the cost of monitoring and reporting, and any other costs necessary to comply with the rule;

- An analysis of the impact on small businesses,[4] and an analysis of the impact on small counties and small cities.[5] The impact analysis for small businesses must include the

[2] *See* s. 120.54(3)(b)1., F.S.
[3] *See* s. 120.241(2), F.S.

basis for the agency's decision not to implement alternatives that would reduce adverse impacts on small businesses;

- Any additional information that the agency determines may be useful; and

- A description of any regulatory alternative submitted by a substantially affected person and a statement adopting the alternative or a statement of the reasons for rejecting the alternative in favor of the proposed rule.

Regulation of Pain Management Clinics

The 2010 Legislature enacted CS/CS/SB 2272 and CS/CS/SB 2722[6] to help address the prescription drug abuse epidemic that is fueled by "pill mills." This law created ss. 458.3265 and 459.0137, F.S., to create a registration and inspection program for pain management clinics in which allopathic physicians and osteopathic physicians who primarily engage in the treatment of pain by prescribing or dispensing controlled substance medications may practice. These two sections of law are similar for the respective practice acts.

Among other things, this law requires the Board of Medicine and the Board of Osteopathic Medicine to adopt rules setting forth standards of practice for physicians and osteopathic physicians practicing in pain management clinics, as they are defined in law. The rules are required to address, at a minimum, facility operations; physical operations; infection control requirements; health and safety requirements; quality assurance requirements; patient records; training requirements for all facility health care practitioners who are not regulated by another board; inspections; and data collection and reporting requirements.[7]

Both boards proceeded through the rulemaking process, with similar language. The Board of Osteopathic Medicine filed its rule 64B15-14.0051, Florida Administrative Code, Standards of Practice for Physicians Practicing in Pain Management Clinics, on October 10, 2010, and the rule became effective on November 11, 2010. The Board of Medicine filed its rule for adoption on November 8, 2010. However, ch. 2010-279, L.O.F., became effective on November 17, 2010, before the Board of Medicine's rule became effective.[8]

The Board of Medicine's rule 64B8-9.0131, Florida Administrative Code, that was filed for adoption provides standards of practice in pain management clinics in the following broad categories:

- Evaluation of patient and medical diagnosis;

[4] "Small business" is defined to mean an independently owned and operated business concern that employs 200 or fewer permanent full-time employees and that, together with its affiliates, has a net worth of not more than $5 million or any firm based in this state which has a Small Business Administration 8(a) certification. As applicable to sole proprietorships, the $5 million net worth requirement shall include both personal and business investments.
[5] "Small county" and "small city" are defined to mean any county that has an unincarcerated population of 75,000 or less and any municipality that has an unincarcerated population of 10,000 or less, respectively, according to the most recent decennial census.
[6] Ch. 2010-211, L.O.F.
[7] *See* ss. 458.3265(4)(d) and 459.0137(4)(d), F.S.
[8] A proposed rule is adopted on being filed with the Department of State and becomes effective 20 days after being filed, on a later date specified in the notice of proposed rulemaking, or on a date required by statute. *See* s. 120.54(3)(d)6., F.S.

- Treatment plan;
- Informed consent and agreement for treatment;
- Periodic review;
- Consultation;
- Patient drug testing;
- Patient medical records;
- Denial or termination of controlled substance therapy;
- Facility and physical operations;
- Infection control;
- Health and safety;
- Quality assurance; and
- Data collection and reporting.

SERC for Rule 64B8-9.0131, Florida Administrative Code

The Center for Economic Forecasting and Analysis (CEFA), part of the Florida State University Institute of Science and Public Affairs, was engaged to estimate the costs for the Department of Health and the Pain Management Clinics for proposed rule 64B8-9.0131, Standards of Practice for Physicians Practicing in Pain Management Clinics, for the Board of Medicine. For purposes of determining whether the proposed rule requires Legislative ratification, the SERC indicates the proposed rule "is likely to increase regulatory costs, including any transactional costs, in excess of $1 million in the aggregate within 5 years after the implementation of the rule."[9]

Specifically, the SERC indicates the expected statewide transactional costs are $64.459 million in the first year, with $60,912 million in costs expected in the following years. On a per-clinic basis, this represents estimated costs of $69,162 in the first year with an expected $65,356 in costs in the following years. On a per-patient basis for an existing patient, the costs average $43.73 in the first year and $40.91 per year for years 2 through 5. For a new patient, the first year costs average $60.83 per year.[10]

In summary, the bulk of the expected statewide transactional costs is related to the patient drug testing requirement. The proposed rule provides:

> Patient Drug Testing. To assure the medical necessity and safety of any controlled substances that the physician may consider prescribing as part of the patient's treatment plan, patient drug testing shall be performed in accordance with one of the collection methods set forth below[11] and shall be conducted and the results reviewed prior to the initial issuance or dispensing of a controlled substance prescription, and thereafter, on a random basis at least twice a year and when requested by the treating physician. Nothing

[9] *See* The SERC of Proposed Rules in Regulation of Pain Management Clinics in Florida, BOM 64B8-9.0131, Standards of Practice for Physicians Practicing in PMC, January 18, 2011, page 15, paragraph (a)3. A copy of the SERC is on file in the Senate Health Regulation Committee.
[10] *Id*, page 17, paragraph (d).
[11] The collection methods set forth in the proposed rule include referral to an outside laboratory, specimen collection in the pain management clinic and sent to an outside laboratory for testing, and specimen collected and tested in the office.

in this rule shall preclude a pain management clinic from employing additional measures to assure the integrity of the urine specimens provided by patients.[12]

The SERC bases this component of the estimate on several assumptions and statistical modeling methods. To provide a perspective, estimates included 932 pain management clinics and 1,314 full time physicians seeing between 20 – 30 patients per day, for 250 annual work days.

III. Effect of Proposed Changes:

The bill provides for Legislative ratification of the Board of Medicine's Rule 64B8-9.0131, Florida Administrative Code, Standards of Practice for Physicians Practicing in Pain Management Clinics.

The act shall take effect upon becoming a law.

Other Potential Implications: The Board of Osteopathic Medicine adopted a similar rule with an effective date of November 8, 2010. Osteopathic physicians or allopathic physicians, or both, may practice in a pain management clinic. The absence of similar practice standards could prove unmanageable from a quality of care perspective, an operational perspective, and an enforcement perspective.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Article I, Section 24(a) and (b) of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

[12] *See* proposed rule 64B8-9.0131(2)(f).

B. Private Sector Impact:

The bill ratifies a rule for which its SERC indicates the expected statewide transactional costs are $64.459 million in the first year, with $60.912 million in costs expected in the following years. On a per-clinic basis, this represents estimated costs of $69,162 in the first year with an expected $65,356 in costs in the following years. On a per-patient basis for an existing patient, the costs average $43.73 in the first year and $40.91 per year for years 2 through 5. For a new patient, the first year costs average $60.83 per year.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

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

None.

B. Amendments:

None.

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 Rules Committee

BILL:	SB 690
INTRODUCER:	Senator Richter
SUBJECT:	Assisted Living Facilities
DATE:	April 21, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Daniell	Walsh	CF	**Favorable**
2.	O'Callaghan	Stovall	HR	**Favorable**
3.	O'Callaghan	Phelps	RC	**Pre-meeting**
4.				
5.				
6.				

I. Summary:

This bill removes the requirement that the Department of Elderly Affairs (DOEA) must submit a copy of proposed rules to the Speaker of the House of Representatives, the President of the Senate, and appropriate committees of substance for review and comment prior to promulgation.

This bill substantially amends s. 429.41, F.S.

II. Present Situation:[1]

An assisted living facility (ALF) is a residential establishment, or part of a residential establishment, that provides housing, meals, and one or more personal services for a period exceeding 24 hours to one or more adults who are not relatives of the owner or administrator.[2] A personal service is direct physical assistance with, or supervision of, the activities of daily living and the self-administration of medication.[3] Activities of daily living include: ambulation, bathing, dressing, eating, grooming, toileting, and other similar tasks. An ALF may be operated for profit or not-for-profit, and can range from small houses resembling private homes to larger developments with hundreds of residential beds.

[1] A majority of the information contained the Present Situation of this bill analysis is from an interim report by the Committee on Health Regulation of the Florida Senate. *See* Comm. on Health Reg., The Florida Senate, *Assisted Living Facility Licensure Review* (Interim Report 2010-118) (Oct. 2009), *available at* http://archive.flsenate.gov/data/Publications/2010/Senate/reports/interim_reports/pdf/2010-118hr.pdf (last visited April 11, 2011).

[2] Section 429.02(5), F.S.

[3] Section 429.02(16), F.S.

Assisted living facilities are currently licensed by the Agency for Health Care Administration (AHCA) pursuant to part I of ch. 429, F.S., relating to assisted living facilities and part II of ch. 408, F.S., relating to the general licensing provisions for health care facilities. Assisted living facilities are also subject to regulation under chapter 58A-5 of the Florida Administrative Code. These rules are adopted by the DOEA in consultation with the AHCA, the Department of Children and Family Services, and the Department of Health, and must include minimum standards in relation to:

- The requirements for maintenance of facilities which will ensure the health, safety, and comfort of residents and protection from fire hazard;
- The preparation and annual update of a comprehensive emergency management plan;
- The number, training, and qualifications of all personnel having responsibility for the care of residents;
- All sanitary conditions within the facility and the surroundings which will ensure the health and comfort of residents;
- License application and license renewal, transfer of ownership, proper management of resident funds and personal property, surety bonds, resident contracts, refund policies, financial ability to operate, and facility and staff records;
- Inspections, complaint investigations, moratoriums, classification of deficiencies, levying and enforcement of penalties, and use of income from fees and fines;
- The enforcement of the resident bill of rights;
- Facilities holding a limited nursing, extended congregate care, or limited mental health license;
- The use of physical or chemical restraints; and
- The establishment of specific policies and procedures on resident elopement.[4]

The DOEA is urged to draft rules that encourage the development of homelike facilities that promote dignity, individuality, strengths, and decision-making of the residents.
Section 429.41(3), F.S., requires that the DOEA submit all proposed rules to the Speaker of the House of Representatives, the President of the Senate, and the appropriate committee for review and comment prior to promulgation.

During the 2010 Regular Session, HB 1565 passed the Legislature, but was vetoed by Governor Crist. During the 2011 Special Session "A," the veto was overridden and the bill became law.[5] This law requires state agencies to determine the impact of proposed agency rules and if the rules have an adverse impact on small businesses or is likely to increase regulatory costs in excess of $200,000 in the aggregate within 1 year after implementation of the rule, the agency must prepare a statement of estimated regulatory costs (SERC).[6] The SERC must provide whether the rules will financially impact small businesses by $1 million or more over the first 5 years of enactment. If the economic analysis concludes that the rules meet or exceed this threshold, the rules must be presented to the Speaker of the House of Representatives and the President of the Senate and cannot take effect until ratified by the Legislature.

[4] Section 429.41(1), F.S.
[5] Chapter 2010-279, Laws of Fla.
[6] Section 120.54(3)(b)1., F.S. *See also* s. 120.541, F.S.

The DOEA will be required to follow the rulemaking procedure outlined in HB 1565 irrespective of the fact that s. 429.41, F.S., requires the DOEA to submit proposed rules to the Speaker of the House of Representatives, the President of the Senate, and appropriate committees. However, s. 429.41, F.S., is not redundant or duplicative because HB 1565 requires rules to be submitted to the Legislature if certain conditions exist, while s. 429.41, F.S., requires the DOEA to submit a copy of *all* proposed rules.

III. Effect of Proposed Changes:

This bill amends s. 429.41, F.S., to remove the requirement that the DOEA submit a copy of proposed rules to the Speaker of the House of Representatives, the President of the Senate, and appropriate committees of substance for review and comment prior to promulgation.

The bill also removes the requirement that rules promulgated by the DOEA must encourage the development of homelike facilities which promote the dignity, individuality, personal strengths, and decision-making ability of residents.

The bill provides an effective date of July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Article I, Section 24(a) and (b) of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The DOEA would no longer have to submit all rules to the Legislature for review and comment prior to promulgation and therefore, rules should be implemented more quickly, unless they must still be ratified by the Legislature under s. 120.54(3)(b)1., F.S., and s. 120.541, F.S.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

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

None.

B. Amendments:

None.

615608

LEGISLATIVE ACTION

Senate . House

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. .

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. .

The Committee on Rules (Richter) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause and insert:

Section 1. Subsection (9) of section 429.19, Florida Statutes, is amended to read:

429.19 Violations; imposition of administrative fines; grounds.—

~~(9) The agency shall develop and disseminate an annual list of all facilities sanctioned or fined for violations of state standards, the number and class of violations involved, the penalties imposed, and the current status of cases. The list shall be disseminated, at no charge, to the Department of~~

615608

~~Elderly Affairs, the Department of Health, the Department of Children and Family Services, the Agency for Persons with Disabilities, the area agencies on aging, the Florida Statewide Advocacy Council, and the state and local ombudsman councils. The Department of Children and Family Services shall disseminate the list to service providers under contract to the department who are responsible for referring persons to a facility for residency. The agency may charge a fee commensurate with the cost of printing and postage to other interested parties requesting a copy of this list. This information may be provided electronically or through the agency's Internet site.~~

Section 2. Subsections (6) through (10) of section 429.23, Florida Statutes, are redesignated as subsections (5) through (9), respectively, and present subsection (5) of that section is amended to read:

429.23 Internal risk management and quality assurance program; adverse incidents and reporting requirements.—

~~(5) Each facility shall report monthly to the agency any liability claim filed against it. The report must include the name of the resident, the dates of the incident leading to the claim, if applicable, and the type of injury or violation of rights alleged to have occurred. This report is not discoverable in any civil or administrative action, except in such actions brought by the agency to enforce the provisions of this part.~~

Section 3. Subsection (3) of section 429.35, Florida Statutes, is redesignated as subsection (2), and present subsection (2) of that section is amended to read:

429.35 Maintenance of records; reports.—

~~(2) Within 60 days after the date of the biennial~~

~~inspection visit required under s. 408.811 or within 30 days after the date of any interim visit, the agency shall forward the results of the inspection to the local ombudsman council in whose planning and service area, as defined in part II of chapter 400, the facility is located; to at least one public library or, in the absence of a public library, the county seat in the county in which the inspected assisted living facility is located; and, when appropriate, to the district Adult Services and Mental Health Program Offices.~~

Section 4. Subsections (4) and (5) of section 429.41, Florida Statutes, are redesignated as subsections (3) and (4), respectively, and present subsection (3) of that section is amended to read:

429.41 Rules establishing standards.—

~~(3) The department shall submit a copy of proposed rules to the Speaker of the House of Representatives, the President of the Senate, and appropriate committees of substance for review and comment prior to the promulgation thereof. Rules promulgated by the department shall encourage the development of homelike facilities which promote the dignity, individuality, personal strengths, and decisionmaking ability of residents.~~

Section 5. Section 429.54, Florida Statutes, is repealed.

Section 6. This act shall take effect July 1, 2011.

================ T I T L E A M E N D M E N T ================

And the title is amended as follows:

Delete everything before the enacting clause and insert:

A bill to be entitled

615608

An act relating to assisted living facilities; amending s. 429.19, F.S.; removing a requirement that the Agency for Health Care Administration disseminate annually a printed list of assisted living facilities sanctioned or fined to specified agencies and departments; amending s. 429.23, F.S.; removing reporting requirements for assisted living facilities relating to liability claims; amending s. 429.35, F.S.; removing an obsolete reporting requirement; amending s. 429.41, F.S.; removing a provision requiring the Department of Elderly Affairs to submit to the Legislature for review and comment a copy of proposed department rules establishing standards for resident care; repealing s. 429.54, F.S., relating to a provision that authorizes the Department of Elderly Affairs to collect information regarding the cost of providing certain services in facilities and to conduct field visits and audits and a provision authorizing a local subsidy; providing an effective date.

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 Rules Committee

BILL:	SB 692
INTRODUCER:	Senator Richter
SUBJECT:	Assisted Living Facilities
DATE:	April 21, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Daniell	Walsh	CF	**Favorable**
2.	O'Callaghan	Stovall	HR	**Favorable**
3.	O'Callaghan	Phelps	RC	**Pre-meeting**
4.				
5.				
6.				

I. Summary:

This bill removes the statutory requirement that the Agency for Health Care Administration (AHCA) distribute all biennial and interim visit reports of assisted living facilities (ALFs) to the local ombudsman council, at least one public library, and to the district Adult Services and Mental Health Program Offices.

This bill substantially amends s. 429.35, F.S.

II. Present Situation:

An assisted living facility (ALF) is a residential establishment, or part of a residential establishment, that provides housing, meals, and one or more personal services for a period exceeding 24 hours to one or more adults who are not relatives of the owner or administrator.[1] A personal service is direct physical assistance with, or supervision of, the activities of daily living and the self-administration of medication.[2] Activities of daily living include: ambulation, bathing, dressing, eating, grooming, toileting, and other similar tasks. An ALF may be operated for profit or not-for-profit, and can range from small houses resembling private homes to larger developments with hundreds of residential beds.

Assisted living facilities are currently licensed by the AHCA pursuant to part I of ch. 429, F.S., relating to assisted living facilities and part II of ch.408, F.S., relating to the general licensing provisions for health care facilities. Assisted living facilities are also subject to regulation under

[1] Section 429.02(5), F.S.
[2] Section 429.02(16), F.S.

chapter 58A-5 of the Florida Administrative Code. These rules are adopted by the Department of Elder Affairs (DOEA) in consultation with the AHCA, the Department of Children and Family Services, and the Department of Health.[3]

As of February 2011, there were 2,926 ALFs licensed in Florida.[4] All licensed ALFs must have a biennial inspection[5] and between January 2010 and February 2011, 2,366 biennial inspection visits were conducted.[6]

Section 429.35(2), F.S., requires the AHCA, within 60 days after a biennial inspection and 30 days after any interim visit, to forward the results to:

- The local ombudsman council in the appropriate planning and service area;
- At least one public library, or if none, then to the county seat; and
- The district Adult Services and Mental Health Program Offices.

Section 408.806(8), F.S., allows the AHCA to provide electronic access to information or documents, such as inspection results. The AHCA provides written reports of all inspections to the provider. Compliance and noncompliance with regulations are cited in the report. Upon review by the AHCA, the reports are posted on the inspections report website[7] and a monthly email is sent to the Office of State Long-Term Care Ombudsman (office) of all inspections completed. The office distributes this information to the local ombudsman councils.[8]

III. Effect of Proposed Changes:

This bill amends s. 429.35, F.S., to remove the requirement that the AHCA distribute, within 60 days after the date of the biennial inspection visit or within 30 days after the date of any interim visit, all biennial and interim visit reports of ALFs to the local ombudsman council, at least one public library or to the county seat in which the inspected ALF is located if there is no library, and to the district Adult Services and Mental Health Program Offices.[9]

The bill provides an effective date of July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

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[3] Section 429.41(1), F.S.
[4] Agency for Health Care Admin., *2011Bill Analysis and Economic Impact Statement SB 692* (Feb. 28, 2011) (on file with the Senate Health Regulation Committee).
[5] Section 408.811(1)(b), F.S.
[6] Agency for Health Care Admin., *supra* note 4.
[7] *See* http://apps.ahca.myflorida.com/dm_web/(S(n3dnev45xakyh155qllelimg))/Default.aspx (last visited April 7, 2011).
[8] Agency for Health Care Admin., *supra* note 4.
[9] According AHCA, the reports will continue to be available on the agency's website for retrieval and review. *Id*.

B. Public Records/Open Meetings Issues:

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Article I, Section 24(a) and (b) of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

By eliminating the requirement that the AHCA forward the results of all biennial and interim visit reports to the local ombudsman council, the public library, and the district Adult Services and Mental Health Program Offices, the bill may have a positive fiscal impact on the AHCA.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

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

None.

B. Amendments:

None.

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 Rules Committee

BILL:	SB 722
INTRODUCER:	Senator Norman and others
SUBJECT:	Damage by Dogs
DATE:	April 21, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Looke	Spalla	AG	**Favorable**
2.	Wood	Yeatman	CA	**Favorable**
3.	Wood	Phelps	RC	**Pre-meeting**
4.				
5.				
6.				

I. Summary:

This bill repeals the statutory requirement that a dog be deemed a dangerous dog on the basis that it participated in or was trained for dog fighting.

This bill substantially amends section 767.11 of the Florida Statutes.

II. Present Situation:

In s. 767.10, F.S., the Florida Legislature finds that dangerous dogs are an increasing threat to the public welfare, in part due to the failure of owners of such dogs to confine them, and that the previous law was inadequate to quell this threat.[1] Accordingly, s. 767.12, F.S., allows for the classification of dangerous dogs and mandates that once a dog is classified as dangerous its owner is subject to a series of restrictions including but not limited to:

- mandatory registration of the dog;
- mandatory confinement of the dog in a securely fenced area;
- mandatory posting of warning signs;
- permanent identification of the dog as dangerous;
- possible annual fees imposed by the local government;
- prohibition on use of the dog for hunting; and
- substantial restrictions on the owner's ability to remove the dog from the fenced enclosure.[2]

[1] Section 767.10, F.S.
[2] *See* ss. 767.12(1)-(4), F.S.

Also, s. 767.13(1), F.S., provides that an owner of a previously classified dangerous dog is guilty of a first degree misdemeanor if that dog attacks or bites a person or domestic animal without provocation. Section 767.13(3), F.S., provides that such an owner is guilty of a third degree felony if the dog causes serious injury or death to a human being.[3]

Section 767.11(c), F.S., declares that any dog who "[h]as been used primarily or in part for the purpose of dog fighting or is a dog trained for dog fighting" is deemed a dangerous dog under chapter 767, F.S.[4] According to multiple animal control centers around the state, the classification of a dog as a dangerous dog essentially prevents it from being adopted. This is because owners do not want to deal with the legal restrictions or because shelters are concerned about liability issues. Currently, at least four animal control centers in Duval, Palm Beach, Orange and Hillsborough counties are out of compliance with the law in that they do not automatically deem a dog as a dangerous dog simply due to participation in dog fighting.[5] Florida is one of thirteen states which either deems a dog dangerous or automatically destroys a dog based only on participation in or training for dog fighting.[6]

The current statute is unclear whether a submissive dog which is used as a bait dog in order to make fighting dogs fight is to be considered dangerous. Media relating to this issue has focused on the belief held by animal shelters who do comply with current law that the statute does extend to bait dogs, which are typically picked because they are not aggressive.[7]

Currently, most shelters give a history of any adopted dog to the new owner. However, this is not required by law and there is no standard procedure which is followed statewide.[8] When shelters encounter an abandoned or stray dog, they typically evaluate the dog's temperament and decide on a case-by-case basis whether it can be rehabilitated and whether it should be put up for adoption. There is no law or standard procedure which mandates how shelters determine whether a dog should be put up for adoption.

III. Effect of Proposed Changes:

Section 1 amends s. 767.11, F.S., to remove the requirement that a dog be deemed a dangerous dog on the sole basis that it was used or trained for dog fighting.

Removing this requirement would allow dogs used or trained for dog fighting to be adopted out by shelters without being classified as dangerous. There would be no notice requirement by law for the shelter to inform the new owner of the dog's fighting history. Shelters could determine the dog's temperament through testing and base their decision on that information. The new owner would not be required to register the dog, notify the local animal control authority when

[3] *See* ss. 767.13(1), (3), F.S.
[4] Section 767.11(c), F.S.
[5] Memorandum to Senate Committee on Agriculture from Denise Lasher, President of Lasher Consulting, Inc., (February, 2011) (on file with Senate Committee on Agriculture).
[6] Voices for No More Homeless Pets, *Florida Moves to Protect Canine Victims of Cruelty*, Best Friends Animal Society, February 01, 2011, *found at* http://network.bestfriends.org/campaigns/pitbulls/16662/news.aspx (last visited on Feb. 15, 2011)
[7] Patricia Mazzei, *Bill Could Give Dogs Trained to Fight a Reprieve*, Miami Herald, Mar. 29, 2011, *available at* http://www.miamiherald.com/2011/03/29/2140287/bill-could-give-dogs-trained-to.html#.
[8] Conversation with Scott Trebatoski, President of Florida Animal Control Association (April 1, 2011).

the dog is loose, keep the dog in a proper enclosure if not muzzled and on a leash, post warning signs, pay fees to local governments for registration, or inform the local animal control authority of the identity of a new owner when the dog is sold. They would also no longer be restricted from using the dogs for hunting.

Section 2 provides an effective date of July 1, 2011.

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:

Private owners who adopt a dog formerly used for fighting would no longer be required to provide a security fence or muzzle or to pay dangerous dog registration fees in localities which impose them. Dangerous dog registration fees typically range from $100-$500 per year.

C. Government Sector Impact:

There would be a minimal negative fiscal impact on local governments which charge a fee for registration of dangerous dogs.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

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

None.

B. Amendments:

None.

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 Rules Committee

BILL:	CS/CS/SB 450
INTRODUCER:	Judiciary Committee, Military Affairs, Space, and Domestic Security Committee, and Senator Bennett
SUBJECT:	Emergency Management
DATE:	April 21, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Yune	Carter	MS	**Fav/CS**
2.	O'Connor	Maclure	JU	**Fav/CS**
3.	O'Connor	Phelps	RC	**Pre-meeting**
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

This bill provides immunity from civil liability to any person who gratuitously and in good faith provides temporary housing, food, water, or electricity to emergency first responders or the immediate family members of emergency first responders, during certain declared emergencies, unless the person acts in a manner that demonstrates a reckless disregard for the consequences of another. This bill provides specific requirements with regard to when the immunity applies and when it does not.

This bill creates section 252.515, Florida Statutes.

II. Present Situation:

Declarations of Emergency

Presently, s. 252.36(2), F.S., empowers the Governor to declare a state of emergency by executive order or proclamation if he or she finds that an emergency has occurred or that the threat of an emergency is imminent. An emergency is "any occurrence, or threat thereof, whether

natural, technological, or manmade, in war or in peace, which results or may result in substantial injury or harm to the population or substantial damage to or loss of property."[1] The state of emergency continues until the Governor finds that the threat or danger has been dealt with to the extent that the emergency conditions no longer exist, at which point he or she terminates the state of emergency by executive order or proclamation.[2] The state of emergency may only continue for up to 60 days, unless renewed by the Governor.[3] Additionally, s. 381.00315, F.S., empowers the State Health Officer to declare public health emergencies. A public health emergency is "any occurrence, or threat thereof, whether natural or manmade, which results or may result in substantial injury or harm to the public health from infectious disease, chemical agents, nuclear agents, biological toxins, or situations involving mass casualties or natural disasters."[4] A public health emergency may only last for up to 60 days, unless the Governor concurs in the renewal of the declaration.[5]

Negligence

"Negligence is the failure to use reasonable care, which is the care that a reasonably careful person would use under like circumstances. Negligence is doing something that a reasonably careful person would not do under like circumstances or failing to do something that a reasonably careful person would do under like circumstances."[6] A person injured by another's negligence may recover damages against the negligent party if the negligence was the legal cause of the injury.[7] Negligence actions are governed by common law and by ch. 768, F.S.

Chapter 768, F.S., which governs negligence actions, provides several sections where a certain individual or group is immune from civil liability if the individual or group meets the statutory requirements. In these sections, Florida law provides immunity from negligence, but not reckless behavior. For example, the Good Samaritan Act provides that a health care provider that provides emergency services pursuant to certain statutes is immune from civil liability unless he or she acted with reckless disregard.[8] Reckless disregard is "such conduct that a health care provider knew or should have known, at the time such services were rendered, created an unreasonable risk of injury so as to affect the life or health of another, and such risk was substantially greater than that which is necessary to make the conduct negligent."[9] Also, s. 768.1315, F.S., provides that a state agency or subdivision that donates fire control or fire rescue equipment to a volunteer fire department is not liable for civil damages caused by a defect in the equipment which occurs after the donation. There is an exception to immunity under that section for actions that constitute "malice, gross negligence, recklessness, or intentional misconduct."[10]

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[1] Section 252.34(3), F.S.
[2] Section 252.36(2), F.S.
[3] *Id.*
[4] Section 381.00315(1)(b), F.S.
[5] *Id.*
[6] Florida Standard Jury Instructions in Civil Cases, 401.4, *available at* http://www.floridasupremecourt.org/civ_jury_instructions/instructions.shtml#401 (last visited Mar. 21, 2011).
[7] *See* Florida Standard Jury Instructions in Civil Cases, 401.12, 401.18, *available at* http://www.floridasupremecourt.org/civ_jury_instructions/instructions.shtml#401 (last visited Mar. 21, 2011).
[8] Section 768.13(2)(b)1., F.S.
[9] Section 768.13(2)(b)3., F.S.
[10] Section 768.1315(4)(a)1., F.S.

III. Effect of Proposed Changes:

This bill creates the "Postdisaster Relief Assistance Act." The bill provides that any person who gratuitously and in good faith provides temporary housing, food, water, or electricity to emergency first responders or the immediate family members of emergency first responders may not be held liable for any civil damages unless the person acts in a manner that demonstrates a reckless disregard for the consequences of another. The bill defines immediate family member as a parent, spouse, child, or sibling

This bill defines reckless disregard as "conduct that a reasonable person knew or should have known at the time such services were provided would be likely to result in injury so as to affect the life or health of another, taking into account the extent or serious nature of the prevailing circumstances."

The immunity from civil liability applies in emergency situations that are related to and that arise out of a public health emergency pursuant to s. 381.00315, F.S., or a state of emergency pursuant to s. 252.36, F.S.

This bill also provides that a person may register with a county emergency management agency as a temporary provider of housing, food, water, and electricity, if the county provides for such registration. If a person who provides the services registers with a county emergency management agency, he or she is presumed to have acted in good faith in providing such services.

The immunity provided to persons under this bill does not apply to damages as a result of any act or omission:

- That occurs more than 6 months after the declaration of an emergency, unless the declared emergency is extended, in which case the immunity continues to apply for the duration of the extension; or

- That is unrelated to the original declared emergency or any extension thereof.

This bill has an effective date of July 1, 2011.

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:

To the extent persons who comply with the requirements of the bill enjoy immunity from liability, they may benefit economically by not incurring civil judgments.

C. Government Sector Impact:

The bill provides that a person who registers with the county as a provider of services to first responders is presumed to have acted in good faith. The bill does not require county emergency management agencies to establish such a registration function. To the extent counties choose to do so, they may experience costs related to registration.

The Division of Emergency Management (DEM) has provided that there is no fiscal impact to DEM.[11]

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

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

CS/CS by Judiciary on March 28, 2011:
The committee substitute makes conforming changes to the portion of the bill that specifies when immunity does not apply to include declarations of emergency by the Governor and declarations of emergency by the State Health Officer, which is consistent with the rest of the bill.

CS by Military Affairs, Space, and Domestic Security on March 10, 2011:
The committee substitute:

- Provides that <u>any person</u>, rather than an individual, corporation, business entity, or employee thereof, who provides temporary housing, food, water, or electricity to

[11] Division of Emergency Management, *Senate Bill 450 Fiscal Analysis* (Feb. 7, 2011) (on file with the Senate Committee on Judiciary).

emergency first responders or the immediate family members of emergency first responders may not be held liable for any civil damages;
- Provides that the services must be provided "gratuitously and in good faith";
- Defines an "emergency first responder";
- Applies a uniform "reckless disregard" standard of conduct that will either permit or bar a provider of housing, food, water, or electricity from receiving immunity from civil damages and eliminates the "ordinary reasonably prudent person" standard of conduct; and
- Grants those providers who register with a county emergency management agency as a temporary provider of housing, food, water, or electricity the presumption that their actions are done in good faith.

A. Amendments:

None.

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 Rules Committee

BILL:	SB 502
INTRODUCER:	Oelrich
SUBJECT:	State Symbols
DATE:	April 21, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wiggins	Yeatman	EP	**Favorable**
2.	Mason	Roberts	GO	**Favorable**
3.	Mason	Phelps	RC	**Pre-meeting**
4.				
5.				
6.				

I. Summary:

This bill designates the Barking Tree Frog as the official state amphibian.

The bill creates section 15.03865 of the Florida Statutes.

II. Present Situation:

Currently, no amphibian is designated as the official state amphibian.

Chapter 15, F.S., designates official state emblems. To date, there are designations for a state tree, fruit, beverage, citrus archive, anthem, song, shell, stone, gem, wildflower, play, animal, freshwater fish, saltwater fish, marine mammal, saltwater mammal, butterfly, reptile, saltwater reptile, tortoise, air fair, rodeo, festival, moving image center and archive, litter control symbol, pageant, opera program, renaissance festival, railroad museums, transportation museum, soil, fiddle contest, band, sports hall of fame, pie, maritime museum, and horse.

The Barking Tree Frog is one of the largest frogs found in the United States and is found primarily in Florida.[1] Because of their specially developed foot pads, Barking Tree Frogs spend the majority of their time climbing trees and the walls of aquariums, but they can also be found burrowing under tree roots.[2] The color of the Barking Tree Frog varies greatly: from lime green

[1] Barking Tree Frog Stats & Facts, http://animal.discovery.com/guides/reptiles/frogs/barkingtreefrog.html (last visited March 31, 2011).
[2] *Id.*

to brown with some yellow and gold coloring on its throat, belly, and inside its hind legs.[3] The Barking Tree Frog gets its name from the low-pitch noise it makes during the rainy season, which sounds similar to a dog's bark, or even a honking goose.[4] This sound is only made by the males in the species.[5]

III. Effect of Proposed Changes:

Section 1 creates section 15.03865, of the Florida Statutes, to designate the Barking Tree Frog as the official state amphibian.

Section 2 provides that this act shall take effect July 1, 2011.

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:

None.

C. Government Sector Impact:

The Department of State maintains a list on its website of all official state symbols.

VI. Technical Deficiencies:

None.

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[3] *Id.*
[4] *Id.*
[5] *Id.* To hear the Barking Tree Frog, please visit: http://www.youtube.com/watch?v=W4vdf3B3_bY&feature=related.

VII. Related Issues:

None.

VIII. Additional Information:

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

None.

B. Amendments:

None.

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 Rules Committee

BILL:	CS/SB 648
INTRODUCER:	Senate Banking and Insurance Committee and Senator Joyner
SUBJECT:	Estates
DATE:	April 21, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Maclure	JU	**Favorable**
2.	Burgess	Burgess	BI	**Fav/CS**
3.	Burgess	Phelps	RC	**Pre-meeting**
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

The bill establishes standards for privilege of communications between a lawyer and a client acting as a fiduciary. The bill provides that a client acts as a fiduciary when serving as a personal representative, a trustee, an administrator ad litem, a conservator, or an attorney in fact. The bill provides that the notice of administration that must be sent by the personal representative of the estate must include a statement that the fiduciary lawyer-client privilege applies with respect to the personal representative and the attorney employed by the personal representative. The bill provides that the notice that a trustee must provide to qualified beneficiaries must include a statement that the fiduciary lawyer-client privilege applies with respect to the trustee and the attorney employed by the trustee.

Effective October 1, 2011, the bill increases the share a decedent's surviving spouse will receive in an intestate estate to the entire intestate estate when all of the decedent's descendants are also descendants of the surviving spouse and the surviving spouse does not have any other descendants.

Effective July 1, 2011, the bill:

- Permits wills to be reformed for mistake, which would be comparable to an existing provision applicable to testamentary trusts, revocable trusts, and other trusts.
- Allows wills to be modified to achieve the testator's tax objectives where it is not contrary to the testator's probable intent.
- Authorizes a court to award taxable costs, including attorney's fees and guardian ad litem fees, in a proceeding arising to reform a will for mistake or a proceeding for modifications to achieve the testator's tax objectives.

The bill authorizes a challenge to the revocation of a will or trust on the grounds of fraud, duress, mistake, or undue influence after the death of the testator or settlor. The bill limits powers of a guardian to prosecute or defend certain proceedings, to provide that there is a rebuttable presumption that an action challenging the ward's revocation of all or part of a trust is not in the ward's best interest if the revocation relates solely to a devise. This limitation does not preclude a challenge after the ward's death.

The bill provides that Florida Rule of Civil Procedure 1.525 applies to clarify when and under what circumstances a trustee or beneficiary of a trust or attorney must file a motion for attorney's fees and costs incurred in a judicial proceeding concerning a trust, with exceptions. Florida Rule of Civil Procedure 1.525 requires a party seeking costs or attorney's fees to serve a motion within the 30 days that follow the filing of a judgment.

Except as otherwise provided in the bill, it provides an effective date of upon becoming a law and applies to all proceedings pending before such date and all cases commenced on or after the effective date.

This bill creates sections 90.521, 732.615, 732.616, and 733.1061, Florida Statutes. This bill amends sections 732.102, 732.5165, 732.518, 733.312, 736.0207, 736.0406, 736.0813, 744.441, and 736.0201, F.S.

II. Present Situation:

Lawyer-client Privilege

Current statutory provisions for lawyer-client privilege are contained in s. 90.502, F.S., which defines "client" as a person or entity who consults a lawyer to obtain legal services, and provides generally:

- Communication between a lawyer and client is privileged;
- The privilege can be claimed by the client, the guardian of the client, the personal representative of a deceased client, a successor, trustee, or similar representative of an entity;
- The privilege can be asserted by the lawyer, but only on behalf of the client;
- The privilege does not apply if: the services of the lawyer were sought to enable someone to commit a crime; a communication is relevant to an issue between parties who claim through the same deceased client; a communication is relevant to an issue of breach of duty by the lawyer; a communication is relevant to an issue concerning competence of a client executing an attested document for which the attorney is an attesting witness; or a communication is relevant to an issue of common interest between two or more clients.

Surviving Spouse's Intestate Share

In the event of intestacy, when a person dies without a will, the Florida Probate Code provides a default position which establishes a public policy. Intestate provisions are designed to distribute estates in a manner that most decedents would have wanted had they prepared their own wills.[1] If a decedent dies without any descendants, the surviving spouse gets the entire intestate estate. If a decedent dies with lineal descendants who are also descendants of the surviving spouse, the surviving spouse receives the first $60,000 of the intestate estate and one-half of the balance of the intestate estate.[2] If the decedent's descendants, one or more of whom are not lineal descendants of the surviving spouse, the intestate estate is divided 50 percent to the surviving spouse and 50 percent to descendants.

Trusts – Reformation of Mistake

Trusts and other donative documents may be reformed due to mistake. Upon application of a settlor or any interested person, the court may reform the terms of a trust, even if ambiguous, to conform the terms to the settlor's intent if it is proved by clear and convincing evidence that both the accomplishment of the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.[3] To the contrary, the non-trust provisions of wills may not be reformed due to mistake.[4] Trusts under a will (testamentary trusts) may be reformed due to mistake, but the non-trust provisions of the same will may not be reformed for mistake.[5] Deeds of remainder interests and life insurance beneficiary designations, which are documents that have testamentary effect, may be reformed for mistake under Florida law.[6]

Upon application of any interested person, to achieve the settlor's tax objectives the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intent.[7] In all actions for breach of fiduciary duty or challenging the exercises of, or failure to exercise, a trustee's powers, and in proceedings under ss. 736.410-736.0417, F.S.,[8] the court shall award

[1] Probate Law Committee of the Real Property, Probate and Trust Law Section of the Florida Bar, White Paper: Surviving Spouse's Intestate Share (2011) (on file with the Senate Committee on Judiciary).
[2] Section 732.102, F.S.
[3] Section 736.0415, F.S.
[4] *See, e.g., In re Estate of Barker*, 448 So. 2d 28 (Fla 1st DCA 1984) (Extrinsic evidence of testator's intent regarding revocation of earlier will was not admissible and, without aid of extrinsic evidence, subsequent will was clear as to its meaning and did not preclude distribution of residuary estate to legal heirs who were specifically bequeathed only $1 each); *In re Mullin's Estate*, 128 So. 2d 617 (Fla. 2d DCA 1961) (Scrivener's mistake in drafting codicil so that residuary legatees were excluded was insufficient reason to revoke probate of an otherwise valid codicil).
[5] Probate Law Committee of the Real Property, Probate and Trust Law Section of the Florida Bar, White Paper: Proposed Enactment of sections 732.615, 732.616, and 733.1061, F.S. (2011) (on file with the Senate Committee on Judiciary).
[6] *Id.*
[7] Section 736.0416, F.S.
[8] Proceedings under s. 736.0410, F.S., involve the modification or termination of trusts; proceedings under s. 736.04113,F.S., involve judicial modifications of an irrevocable trust when the modifications is not inconsistent with the settlor's purpose; proceedings under s. 736.04114, F.S., involve proceedings for judicial construction of an irrevocable trust with federal tax provisions; proceedings under s. 736.04115, F.S., involve judicial modification of an irrevocable trust when modification is in the best interests of beneficiaries; proceedings under s. 736.04117, F.S., involve the trustee's power to invade the principal in a trust; proceedings under s. 736.0412, F.S., involve nonjudicial modification of an irrevocable trust; proceedings under s. 736.0413, F.S., involve application of the cy pres doctrine to modify a charitable trust; proceedings under s. 736.0414, F.S., involve the modification or termination of an uneconomic trust; proceedings under s. 736.0415, F.S., involve reformation of a

taxable costs as in chancery actions, including attorney fees and guardian ad litem fees.[9] When awarding the costs and fees, the court may direct payment from a party's interest or enter a judgment that may be satisfied from other property.

Wills – Post-Death Challenges to the Revocation of a Will or Codicil

A "will" is defined as an "instrument, including a codicil, executed by a person in the manner prescribed by [the Probate Code], which disposes of the person's property on or after his or her death and includes an instrument which merely appoints a personal representative or revokes or revises another will."[10] Section 732.5165, F.S., provides that a will is void if the execution is procured by fraud, duress, mistake, or undue influence. Since "will" includes an "instrument revoking a will, Florida law would appear to permit a challenge to a "written instrument" revoking a will on grounds that it was procured by fraud, duress, mistake, or undue influence. There are no reported Florida cases addressing a challenge to the revocation of a will on these grounds.[11]

Trusts – Challenge of a Revocation or Amendment of Revocable Trust

The creation of a trust may be challenged on the grounds of fraud, duress, mistake, or undue influence in post-death proceedings.[12] The law does not appear to authorize a challenge of a revocation or amendment of a revocable trust on the same grounds.[13] The Second District Court of Appeal in *Hoffman v. Kohns* allowed a challenge to a revocation of a revocable trust in post-death proceedings on the grounds that the settlor had been subject to undue influence and the court set aside the revocation.[14] The *Hoffman* case was later found to be in conflict with *Genova v. Florida National Bank of Palm Beach County*, where the Fourth District Court of Appeal did not allow a trustee's challenge to a settlor's attempted revocation of her revocable trust where the challenge was based on the grounds that the revocation was the product of undue influence.[15] The Fourth District reasoned that the settlor could not be deprived of her right to revoke the trust without a judicial or medical determination of the settlor's incapacity.[16] The Florida Supreme Court later disapproved *Hoffman*, when it was certified for a conflict with *Genova*.[17] The Florida Supreme Court found that undue influence cannot be asserted as a basis for preventing a competent settlor from revoking a revocable trust.[18]

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trust to correct mistakes; proceedings under s. 736.0416, F.S., involve modifications to achieve the settlor's tax objectives; and proceedings under s. 736.0417, F.S., involve proceedings to combine or divide trusts.

[9] Section 736.1004, F.S.

[10] Section 731.201(40), F.S.

[11] Probate Law Committee of the Real Property, Probate and Trust Law Section of the Florida Bar, White Paper: Revocation of a Will or Revocable Trust is Subject to Challenge (2011) (on file with the Senate Committee on Judiciary).

[12] Section 736.0406, F.S.

[13] *Hoffman v. Kohns*, 385 So. 2d 1064 (Fla. 2d DCA 1980), and *Florida National Bank of Palm Beach County v. Genova*, 460 So. 2d 895 (Fla. 1984), discussed in Probate Law Committee of the Real Property, Probate and Trust Law Section of the Florida Bar, White Paper: Revocation of a Will or Revocable Trust is Subject to Challenge (2011) (on file with the Senate Committee on Judiciary).

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

In a recent case, a trustee asserting that a settlor had been subject to undue influence sought to challenge a settlor's revocation of an inter vivos revocable trust after the settlor's death. Weeks prior to the settlor's death, she placed her money into a joint account with the person who allegedly asserted undue influence on the settlor.[19] The Fourth District Court of Appeal held that the settlor's revocation of a revocable trust during her lifetime was not subject to a challenge on the ground of undue influence.[20] The Probate Law Committee of the Real Property, Probate and Trust Law Section of the Florida Bar (RPPTL) argues that once a settlor is dead, the remedies available for a post-death challenge of revocation of trust which could serve as a will substitute should be consistent with the remedies for post-death challenges to the revocation of a will or codicil.[21]

Guardianship

A guardian of the property of an incapacitated settlor may bring an action to contest the validity of all or part of a trust before the trust becomes irrevocable.[22] To prosecute or defend claims or proceedings in any jurisdictions for the protection of the estate and of the guardian in the performance of his or her duties, court approval is necessary and may only be obtained upon a finding that the action appears to be in the ward's best interests during the ward's probable lifetime.[23]

Attorney's Fees and Costs in Trust Proceedings

Uncertainty exists as to when and under what circumstances a trustee or beneficiary of a trust or attorney must file a motion for attorney's fees and costs incurred in a judicial proceeding concerning a trust.[24]

III. Effect of Proposed Changes:

Fiduciary Lawyer-client Privilege

The bill creates s. 90.5021, F.S., to establish standards that apply to communications between a lawyer and a client acting as a fiduciary. The bill provides that a client acts as a fiduciary when serving as a personal representative, a trustee, an administrator ad litem, a conservator, or an attorney in fact. A communication between a lawyer and a client acting as a fiduciary is privileged and protected under s. 90.502, F.S., to the same extent as if the client were not acting as a fiduciary. The communication between a lawyer and a client acting as a fiduciary is not privileged if it falls within the exception for crime or fraud , as specified in s. 90.502(4)(a). The bill provides that the notice of administration that must be sent by the personal representative of

[19] *MacIntyre v. Wedell*, 12 So. 3d 273, 273 (Fla. 4th DCA 2009).
[20] *Id.*
[21] Probate Law Committee of the Real Property, Probate and Trust Law Section of the Florida Bar, *supra*, note 11.
[22] Section 736.0207, F.S.
[23] Section 744.441, F.S.
[24] The Probate & Trust Litigation Committee of the Real Property, Probate and Trust Law Section of the Florida Bar approved on September 25, 2010, to support a change in Florida law which clarifies the deadline for when and under what circumstances a trustee or beneficiary of a trust or attorney must file a motion for attorney's fees and costs incurred in a judicial proceeding concerning a trust, (2011 Legislative Position Request Form) (on file with the Senate Judiciary Committee).

the estate under s. 733.312(2)(b), F.S., must include a statement that the fiduciary lawyer-client privilege applies with respect to the personal representative and the attorney employed by the personal representative. The bill provides that the notice that a trustee must provide to qualified beneficiaries under s. 736.0813(1)(a), F.S., must include a statement that the fiduciary lawyer-client privilege applies with respect to the trustee and the attorney employed by the trustee.

Surviving Spouse's Intestate Share

Effective October 1, 2011, the bill amends s. 732.102, F.S., to increase the share a decedent's surviving spouse will receive in an intestate estate to the entire intestate estate when all of the decedent's descendants are also descendants of the surviving spouse and the surviving spouse does not have any other descendants. If there are one or more surviving descendants of the decedent who are not lineal descendants of the surviving spouse, then the surviving spouse gets one-half of the intestate estate. If there are one or more surviving descendants of the decedent, all of whom are also descendants of the surviving spouse, and the surviving spouse has one or more descendants who are not descendants of the decedent, the surviving spouse gets one-half of the intestate estate.

Trusts – Reformation of Mistake

Effective July 1, 2011, the bill creates s. 732.615, F.S., to permit wills to be reformed for mistake, which would be comparable to an existing provision applicable to testamentary trusts, revocable trusts, and other trusts.[25]

Effective July 1, 2011, the bill creates s. 732.616, F.S., to allow wills to be modified to achieve the testator's tax objectives where it is not contrary to the testator's probable intent, which would be comparable to existing provisions applicable to testamentary trusts, revocable trusts, and other trusts.[26]

Effective July 1, 2011, the bill creates s. 733.1061, F.S., to authorize a court to award taxable costs, including attorney's fees and guardian ad litem fees, in a proceeding arising to reform a will for mistake or a proceeding for modifications to achieve the testator's tax objectives. When awarding the costs and fees, the court may direct payment from a party's interest or enter a judgment that may be satisfied from other property.

Trusts – Challenge of a Revocation or Amendment of Revocable Trust

The bill amends s. 732.5165, F.S., to authorize a challenge to the revocation of a will on the grounds of fraud, duress, mistake, or undue influence.
The bill amends s. 732.518, F.S., to authorize a challenge to the revocation of all or part of a will.

The bill amends s. 736.0207, F.S., to authorize a challenge to the revocation of a revocable trust or part of the revocable trust on the grounds of fraud, duress, mistake, or undue influence on the death of a settlor.

[25] Section 736.0415, F.S.
[26] Section 736.0416, F.S.

The bill amends s. 736.0406, F.S., to authorize a challenge to the creation, amendment, restatement, or revocation of a trust on the grounds it was procured by fraud, duress, mistake, or undue influence.

The bill amends s. 744.441, F.S., to limit powers of a guardian to prosecute or defend certain proceedings to provide that there is a rebuttable presumption that an action challenging the ward's revocation of all or part of a trust is not in the ward's best interest if the revocation relates solely to a devise. This does not preclude a challenge after the ward's death.

Attorney's Fees and Costs in Trust Proceedings

The bill amends s. 736.0201, F.S., to clarify Florida Rule of Civil Procedure 1.525 applies to clarify when and under what circumstances a trustee or beneficiary of a trust, or attorney must file a motion for attorney's fees and costs incurred in a judicial proceeding concerning a trust. Florida Rule of Civil Procedure 1.525 requires a party seeking costs or attorney's fees to serve a motion within the 30 days that follow the filing of a judgment. The bill specifies two exceptions. It specifies that the following circumstances do not constitute taxation of costs or attorney's fees even if the payment is for services rendered or costs incurred in a judicial proceeding:

- a trustee's payment of compensation or reimbursement of costs to persons employed by the trustee from assets of the trust; or
- a determination by the court directing from what part of the trust fees or costs shall be paid, unless the determination is made in an action for a breach of fiduciary duty or challenging the exercise of, or failure to exercise, a trustee's powers.

Effective Date and Application

Except as otherwise provided in the bill, it provides an effective date of upon becoming a law and applies to all proceedings pending before such date and all cases commenced on or after the effective date.

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:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

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

CS by Banking and Insurance on March 22, 2011

The CS creates s. 90.5021, F.S., to establish standards for privilege of communications between a lawyer and a client acting as a fiduciary. The CS provides that a client acts as a fiduciary when serving as a personal representative, a trustee, an administrator ad litem, a conservator, or an attorney in fact. The CS provides that the notice of administration that must be sent by the personal representative of the estate must include a statement that the fiduciary lawyer-client privilege applies with respect to the personal representative and the attorney employed by the personal representative. The CS provides that the notice that a trustee must provide to qualified beneficiaries must include a statement that the fiduciary lawyer-client privilege applies with respect to the trustee and the attorney employed by the trustee.

B. Amendments:

None.

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 Rules Committee

BILL:	SB 726
INTRODUCER:	Senator Bullard
SUBJECT:	State Symbols/Official State Flagship
DATE:	April 21, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Mason	Roberts	GO	**Favorable**
2.	Wiggins	Yeatman	EP	**Favorable**
3.	Wiggins	Phelps	RC	**Pre-meeting**
4.				
5.				
6.				

I. Summary:

This bill designates the Schooner Western Union the official state flagship.

This bill creates section 15.0465 of the Florida Statutes.

II. Present Situation:

Currently, no ship is designated as the official state flagship.

Chapter 15, F.S. designates official state emblems. To date there are designations for a state tree, fruit, beverage, anthem, song, shell, stone, gem, wildflower, play, animal, freshwater fish, saltwater fish, marine mammal, saltwater mammal, butterfly, reptile, saltwater reptile, tortoise, air fair, rodeo, festival, moving image center and archive, litter control symbol, pageant, opera, renaissance festival, railroad museums, transportation museum, soil, fiddle contest, band, sports hall of fame, pie, maritime museum, and horse.

The Schooner Western Union is a 130-foot historic sailing vessel of the tall ship class. Construction of the ship began in Grand Cayman, but it was completed in Key West and first launched on April 7, 1939.[1] The Schooner is made of yellow pine and mahogany. For thirty-five years the Schooner served as a cable vessel for the Western Union Telegraph Company, repairing underwater cables throughout the Keys, Cuba, and the Caribbean. Since retiring, the Schooner was used as a charter boat in various events and is now an open maritime museum.

[1] Schooner Western Union Maritime Museum—Boat History, http://www.schoonerwesternunion.org/key-west/boat-history.htm (last visited March 25, 2011).

III. Effect of Proposed Changes:

Section 1 creates section 15.0465, F.S., to designate the Schooner Western Union as the official state flagship.

Section 2 provides that this act shall take effect July 1, 2011.

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:

None.

C. Government Sector Impact:

The Department of State maintains a list on its website of all official state symbols.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

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

None.

B. Amendments:

None.

LEGISLATIVE ACTION

Senate . House

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The Committee on Rules (Gardiner) recommended the following:

Senate Amendment

Delete lines 200 - 206
and insert:
Section 2. The Sheriff of Broward County is authorized and directed to appropriate from funds of the Broward County Sheriff's Office not otherwise appropriated and to draw a warrant payable to Eric Brody in the sum of $23,679,298.30. In lieu of payment, the Sheriff of Broward County may

693104

LEGISLATIVE ACTION

Senate . House

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The Committee on Rules (Thrasher and Gaetz) recommended the following:

Senate Amendment

Delete lines 222 - 235

and insert:

Section 4. The amount paid by the Broward County Sheriff's Office pursuant to s. 768.28, Florida Statutes, and the amount awarded under this act are intended to provide the sole compensation for all claims arising out of the facts described in this act which resulted in the injuries to Eric Brody. The total amount of attorney's fees, lobbying fees, costs, and other similar expenses may not exceed 25 percent of the total amount awarded under sections 2 and 3 of this act, which shall include

693104

any fees earned and amounts recovered in the prosecution of any assigned claim as permitted under section 2 of this act.

860096

LEGISLATIVE ACTION

Senate . House

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The Committee on Rules (Gardiner) recommended the following:

Senate Amendment

In title, delete lines 136 - 148.

930932

LEGISLATIVE ACTION

Senate . House

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The Committee on Rules (Gardiner) recommended the following:

Senate Amendment

In title, delete lines 154 - 155
and insert:
WHEREAS, the jury found Eric Brody's damages to be $30,609,298, including a determination that his past and future

367120

LEGISLATIVE ACTION

Senate . House

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The Committee on Rules (Gardiner) recommended the following:

Senate Amendment

In title, delete line 157
and insert:
WHEREAS, final judgment was entered for $30,609,298, and

191080

LEGISLATIVE ACTION

Senate . House

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The Committee on Rules (Gardiner) recommended the following:

Senate Amendment

In title, delete lines 158 - 159
and insert:
the court entered a cost judgment for $270,372.30, and

LEGISLATIVE ACTION

Senate . House

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The Committee on Rules (Gardiner) recommended the following:

Senate Amendment

In title, delete lines 174 - 176
and insert:
WHEREAS, upon the passage of a claim bill for any amount in excess of the insurance policy limit of $3 million, Eric Brody believes that the Broward County Sheriff's Office may have a cause of action pursuant to

585020

LEGISLATIVE ACTION

Senate . House

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The Committee on Rules (Gardiner) recommended the following:

Senate Amendment

In title, delete line 185
and insert:
$30,679,298.30 is sought through the submission of a claim bill

THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

Location
402 Senate Office Building

Mailing Address
404 South Monroe Street
Tallahassee, Florida 32399-1100
(850) 487-5237

DATE	COMM	ACTION
2/1/11	SM	Unfavorable
4/12/11	RC	Pre-meeting

February 1, 2011

The Honorable Mike Haridopolos
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 42 (2011)** – Senator Lizbeth Benacquisto
Relief of Eric Brody

SPECIAL MASTER'S FINAL REPORT

THIS IS A CONTESTED EXCESS JUDGMENT CLAIM FOR $30,760,670.30 OF LOCAL MONEY BASED ON A JURY AWARD AGAINST THE BROWARD COUNTY SHERIFF'S OFFICE TO COMPENSATE CLAIMANT ERIC BRODY FOR THE PERMANENT INJURIES HE SUFFERED IN A COLLISION WITH A DEPUTY SHERIFF'S CRUISER.

FINDINGS OF FACT:

On the evening of March 3, 1998, in Sunrise, Florida, 18-year-old Eric Brody was on his way home from his part-time job. He was making a left turn from Oakland Park Boulevard into his neighborhood when his AMC Concord was struck near the passenger door by a Sheriff's Office cruiser driven by Deputy Sheriff Christopher Thieman.

Deputy Thieman was on his way to a mandatory roll call at the Sheriff's district station in Weston. One estimate of his speed was 70 MPH. Even the lowest credible estimate of his speed was in excess of the 45 MPH speed limit. It is estimated that the cruiser, after braking, struck Eric's vehicle at about 53 MPH. The impact caused Eric to be violently thrown toward the passenger door, where he struck his head. He suffered broken ribs and a skull fracture. Eric was airlifted to Broward General Hospital where he underwent an

emergency craniotomy to reduce brain swelling. However, he suffered a severe brain injury that left him with permanent disabilities.

Eric was in the hospital intensive care unit for four weeks and then was transferred to a rehabilitation center. He was later transferred to a nursing home. He remained in an induced coma for about six months. After the coma, Eric had to learn to walk and talk again. Eric is now 31 years old and lives with his parents. He has difficulty walking and usually uses a wheelchair or a walker. His balance is diminished and he will often fall. Eric has some paralysis on the left side of his body and has no control of his left hand. He must be helped to do some simple personal tasks. He tires easily. The extent of his cognitive disabilities is not clear. His processing speed and short-term memory are impaired and his mother believes his judgment has been affected.

At the time of the collision, Eric had been accepted at two universities and was interested in pursuing a career in radio broadcasting. However, his speech was substantially affected by his injuries and it is now difficult for anyone other than his mother to understand him.

One of the main issues in the trial was whether Eric was comparatively negligent. The Broward County Sheriff's Office (BCSO) contends that Eric was not wearing his seatbelt and that, if he had been wearing his seatbelt, his injuries would have been substantially reduced. Eric has no memory of the accident because of his head injury, but testified at trial that he always wore his seatbelt. The paramedics who arrived at the scene of the crash testified that Eric's seatbelt was not fastened. However, the seatbelt was spooled out and there was evidence presented that the seatbelt could have become disconnected in the crash.

The jury saw a crash re-enactment that was conducted with similar vehicles, using a belted test dummy. The results of the reenactment supported the proposition that the collision would have caused a belted driver to strike his or her head on the passenger door. The seatbelt shoulder harness has little or no effect in stopping the movement of the upper body in a side impact like the one involved in this case. The head injury that Eric sustained is consistent with injuries sustained

by belted drivers in side impact collisions. Therefore, Eric's injury is not inconsistent with the claim that he was wearing his seatbelt at the time of the collision. I conclude from the evidence presented that Eric was more likely than not wearing his seat belt.

Deputy Thieman's account of the incident was conspicuously lacking in detail. Deputy Thieman did not recall how fast he was going before the collision. He could not recall how close he was to Eric's vehicle when he first saw it. He could not recall whether Eric's turn signal was on.

A curious aspect of the incident was that Deputy Thieman had been traveling in the left lane of Oakland Park Boulevard, which has three westbound lanes, but collided with Eric's vehicle in the far right lane. If Deputy Thieman had stayed in the left lane, the collision would not have occurred. Why Deputy Thieman swerved to the right was not adequately explained. It would seem that the natural response in seeing a vehicle moving to the right would be to try to escape to the left. At trial, Deputy Thieman testified that he did not turn to the left because that was in the direction of oncoming traffic. However, there was no oncoming traffic at the time. It is concluded that the manner in which Deputy Thieman maneuvered his vehicle was unreasonable under the circumstances and that it was a contributing cause of the collision.

Deputy Thieman's was fired by the Broward County Sheriff's Office in 2006 for misconduct not related to the collision with Eric Brody.

Eric received $10,000 from Personal Injury Protection coverage on his automobile insurance. He receives Social Security disabilities payments of approximately $560 each month. He also received some vocational rehabilitation assistance which paid for a wheelchair ramp and some other modifications at his home.

Eric has a normal life expectancy. One life care plan developed for Eric estimated the cost of his care will be $10,151,619. There was other evidence that his future care would cost $5 to $7 million.

LITIGATION HISTORY:

In 2002, a negligence lawsuit was filed in the circuit court for Broward County by Charles and Sharon Brody, as Eric's parents and guardians, against the BCSO. In December 2005, after a lengthy trial, the jury found that Deputy Thieman was negligent and that his negligence was the sole cause of Eric's damages. The jury awarded damages of $30,609,298. The court entered a cost judgment of $270,372.30. The sum of these two figures is $30,879,670.30. Post-trial motions for new trial and remittitur were denied. The verdict was upheld on appeal.

The BCSO paid the $200,000 sovereign immunity limit under s. 768.28, Florida Statutes. The payment was placed in a trust account and none of it has been disbursed. Attorney's fees and costs have not been deducted. Eric Brody has received nothing to date.

CONCLUSIONS OF LAW:

The claim bill hearing was a *de novo* proceeding to determine, based on the evidence presented to the Special Master, whether the BCSO is liable in negligence for the damages suffered by Eric Brody and, if so, whether the amount of the claim is reasonable.

Deputy Thieman had a duty to operate his vehicle in conformance with the posted speed limit and with reasonable care for the safety of other drivers. His speeding and failure to operate his vehicle with reasonable care caused the collision and the injuries that Eric Brody sustained. The BCSO is liable as Deputy Thieman's employer.

Although Eric Brody was required to yield before turning left, the evidence does not show that a failure to yield was a contributing cause of the collision. Eric reasonably judged that he could safely make the left turn. He was well past the lane in which Deputy Thieman was traveling. The collision appears to have been caused solely by Deputy Thieman's unreasonable actions in speeding and swerving to the right. I believe the jury acted reasonably in assigning no fault to Eric.

At the claim bill hearing, Claimant's counsel urged the Special Master to determine that the liability insurer for the BCSO acted in bad faith by failing to timely tender its $3 million coverage in this matter and, therefore, the insurer is

liable for the entire judgment against the BCSO. However, because the insurer was not a party to the Senate claim bill proceeding, and because the bad faith claim is not a proper subject for determination in a claim bill hearing under the rules of the Senate, I did not take evidence nor make a determination regarding the bad faith claim.

The BCSO objected to the provision of the 2010 claim bill that provided for the BCSO's assignment of its bad faith claim against its insurer to Eric Brody as prohibited by the Florida Constitution and beyond the statutory authority of the Senate. It may be unconstitutional for a local claim bill to require the assignment of a legal claim, because Article III, Section 11(a)(7) of the Florida Constitution prohibits special laws or general laws of local application pertaining to "conditions precedent to bringing any civil or criminal proceedings." However, Senate Bill 42 does not require the assignment of the BCSO's legal claim. The bill requires the BCSO to pay the $30 million claim, but states that, in lieu of payment, the BCSO "may" assign its legal claim against the insurer to Eric Brody and, if it assigns its claim, the BCSO is not required to pay the $30 million. In this form, I do not believe that Senate Bill 42 violates the constitutional restriction on special laws or exceeds the Senate's authority.

ATTORNEYS FEES: In compliance with s. 768.28(8), Florida Statutes, the Claimant's attorneys will limit their fees to 25 percent of any amount awarded by the Legislature.

SPECIAL ISSUES: Senate Bill 42 incorrectly states that the jury awarded damages of $30,690,000. The correct amount is $30,609,298. The total excess judgment claim is incorrectly stated as $30,760,372.30. The correct amount is $30,679,670.30.

The positions of the parties regarding this claim bill are uncertain. It is not clear why Broward County opposes the opportunity to avoid a $30 million claim bill by assigning its legal claim against its insurer to the Claimant. It is also unclear why the Claimant would refuse the Legislature's award and the settlement offers made by the County, which would allow Eric Brody to begin to receive the care he needs, and choose instead to accept the risk and further delay associated with commencing a bad faith claim against

the County's insurer.

The Senate should also consider the unusual size of this claim bill. Sovereign immunity from liability in tort effectively prevents the State and local governments from being bankrupted by damage awards. Claim bills in excess of $10 million are unusual. Claims bills in excess of $20 million are rare. This claim bill for over $30 million is the largest ever claim bill to my knowledge. In the past, the largest claim bills have usually called for installment payments or other mechanisms to make the fiscal impact manageable. The BCSO contends that it cannot pay this claim without drastic reductions in governmental services. It asserts that the claim is equivalent to 300 law enforcement officers or five fire/rescue stations. Eric Brody deserves to be compensated for his injuries caused by the negligence of Deputy Thieman, but it would be unreasonable to waive sovereign immunity if the result is to cause severe reductions in government services to the citizens of Broward County.

The fiscal burden that would be associated with the Legislature's regular passage of $10, $20, and $30 million claim bills, especially for claims that will be paid by local governments beyond their insurance coverage, indicates that a balance must be struck between the principle of sovereign immunity and the principle of fair compensation.

The payment of a claim bill is a matter of legislative grace and the Senate is free to deviate from a jury award. When very large claim bills are filed, it is reasonable for the Senate to consider, among other factors, whether the amount of a claim deviates substantially above or below the median jury verdict for similar injuries. At the request of the Special Master, the parties submitted jury verdict data for cases involving permanent brain injuries. The information was inadequate to allow a median award to be stated with confidence, but it is under $20 million. As stated above, the life care plans for Eric Brody ranged from $5 to $10 million.

If the Senate wishes to pay the claim, I believe the option to assign the claim should be preserved in the bill, but the award should be reduced to $15 million and Broward County should be allowed to pay the award in several installments.

RECOMMENDATIONS: For the reasons set forth above, I recommend that Senate Bill 42 (2011) be reported UNFAVORABLY.

Respectfully submitted,

Bram D. E. Canter
Senate Special Master

cc: Senator Lizbeth Benacquisto
R. Philip Twogood, Secretary of the Senate
Counsel of Record

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April 25, 2011

The Honorable John Thrasher
Chairman, Florida Senate Rules Committee
400 Senate Office Building
404 South Monroe Street
Tallahassee, FL 32399-1100

Dear Senator Thrasher:

I respectfully request the following issues be considered at the Senate Rules Committee hearing on April 26, 2011 on the Eric Brody claim bill (SB 42). I was present at the hearing on April 15, 2011 to present these views to the Committee, but I cannot be present on April 26, 2011 because of a long standing commitment to be out of the Country.

Please understand that my comments are in no way intended to diminish or disparage the very substantial injuries and damages suffered by Eric Brody in the automobile accident with an automobile owned and operated by the Sheriff's Department. All of us recognize the severity of what happened to Eric Brody, and certainly extend to him and his family our prayers and hope for the future.

However, the difficult task before the Rules Committee still is to focus upon the consideration of the contents and effect of the claim bill, and these are the subject of my analysis. That focus demonstrates that this is a claim bill which **does not comply with the general statutory law for a claim bill, fails to end the claim, does not contain language and directions necessary to such a claim bill, is inaccurate in a factual finding, and does not comply with the law as to attorney fee limitations.**

1. Does not comply with the existing general statutory law for a claim bill:

Florida Statute 11.066 (3) provides:

> To enforce a judgment for monetary damages against the state or a state agency, the sole remedy of the judgment creditor, if

> there has not otherwise been an appropriation made by law to pay the judgment, is to petition the Legislature in accordance with its rules to seek an appropriation to pay the judgment.

The present claim bill's direction to the local constitutional officer to pay the judgment is a ruse that avoids the requirements of the law. Instead of a real direction to pay, the bill sets up an assignment procedure which has no lawful basis in the claim bill statute and to my knowledge is unprecedented in a claim bill. The "in lieu" provision of the bill contravenes the compensatory function of the claim bill, amounting to a direction to the local constitutional officer to assign the claim, and also contravenes the claimant's entitlement to payment of the claim by the local constitutional officer. This provision is contrary to the established statutory scheme of both Florida Statute 11.066 and Florida Statute 768.28 which is for the legislature to direct payment of an amount in a claim bill.

2. Does not end the claim:

A claim bill is intended to end and settle a claim for a realistic amount with the direction that amount be paid from the State Treasury or by the local agency or constitutional officer. This claim bill is not the end of this claim. This claim bill is simply the beginning of another phase of this claim. This claim bill is designed to use the claim bill procedure to set up a purported bad faith claim against the Sheriff Department's liability insurer. It is another contrivance in further extension of bad faith claims following the Florida Supreme Court's 2005 decision in *Berges v. Infinity Insurance Company*, 896 So.2d 665 (Fla. 2005). By this procedure, both Eric Brody and the Broward County Sheriff's office will be involved in many more years of litigating this claim. (I note that the *Berges* case took fourteen years to resolve.)

3. The claim bill does not comply with the Legislative Claim Bill Manual in several respects:

A. Local bill requirement

> A claim bill that directs a payment by a local constitutional officer is a "local claim bill," Manual I.H (page 3). There are two important characteristics that distinguish a local claim bill from a general claim bill: the "relating to" clause in the title of

the bill and the appropriation sections that follow the enacting clause. Manual II.A (page 5). In the present claim bill, the "relating to" clause is for a general claim bill rather than a local claim bill. This will cause confusion as the "bad faith" case is litigated in the Circuit Court, and in the future when argued by claimants' lawyers to apply to a broad range of sovereign immunity cases.

B. Medicaid reimbursement requirement

This claim bill itself says that Eric Brody has been totally dependent on public health programs and tax payer assistance since the automobile accident. Obviously, then, there is a substantial amount owing to Medicaid. When Medicaid reimbursement is owed, the Manual requires that the claim bill shall direct payment of the amount which Medicaid has paid to the Florida Agency for Health Care Administration, Manual II. D (page 5). This claim bill omits any reference to the Medicaid amount and does not contain the appropriate direction that the State be repaid what is owed. Is it the intention of the legislature that Medicaid not be repaid in this case, notwithstanding the record-setting amount of the claim bill?

4. Inaccurate in findings of fact:

For example, the claim bill states as a fact that "the cost of Eric Brody's life care plan is nearly $10 million." First, this fact was not found by the Special Master who examined the claim. The Special Master actually found "the life care plans ranged from $5 to 10 Million." Special Master's Final Report" page 6. Second, the overall amount paid out in a life care plan during the course of a person's life differs substantially from the "present value" cost of funding or annuitizing such a plan. The Special Master's report, and thus the claim bill, fails to specify whether it is referring to the lifetime payout or the present value cost of funding. It is the present value of a life care plan which is properly in a claim bill because that is the amount needed to fund the life care plan. Since this bill is a prelude to future litigation, it is important that the bill be accurate in what is presented as a finding of fact.

5. Does not comply with the law on attorney fee limitations:

The claim bill conflicts with the existing provisions of Florida Statute 768.28 which provides for 25% limitation on attorney fees. This claim bill has language that purports to entitle the claimant's lawyers and other advisers to recover potentially millions in additional money from pursuing collection of the claim bill. Other than in this claim bill, the amount of attorney fees awarded in connection with the representation in a claim involving sovereign immunity has been limited to no more than the statutory amount. Additional fees are not authorized within the statute, and should not be part of this claim bill.

I urge the Committee not to move this claim bill in its present form. There will be undoubtedly adverse future consequences of this unprecedented converting of the claim bill procedure into a "bad faith" claim. The claim bill procedure should not be used merely as a vehicle upon which to launch further claims. That is precisely the precedent which this bill would create.

The present claim bill should be not moved unless and until it conforms to the law and the rules of the Legislature.

Sincerely,

Charles T. Wells
Appearing on behalf of Ranger
Insurance Company

CTW/mm
cc: All Rules Committee Members
Counsel for the BSO, Counsel for the Claimant

THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

Location
402 Senate Office Building

Mailing Address
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Tallahassee, Florida 32399-1100
(850) 487-5237

DATE	COMM	ACTION
2/1/11	SM	Unfavorable
4/21/11	RC	**Pre-meeting**

February 1, 2011

The Honorable Mike Haridopolos
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 18 (2011)** – Senator Dennis L. Jones
Relief of Daniel and Amara Estrada

SPECIAL MASTER'S FINAL REPORT

BASED ON A JURY AWARD OF MORE THAN $20 MILLION AGAINST THE UNIVERSITY OF SOUTH FLORIDA, THIS CONTESTED EXCESS JUDGMENT CLAIM ARISES FROM THE "WRONGFUL BIRTH" OF CALEB ESTRADA, A CHILD WHO, BECAUSE OF A GENETIC DISORDER, WILL REQUIRE A LIFETIME OF EXTRAORDINARY CARE.

FINDINGS OF FACT:

On June 28, 2002, Amara Estrada gave birth to a son, whom she and her husband Daniel named Aiden. Aiden was the couple's first child.

Aiden was delivered at Tampa General Hospital. He had a number of patent physical abnormalities. Consequently, a referral was made for Aiden to be seen by Dr. Boris Kousseff, who was, at the time, a professor of medicine at the University of South Florida (USF) College of Medicine and the Director of the Division of Medical Genetics in USF's Department of Pediatrics. Dr. Kousseff first examined Aiden on July 1, 2002. He saw the infant for a second time about two months later, on August 29, 2002. Arrangements were made for Dr. Kousseff to see Aiden again after 12 months. Dr. Kousseff did not, during either of the visits in 2002, diagnose Aiden as having any particular genetic disease or

syndrome. In fact, however, Aiden was suffering from a condition known as Smith-Lemli-Opitz Syndrome (SLO), a genetic disorder that produces a constellation of physical and cognitive impairments, many of which Aiden had been born with. Dr. Kousseff's failure to diagnose SLO in Aiden was a breach of the accepted standard of care for geneticists.

Not long after Aiden's birth, the Estradas moved from Tampa to Orlando. In Tampa, Aiden had been receiving early intervention services from the state. To continue receiving these services in Orlando, Aiden needed to be examined by the local provider; as a result, he was seen by Dr. Lynda Pollack on November 7, 2002. Dr. Pollack is a pediatrician. She happens also to be a geneticist.

Dr. Pollack performed a pediatric evaluation of Aiden. In her chart, however, she noted that blood for a cholesterol test should be obtained. The purpose for conducting a cholesterol test would have been to diagnose SLO, which Dr. Pollack suspected Aiden might have. Dr. Pollack did not herself order the test, however, nor did she recommend to the Estradas or any of Aiden's medical providers that the test be administered. It is reasonably likely that if Dr. Pollack had followed through to ensure that the cholesterol test was performed, Aiden's true condition, which remained undiagnosed, would have been discovered before Amara Estrada became pregnant again. Dr. Pollack's failure to act on her own suggestion to recommend a cholesterol test was a breach of the accepted standard of care for physicians.

Months passed, and the severity of Aiden's multiple impairments became increasingly manifest. He had profound developmental delays. Further, being unable to eat or drink by mouth, Aiden was forced to depend on a gastronomy tube (G-tube), which had been surgically placed through the wall of his stomach, for nutrition and hydration. The Estradas remained unaware that Aiden had a discrete genetic disorder; they were, however, understandably worried that their next child, were they to have one, would have the same birth defects as Aiden. They decided that unless they could be assured that the risk of recurrence were negligible, they would adopt rather than take a chance on having another special needs child.

The question that was foremost in the Estradas' minds when they brought Aiden to see Dr. Kousseff on September 15, 2003, was whether they could have another child without the recurrence of Aiden's birth defects. Dr. Kousseff told the couple that, because Aiden's condition did not fit a particular syndrome, they could expect to have normal children going forward. He advised them that Amara should, if pregnant, have fetal sonograms taken at 16 and 23 weeks into the pregnancy, to rule out the presence of birth defects. Dr. Kousseff put his mistaken judgment regarding the chance of recurrence in a letter to the Estradas, which was dated September 15, 2003. Dr. Kousseff's faulty risk assessment fell below the standard of care for geneticists faced with this situation, which calls for the doctor to advise parents whose first child has birth defects of unknown etiology that there is at least a 25 percent chance of those defects recurring in their next child.

Having received the "green light" from Dr. Kousseff, Daniel and Amara elected to have another child. Amara became pregnant in early 2004. Her pregnancy progressed normally. The ultrasound scans that Dr. Kousseff had recommended were conducted and gave no cause for concern. SLO is not detectable through sonography. It can be diagnosed by an amniotic fluid test, but, because Aiden had not been diagnosed with SLO, amniocentesis was not indicated for Amara, who—in light of Dr. Kousseff's report— was not believed to be at risk of carrying a child having hereditary abnormalities.

On November 18, 2004, Amara gave birth to Caleb Estrada, who was delivered at Shands Teaching Hospital in Gainesville. Caleb, unfortunately, had the same birth defects as his brother Aiden. In short order, the doctors at Shands determined that Caleb's congenital anomalies were the result of SLO. Having correctly diagnosed Caleb, the doctors next examined Aiden and concluded that he, too, had SLO.

Caleb Estrada has serious deformities and impairments. It is unlikely that he will ever walk normally, although he might someday be able to "functionally ambulate." He will not be able to talk or effectively communicate due to cognitive deficits. He cannot currently eat or drink and must be fed through a G-tube, a situation that is likely permanent, though

not necessarily so. In short, while some improvement in his situation is possible, Caleb will never be able to care for himself; rather, he will need continual care around the clock, seven days per week, for the rest of his life.

The Estradas have health insurance that has paid, and continues to pay, many of Caleb's medical expenses. Their insurer, Blue Cross/Blue Shield, has asserted a lien of approximately $25,500, which would be paid from the proceeds of the claim bill.

Caleb is currently receiving special education services in the public schools of Alachua County. He is not presently eligible for public assistance, such as Medicaid, because his parents' income is too high to qualify. (Amara, a veterinary cardiologist, is an assistant professor of veterinary medicine at the University of Florida. Daniel works as an administrator in UF's Department of Pediatrics; as of the final hearing, however, Daniel had been notified that he would be laid off at the end of the year.)

The parties sharply dispute the present value of the cost of Caleb's future extraordinary care. The Claimants' experts offered a detailed "continuum of care" plan, the present value of which, according to their economist, is about $25 million. In contrast, USF's experts placed the present value of Caleb's life care expenses at between, roughly, $2.5 million and $3.8 million. USF's proposed lifetime care plan affords fewer services than the Claimants' plan and assumes that Caleb will not live past the age of 40, whereas the Claimants assume that Caleb will have a normal lifespan. USF also has argued, in this proceeding, that Caleb's future financial needs can be adequately covered by purchasing an annuity, which, USF asserts, could be obtained for $1 million to $3 million from a reputable insurance company.

At the conclusion of the trial in the civil action that the Estradas brought against USF, which will be discussed below, the jury returned a verdict in favor of the Estradas, awarding them $18.5 million as the present value of the cost of providing Caleb's future extraordinary care. Having considered the evidence and arguments presented at the trial and in this proceeding, the undersigned finds no basis for disturbing the jury's assessment of this item of damages. The sum of $18.5 million is a reasonably accurate

determination of the present value of the future economic expenses associated with the lifetime of extraordinary care Caleb will need.

In addition to the award for future medical expenses, the jury found that Caleb's parents had incurred $53,000 in past extraordinary expenses in caring for him. USF has not challenged this item of damages. It is determined that the sum of $53,000 is, as the jury found, a reasonably accurate assessment of the Estradas' past economic losses.

Finally, the jury found that Daniel and Amara Estrada had endured "pain and suffering" for which each should be awarded $2.5 million. There is no formula, no scientific or mathematic method, for determining the appropriate amount of an award for pain and suffering. While the undersigned does not believe that the jury's determination in this regard was unreasonable under the circumstances, he nevertheless finds, for reasons that will be discussed below, that noneconomic damages should be limited to $500,000 per parent.

The jury in the civil trial was asked to compare the negligence of Dr. Kousseff to that of Dr. Pollack and apportion the fault between them by percentages. The jury determined that Dr. Kousseff's negligence comprised 90 percent of the cause of Caleb's "wrongful birth," while finding Dr. Pollack 10 percent at fault.

While the undersigned might have placed less blame on Dr. Pollack, whose negligence did not change the status quo (in which Amara had no intention of becoming pregnant) and thus would not, without Dr. Kousseff's subsequent, faulty assessment of the risk of recurrence, have proximately led to Caleb's birth, he nonetheless considers the jury's apportionment of the fault to be consistent with the evidence and will defer to the jury's collective wisdom in the matter. It is found, therefore, that Dr. Kousseff was 90 percent responsible for the birth, Dr. Pollack 10 percent.

LEGAL PROCEEDINGS:

In January 2006, the Estradas individually, and as the parents and guardians of Caleb, brought a "wrongful birth" action against USF based on the negligence of Dr. Kousseff. The action was filed in the circuit court in Hillsborough County.

The case was tried before a jury in July 2007. The court directed a verdict in favor of the plaintiffs with regard to USF's liability, finding that Dr. Kousseff had been negligent as a matter of law, and that his negligence was a legal cause of Caleb's birth. The jury returned a verdict awarding the Estradas, as Caleb's guardians, a total of $18,553,000 in damages, broken down as follows: (a) $53,000 for economic losses; and (b) $18.5 million for future economic expenses. The jury further awarded Daniel and Amara Estrada, as individuals, $1.5 million each for past mental anguish resulting from Caleb's birth, and an additional $1 million each for future mental anguish, for a total of $2.5 million in pain and suffering damages per parent.

The jury apportioned the fault for Caleb's birth as follows: Dr. Kousseff, 90 percent; Dr. Pollack, 10 percent.

On August 17, 2007, in accordance with the jury's apportionment of fault, the trial court entered a judgment against USF and in favor of: (a) Daniel and Amara Estrada, as guardians, in the amount of $16,697,700; (b) Daniel Estrada, individually, in the amount of $2.25 million; and (c) Amara Estrada, individually, in the amount of $2.25 million. A cost judgment also was entered, awarding the Estradas $26,994.87.

USF appealed the judgment. On March 2, 2009, the Second District Court of Appeal affirmed, per curiam.

USF paid the Estradas $200,000 under the sovereign immunity cap.

CLAIMANTS' ARGUMENTS:

USF is vicariously liable for the negligence of its employee, Dr. Kousseff, whose negligent advice regarding the risk of Aiden's birth defects recurring in a second child deprived the Estradas of the opportunity to avoid conception or terminate a pregnancy. As a consequence of Dr. Kousseff's negligence, the Estradas have incurred, and will continue to incur, extraordinary expenses in caring for Caleb, whose significant impairments render him permanently incapable of caring for himself. The Claimants urge that a claim bill be enacted awarding them the entire excess judgment of $20,997,700, together with $26,994.87 in costs, and approximately $3.8 million in interest. (The claim for interest

is based on an argument concerning the availability of insurance coverage, which will be discussed below.)

RESPONDENT'S ARGUMENTS: USF does not dispute that Dr. Kousseff was negligent in failing to diagnose Aiden with SLO and advising the Estradas that Aiden's birth defects did not signify an increased risk that a second child would be similarly impaired. Instead, USF makes a number of arguments, the goal of which is to urge defeat of the bill primarily on policy grounds. These arguments include:

(a) "Wrongful birth" is a rare and controversial cause of action. Dr. Kousseff's negligence did not cause Caleb's birth defects. Caleb's life is not "wrongful" and, though caring for him poses challenges, his parents love him and are enriched by his existence. Sovereign immunity should not be waived to provide compensation in a situation where, as here, a human being would not be in existence but for the negligence of the public employee.

(b) The verdict was excessive. The pain and suffering damages awarded to the parents individually far exceeded a rational assessment of their suffering. Moreover, the continuum of care plan for Caleb that the Claimants offered at trial was full of services that either Caleb does not need or will be paid for by insurance or through governmental programs such as the educational services available in the public schools. Not only that, the Claimants' continuum of care plan was based on a normal life expectancy, when a lifespan of 20 or 30 years is more likely. The damages should not have exceeded $3 million.

(c) Dr. Pollack's negligence was a supervening cause of the "wrongful birth." The jury should have found her 100 percent liable—or at least much more at fault than 10 percent.

Ultimately, it is USF's position that there is no compelling reason to enact the instant claim bill, which should be rejected in its entirety.

CONCLUSIONS OF LAW: As provided in s. 768.28, Florida Statutes (2010), sovereign immunity shields USF against tort liability in excess of $200,000 per occurrence. See Eldred v. North Broward Hospital District, 498 So. 2d 911, 914 (Fla. 1986); Paushter v. South Broward

Hospital District, 664 So. 2d 1032, 1033 (Fla. 4th DCA 1995).

Under the doctrine of respondeat superior, USF is vicariously liable for the negligent acts of its agents and employees, when such acts are within the course and scope of the agency or employment. See Roessler v. Novak, 858 So. 2d 1158, 1161 (Fla. 2d DCA 2003). Dr. Kousseff was an employee of USF and was acting in the course and scope of his employment when treating Aiden Estrada. Accordingly, Dr. Kousseff's negligence in connection with his care of Aiden, including the bad advice given to the Estradas regarding the risk of recurrence, is attributable to USF.

The Florida Supreme Court, in Kush v. Lloyd, 616 So. 2d 415 (Fla. 1992), recognized the existence of a cause of action for "wrongful birth," explaining that the claim is "a species of medical malpractice" arising from the birth of "an impaired or deformed child," where the parents allege that "negligent treatment or advice deprived them of the opportunity or knowledge to avoid conception or to terminate the pregnancy." Id. at 417 n.2. The purpose of such an action is to "recover damages for the extraordinary expense of caring for the impaired or deformed child, over and above routine rearing expenses." Id. Such damages, being for the benefit of the child, should be placed in trust. Id. at 424. In addition to economic damages, the parents in a "wrongful birth" action are entitled to recover individually for "mental anguish caused by the birth of a deformed child." Id. at 422-23.

The facts of this case are similar to those of Kush, where, as here, the doctor advised parents that their son's birth defects were an accident of nature and that they could have another child without incident. Id. at 417. The parents in Kush, as the Estradas did in this case, subsequently had another child, who had the same birth defects as their first child. Id.

It is concluded based on Kush that Dr. Kousseff's negligence proximately caused the "wrongful birth" of Caleb Estrada, for which USF is liable.

Generally speaking, each joint tortfeasor whose negligence was a proximate cause of the plaintiff's injury is liable for his

or her share of the damages, under comparative fault principles. In this case, the jury apportioned the fault between Dr. Kousseff, whose employer the Estradas had sued, and Dr. Pollack, whom the defendant had named as a joint tortfeasor pursuant to a Fabre defense. See Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993). USF, recall, was found by the jury to have been 90 percent at fault, due to the actions of Dr. Kousseff, and Dr. Pollack 10 percent at fault.

A negligent party is *not* liable for someone else's injury, however, if a separate force or action was "the active and efficient intervening cause, the sole proximate cause or an independent cause." Department of Transp. v. Anglin, 502 So. 2d 896, 898 (Fla. 1987). Such a supervening act of negligence so completely disrupts the chain of events set in train by the original tortfeasor's conduct that any negligence which occurred before the supervening act is considered too remote to be the proximate cause of any injury resulting from the supervening act. On the other hand, if the intervening cause were foreseeable, which is a question of fact for the trier to decide, then the original negligent party may be held liable. Id. In circumstances involving a foreseeable intervening cause, the original tortfeasor sometimes is said to have "set in motion" the "chain of events" that resulted in the plaintiff's injury. See Gibson v. Avis Rent-a-Car System, Inc., 386 So. 2d 520, 522 (Fla. 1980).

The undersigned rejects USF's argument that Dr. Pollack's negligence constituted a supervening act that relieved USF of liability for Dr. Kousseff's negligence. Although Dr. Pollack's negligence occurred after Dr. Kousseff's initial failure to diagnose Aiden with SLO, it took place before Dr. Kousseff gave the Estradas the green light to have another child. Had Dr. Kousseff not given the Estradas the bad advice regarding the risk of recurrence, Dr. Pollack's negligence would have caused no harm, for the Estradas were not going to have another child absent assurance that they could do so without incident. At most, Dr. Pollack's negligence combined with that of Dr. Kousseff to cause a single injury, namely the "wrongful birth" of Caleb. This is how the case was presented—correctly, in the undersigned's view—to the jury, whose apportionment of the fault was reasonable and has been accepted herein as a finding of fact.

The Estradas offered sufficient evidence to prove the elements of damages available under Kush, both economic and noneconomic. The trial court, in entering the final judgment, appropriately reduced the damages by 10 percent, according to comparative fault principles, to relieve USF of any liability for Dr. Pollack's negligence. The undersigned concludes that the damages awarded in the final judgment are supported both by the evidence presented and the governing law.

LEGISLATIVE HISTORY: This is the second year that this claim has been presented to the Florida Legislature.

ATTORNEY'S FEES: Section 768.28(8), Florida Statutes, provides that "[n]o attorney may charge, demand, receive, or collect, for services rendered, fees in excess of 25 percent of any judgment or settlement." The Claimants' law firm, Searcy Denney Scarola Barnhart & Shipley, P.A., has agreed to limit its fees to 25 percent of the recovery.

The Claimants' attorneys represent that they have incurred approximately $215,000 in litigation costs. They state that the net proceeds to be distributed to the Estradas "will be reduced by" these costs. As written, however, the claim bill would not permit this because it provides that the "total amount paid for attorney's fees, lobbying fees, costs, and other similar expenses relating to the adoption of this act may not exceed 25 percent of the total amount awarded under this act." The attorney's fees alone (at 25 percent of the recovery) would reach the cap.

Unless amended, therefore, the bill would not allow the Claimants' attorneys to charge a fee of 25 percent of the gross recovery and, in addition to that, be reimbursed for costs out of the bill's proceeds. The undersigned does not recommend that the bill be amended.

SPECIAL ISSUES:

Noneconomic Damages

With regard to the noneconomic damages awarded to the Estradas individually for mental anguish, section 766.118(2), Florida Statutes, should be considered. This statute places a limit of $500,000 per claimant on the noneconomic damages recoverable in a medical malpractice case. Section 766.118(7), however, provides that this cap is not

applicable to actions governed by sovereign immunity law. Presumably the rationale for excluding actions governed by section 768.28, Florida Statutes, from the limitation on noneconomic damages imposed under section 766.118 is that the sovereign immunity cap of $100,000 per person is *lower* than the $500,000 cap prescribed in section 766.118.

In enacting a claim bill, the legislature, of course, can reduce an excess judgment in any way it sees fit. Because it would seemingly be anomalous for a claimant to be allowed to recover *more* in noneconomic damages from a governmental entity, via a claim bill, than otherwise would be allowable in a suit against a private defendant, the undersigned recommends that, if this claim bill is approved, the Estradas' respective individual recoveries be reduced, from $2.25 million apiece, to $500,000 per person. This would reduce the excess judgment amount by $3.5 million.

Insurance

USF has a self-insurance program that might provide coverage for this loss. The underlying coverage of up to $3 million per incident was provided by University of South Florida Health Sciences Center Insurance Company (HSCIC) pursuant to a policy that was not provided to the Senate Special Master. In addition to the HSCIC policy, there are two stand-alone excess polices, which are reinsured through Lloyd's, providing additional layers of coverage above $3 million, with limits of $5 million and $10 million, respectively. The excess policies, which were admitted into evidence in this proceeding, are "follow form" policies, meaning that their terms and conditions mirror those of the underlying policy. Thus, although USF did not produce a copy of the primary policy, it is possible to deduce, from the excess policies, the outlines of the underlying coverage, if not all the details thereof.

The HSCIC coverage is limited to $200,000 per incident when sovereign immunity applies, as here. If a claim bill were enacted and signed by the governor, however, then the $3 million limit would be activated. (The Claimants' attorneys argue that this insurance also would cover prejudgment interest, which is why they urge that nearly $4 million in interest be added to the amount of the claim. Given that section 768.28(5) excludes punitive damages and prejudgment interest from the liability that can attach to the

state and its agencies for tort claims, an award for prejudgment interest is probably inappropriate, if not prohibited.) In theory, then, there is potentially available $18 million in liability insurance for this loss, excluding prejudgment interest, assuming a claim bill is passed. The Claimants' attorneys argue, moreover, that the entire judgment ultimately would be covered because the insurers acted in bad faith.

As filed, Senate Bill 18 provides as follows:

> The sum of $24,823,212.92 shall be paid by the University of South Florida, provided the claim is paid exclusively, or at least to the maximum extent possible, out of insurance proceeds, including any bad faith claim that may exist against Lloyds of London under state law.

The Senate Special Master was not provided sufficient information to make detailed findings or conclusions regarding insurance coverage, and in any event such determinations are beyond the scope of the Master's delegated authority. On its face, moreover, although the claim bill appears to *minimize* the possibility that public funds would be used to pay the $25 million obligation it creates, the bill does not *preclude* such from happening, and indeed would *require* that the entire claim be paid out of public funds if no insurance recovery ever materialized.

Consequently, the undersigned must recommend against the enactment of this bill, not because the claim lacks merit, but because if this bill were to pass, a huge sum of public money would be placed at risk, at a time when the state is facing a multi-billion dollar budget shortfall.

RECOMMENDATIONS: For the reasons set forth above, I recommend that Senate Bill 18 (2011) be reported UNFAVORABLY.

Respectfully submitted,

John G. Van Laningham
Senate Special Master

cc: Senator Dennis L. Jones
R. Philip Twogood, Secretary of the Senate
Counsel of Record

LEGISLATIVE ACTION

Senate . House

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The Committee on Rules (Richter) recommended the following:

Senate Amendment

Delete lines 28 - 53
and insert:
WHEREAS, the police officers then placed Kevin Colindres into custody, handcuffing him behind the back and taking him out of the house, where the police officers placed him prone on the ground and applied a hobble restraint to his ankles, and
WHEREAS, in violation of their training and the City of Miami's policies and procedures, the police officers left Kevin Colindres prone on the ground and applied weight to his back, and
WHEREAS, in violation of their training and the City of

Miami's policies and procedures, the police officers left Kevin Colindres in this position in excess of 10 minutes, and

WHEREAS, in violation of their training and the City of Miami's policies and procedures, the police officers failed to appropriately check Kevin Colindres' vital signs, and

WHEREAS, in violation of their training and the City of Miami's policies and procedures, upon realizing that Kevin Colindres had stopped breathing, the officers failed to advise the fire rescue department of the urgency of the matter, thereby delaying the response by fire rescue personnel, and

THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

Location
402 Senate Office Building

Mailing Address
404 South Monroe Street
Tallahassee, Florida 32399-1100
(850) 487-5237

DATE	COMM	ACTION
2/1/11	SM	Fav/1 amendment
4/21/11	RC	**Pre-meeting**

February 1, 2011

The Honorable Mike Haridopolos
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 54 (2011)** – Senator Ronda Storms
Relief of Melvin and Alma Colindres

SPECIAL MASTER'S FINAL REPORT

THIS IS A CONTESTED CLAIM FOR $2,550,000 BASED ON A FINAL JUDGMENT, ENTERED FOLLOWING A NON-BINDING ARBITRATION, FOR MELVIN AND ALMA CONLINDRES AND THE ESTATE OF THEIR SON, KEVIN COLINDRES, AGAINST THE CITY OF MIAMI TO COMPENSATE CLAIMANTS FOR THE DEATH OF KEVIN COLINDRES, WHICH OCCURRED WHILE IN POLICE CUSTODY.

FINDINGS OF FACT:

Background

This matter arises out of the death of Kevin Colindres, a mentally retarded and severely autistic 18-year-old. Due to his disabilities, Kevin's mental capacity was comparable with that of a four-year-old child. Similar to many four-year-olds, Kevin would occasionally throw temper tantrums. However, as Kevin stood 5'9 and weighed approximately 210 pounds, the family members with whom he resided (his mother, father, and three siblings) sometimes required the assistance of law enforcement to control his behavior.

Evening of December 12, 2006

On December 12, 2006, Mrs. Alma Colindres, Kevin's mother, asked Kevin to get dressed. When Kevin would not comply, Alma told Kevin that she would take him to school,

which he hated, unless he cooperated with her. In response to Alma's mention of school, Kevin became violent and struck Alma in the face, put his hands around her neck, and threw a chair at her. These actions prompted Nerania Colindres, Kevin's sister, to call 911 at approximately 6:45 p.m. While waiting for police assistance, Abner Colindres, Kevin's younger brother, held Kevin in a bear hug for approximately 15 minutes.

Kimberly Pile was the first law enforcement officer to respond to the 911 call. Upon Officer Pile's arrival at the Colindres residence, Kevin had calmed down and was no longer engaged in violent behavior. Officer Pile attempted to further calm Kevin by telling him that she was there to help. These efforts were successful, and Kevin sat down on the couch next to Alma.

Although Alma suggested that Officer Pile could leave, Nerania asked her to stay because Kevin had not seen a doctor in over a year. Officer Pile remained on scene and several backup officers arrived at the home a short time later. Although Kevin initially remained calm, he again became agitated when Nerania mentioned that he should be taken to the hospital to treat his ear, which was infected. At that point, Kevin stood up and began to run in the direction of his bedroom. As he did so, Kevin tripped and fell to the floor, which resulted in a laceration to his head. Due to Kevin's injury, Officer Pile radioed for medical assistance at 7:15 p.m. However, due to a miscommunication between the police department and fire rescue dispatchers, "cut to the head" was misinterpreted as "cut to the hand," which resulted in the call being assigned an "Alpha response," the slowest response level with the least priority.

While Kevin was still on the floor, the backup officers immediately handcuffed Kevin's wrists behind his back and removed him from the residence. Unfortunately, Kevin was flailing his arms and otherwise struggling against the officers' efforts, which resulted in the officers placing Kevin face-down on the asphalt. Several officers then proceeded to attach a hobble restraint device to Kevin's ankles.

The undersigned finds that up to this point, the actions of the City of Miami Police Officers were appropriate. However, as detailed below, the events of December 12, 2006, took a

tragic turn for the worse after multiple officers held Kevin face-down for a prolonged period of time.

Continued Restraint in Prone Position

With his wrists handcuffed behind his back and his ankles hobbled, Kevin remained face-down in a prone position while being held in place by Officers Hernandez, Rodriguez, and Sanchez. This was contrary to the procedures of the Miami Police Department, which provide that handcuffed and hobbled subjects should be moved to a sitting position as quickly as possible to avoid the risk of asphyxiation. Although positional asphyxiation and the procedures regarding the proper use of a hobble device are subjects that the Miami Police Department includes as part of officer training, the policy was not learned by Officers Hernandez, Rodriguez, and Sanchez. Indeed, later deposition testimony of the three officers reveals that they were completely unaware of the relevant procedures regarding the hobble device and the positioning of subjects in custody.

Unfortunately, as Kevin attempted to reposition himself so he could breathe, his behavior was misinterpreted by the officers as resistance. As such, the three officers improperly continued to hold Kevin in a prone position. To make matters worse, at least one of the three officers holding Kevin, Officer Rodriguez, made breathing even more difficult by applying pressure to Kevin's back.

After being improperly held in the prone position for 10 to 12 minutes, Kevin stopped breathing. The officers did not notice, however, as they again violated department procedures by neglecting to adequately monitor Kevin. Concerned, Kevin's mother advised the officers that she did not believe that Kevin was breathing. In response, one of the officers placed an ammonia tube in Kevin's nose, with no effect.

Notwithstanding the obvious fact that Kevin was no longer moving and in distress, the officers did not update fire rescue concerning his condition. Instead, contrary to department procedures, the officers kept Kevin in the prone position until the arrival of the paramedics at 7:30 p.m. By that time, Kevin had been face-down for a total of 15 minutes, and had not been breathing for approximately three to five minutes.

Jose Siut, one of the responding paramedics, instructed the officers to remove Kevin from the prone position. Paramedic Siut quickly examined Kevin and discovered that his pupils were fixed, his facial complexion was blue, and he was not breathing. Although Kevin initially exhibited an idioventricular rhythm of 30 beats per minute, he went "flatline" moments later. CPR was then administered for the first time, and Kevin was transported to the hospital. Tragically, the prolonged period of respiratory arrest resulted in anoxic encephalopathy (brain death), and Kevin subsequently passed away at Coral Gables Hospital on January 5, 2007.

Cause of Death

In a report dated February 27, 2007, the Miami-Dade County Medical Examiner concluded that the use of the prone restraint position contributed to Kevin's cardiorespiratory arrest, which in turn caused Kevin's brain death. Specifically, the Medical Examiner found that the "prone restraint position, and any position that restricts abdominal excursion, will interfere with breathing." The report identified Kevin's agitated emotional state as an additional factor contributing to his death.

Notwithstanding the plain language of the Medical Examiner's report, the Respondent argues that Kevin's cardiorespiratory arrest resulted not from positional asphyxia (i.e., suffocation caused by the prone position), but rather from "excited delirium." However, the undersigned is not persuaded by the opinions of Respondent's expert witnesses, Drs. Dimaio and Mash, and instead credits the conclusions of Dr. Werner Spitz, the Claimant's expert. Dr. Spitz opined that Kevin's brain death was the result of cardiac arrest initiated by compression of the chest, which in turn was caused by the use of the prone position and the application of force to Kevin's back.

Kevin is survived by his mother, father, and three siblings.

LITIGATION HISTORY:

On May 7, 2007, Alma and Melvin Colindres, as the personal representatives of Kevin's estate, filed a wrongful death action against the City of Miami. Count one of the complaint alleged, in relevant part, that the City of Miami: negligently failed to monitor Kevin's vital signs while he was restrained; negligently failed to timely call paramedics; and negligently failed to provide CPR. Count two of the complaint asserted

that the City of Miami negligently trained its officers with respect to the proper use of the hobble device and the monitoring of vital signs.

Following extensive discovery, non-binding arbitration was held on March 25, 2010, before Murray Greenberg, a former city attorney for the City of Miami. In his April 28, 2010, Arbitration Award, Mr. Greenberg found that if "the City of Miami Police Officers had been more attentive to Kevin Colindres after they restrained him, there is a strong likelihood that he would be alive today." Based upon this finding, Mr. Greenberg concluded that the City of Miami was negligent in its treatment of Kevin. Acknowledging that it was difficult to assess the appropriate amount of damages to compensate parents for the pain and suffering associated with the loss of a child, Mr. Greenberg determined that a judgment of $2.75 million was warranted. Mr. Greenberg also rejected the City of Miami's various legal defenses, which included an argument that Kevin's estate was barred from recovery by section 776.085, Florida Statutes.

The City of Miami was not bound by Mr. Greenberg's findings, and could have proceeded with a de novo jury trial. Instead, the City of Miami decided to limit further litigation costs by agreeing to the entry of a final judgment for $2.75 million, with the intention of vigorously opposing a claim bill.

The Respondent has paid $200,000 against the final judgment, leaving a balance of $2,550,000, which is the amount sought through this claim bill.

CLAIMANTS' ARGUMENTS:

- City of Miami Police Officers negligently restrained Kevin for 15 minutes in a prone position while handcuffed and hobbled, which was the proximate cause of his death.

- The City of Miami's policies regarding the use of the hobble device and the monitoring of vital signs, while adequate, were negligently imparted to the officers who responded to the Colindres residence.

RESPONDENT'S ARGUMENTS:

- The Respondent objects to any payment to the Claimants through a claim bill.

- The Claimants are barred from recovery by section 776.085, Florida Statutes, which provides that it is a defense to a personal injury or wrongful death action that the plaintiff's injury was sustained during the commission or attempted commission of a forcible felony.

- Kevin's death was the result of "excited delirium," and not from any negligence of the City of Miami or its police officers.

- The police officers were under no duty to perform CPR.

- Sovereign immunity bars the Claimant's negligent training claim.

CONCLUSIONS OF LAW:

It is well-settled that individuals in the custody or control of the police are owed a duty of care that arises under the common law of Florida. Kaisner v. Kolb, 543 So. 2d 732, 734 (Fla. 1989) ("[W]e find that petitioner was owed a duty of care by the police officers when he was directed to stop and thus was deprived of his normal opportunity for protection. Under our case law, our courts have found liability or entertained suits after law enforcement officers took persons into custody, otherwise detained them, deprived them of liberty or placed them in danger . . . . So long as petitioner was placed in some sort of 'custody' or detention, he is owed a common law duty of care"); Moore v. Fla. Fish & Wildlife Conservation Comm'n, 861 So. 2d 1251, 1253 (Fla. 1st DCA 2003) ("Thus, once appellant had been restrained of his liberty, he was in the 'forseeable zone of risk' . . . . Therefore a duty of care was owed to the appellant"). The City of Miami police officers who responded to the Colindres residence breached their duty of care, as it should have been obvious to any reasonable person that restraining Kevin for 15 minutes while he was face-down, handcuffed, and hobbled, was dangerously and needlessly interfering with his ability to breathe. The officers further breached their duty of care when they failed to adequately monitor Kevin's breathing and update fire and rescue regarding the change in his condition. Consistent with the arbitrator's conclusion, the undersigned is convinced by the greater weight of the evidence that Kevin would be alive today had the officers not committed these breaches of duty. Accordingly, the

Claimants have demonstrated that the negligence of the officers was the proximate cause of Kevin's death.

Alternatively, liability in this matter was established by the failure of the City of Miami to adequately train its officers regarding the use of the hobble device. Contrary to the Respondent's contention, the Claimants are not challenging the content of the program, which was adequate. Indeed, the Miami Police Training Center materials concerning the hobble device expressly provide that officers should "never allow the subject to lie on their side, stomach or chest," must "allow [the] subject to lean back against a firm fixed object . . . to relieve stress on the diaphragm," and must "make certain that the subject is under constant supervision." Instead, the Claimants argue that the Respondent was negligent in the operation of its training (i.e., by failing to successfully impart the training content to the officers). See Mercado v. City of Orlando, 407 F.3d 1152, 1162 (11th Cir. 2005) (noting that to state a claim for negligent training, plaintiff must show that the government was negligent in the implementation or operation of the training program). In light of the fact that the three officers holding Kevin in place were completely unaware that it was dangerous or improper to do so, the undersigned concludes that Respondent was negligent in the operation of its hobble device training program. This negligence was the proximate cause of Kevin's asphyxiation and subsequent death.

The City of Miami, as the officers' employer, is liable for their negligence. Mercury Motors Express v. Smith, 393 So. 2d 545, 549 (Fla. 1981) (holding that an employer is vicariously liable for compensatory damages resulting from the negligent acts of employees committed within the scope of their employment).

The undersigned has considered the Respondent's argument that the Claimants are barred from recovery by section 776.085(1), Florida Statutes, which provides that it "shall be a defense to any action for damages for personal injury or wrongful death . . . that such action arose from injury sustained by a participant during the commission or attempted commission of a forcible felony." Although Kevin arguably committed a forcible felony, resisting arrest with violence, by flailing his arms and legs while he was being removed from the residence, see Wright v. State, 681 So. 2d

852, 853 (Fla. 5th DCA 1996), any criminal conduct on Kevin's part ceased once he was handcuffed and hobbled. Any subsequent wiggling or movement on Kevin's part was merely an attempt to breathe, and did not constitute a criminal act. As such, his injuries were not sustained "during the commission" of a crime, which is required by the plain language of the statute for the defense to apply. See Copeland v. Albertson's, Inc., 947 So. 2d 664, 667 (Fla. 2d DCA 2007) (holding that although the plaintiff committed an aggravated assault against a grocery store clerk, the assault did not bar a civil action against store employees for injuries inflicted upon the plaintiff after he fled the store, since the "section 776.085 defense is applicable only to injuries the plaintiff sustains during the commission or attempted commission of a forcible felony") (emphasis added). Accordingly, the undersigned concludes, as did the arbitrator, that the Claimants are not barred from recovery by section 776.085(1).

The undersigned does agree with the Respondent's contention that the officers were under no legal duty to perform CPR. See L.A. Fitness Int'l, LLC v. Mayer, 980 So. 2d 550, 559 (Fla. 4th DCA 2008) (holding that CPR is more than mere first aid, and that non-medical personnel certified in CPR remain laymen and "should have discretion in deciding when to utilize the procedure"). Nevertheless, the Respondent is liable for Kevin's death based upon the other grounds discussed above.

Finally, the undersigned concludes that $2,550,000, the amount sought through this bill, is reasonable and appropriate, particularly in light of the fact that the Claimants watched helplessly as their disabled child suffocated and lapsed into unconsciousness.

LEGISLATIVE HISTORY: This is the first claim bill presented to the Senate in this matter.

ATTORNEYS FEES: The Claimants' attorneys have agreed to limit their fees to 25 percent of any amount awarded by the Legislature in compliance with section 768.28(8), Florida Statutes. Lobbyist's fees are included with the attorney's fees.

FISCAL IMPACT: Should this claim bill be approved, the first $225,000 (the amount remaining on the Self Insured Retention for this

claim) would be paid by Respondent from its Self Insurance Trust Fund. The remaining $2,325,000 necessary to satisfy the claim bill would be provided by Respondent's excess insurance coverage through State National Insurance Company.

As the City of Miami's annual budget is well in excess of $400 million, the undersigned is not persuaded by the Respondent's argument that city operations would be adversely affected by an outlay of $225,000.

SPECIAL ISSUES:

As it is presently drafted, Senate Bill 54 provides that the backup officers "violated their training and the city of Miami's policies by aggressively approaching Kevin Colindres, causing Kevin Colindres to attempt to leave the room." In light of the above factual findings, this sentence should be deleted from the bill.

In addition, while it is true that the officers did not perform CPR, they were under no legal obligation to do so. Accordingly, Senate Bill 54 should also be amended to remove the reference that officers "failed" to administer CPR.

RECOMMENDATIONS:

For the reasons set forth above, the undersigned recommends that Senate Bill 54 be reported FAVORABLY, as amended.

Respectfully submitted,

Edward T. Bauer
Senate Special Master

cc: Senator Ronda Storms
R. Philip Twogood, Secretary of the Senate
Counsel of Record

Attachment

873796

LEGISLATIVE ACTION

Senate . House

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The Special Master on Claim Bills recommended the following:

Senate Amendment

In title, delete lines 28 - 53
and insert:
WHEREAS, the police officers then placed Kevin Colindres into custody, handcuffing him behind the back and taking him out of the house, where the police officers placed him prone on the ground and applied a hobble restraint to his ankles, and
WHEREAS, in violation of their training and the City of Miami's policies and procedures, the police officers left Kevin Colindres prone on the ground and applied weight to his back, and

873796

WHEREAS, in violation of their training and the City of Miami's policies and procedures, the police officers left Kevin Colindres in this position in excess of 10 minutes, and

WHEREAS, in violation of their training and the City of Miami's policies and procedures, the police officers failed to appropriately check Kevin Colindres' vital signs, and

WHEREAS, in violation of their training and the City of Miami's policies and procedures, upon realizing that Kevin Colindres had stopped breathing, the officers failed to advise the fire rescue department of the urgency of the matter, thereby delaying the response by fire rescue personnel, and

LEGISLATIVE ACTION

Senate . House

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The Committee on Rules (Flores) recommended the following:

Senate Amendment (with title amendment)

Delete lines 176 - 185

and insert:

Section 2. Lee Memorial Health System, formerly known as the Hospital Board of Directors of Lee County, is authorized and directed to appropriate from funds of Lee Memorial Health System not otherwise appropriated and to draw the following warrants as compensation for the medical malpractice committed against Aaron Edwards and Mitzi Roden:

(1) The sum of $13,500,000, payable to the Guardianship of Aaron Edwards;

(2) The sum of $1,000,000, payable to Mitzi Roden; and

(3) The sum of $500,000, payable to Mark Edwards.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete lines 12 - 120

and insert:

WHEREAS, Mitzi Roden and Mark Edward's only child, Aaron Edwards, was born on September 5, 1997, at Lee Memorial Hospital, andWHEREAS, during Mitzi Roden's pregnancy, Mitzi Roden and Mark Edwards attended childbirth classes through Lee Memorial Health System and learned of the potentially devastating effect that the administration of Pitocin to augment labor may have on a mother and her unborn child when not carefully and competently monitored, andWHEREAS, Mitzi Roden and Mark Edwards communicated directly to Nurse Midwife Patricia Hunsucker of Lee Memorial Health System of their desire to have a natural childbirth, andWHEREAS, Mitzi Roden enjoyed an uneventful full-term pregnancy with Aaron Edwards, free from any complications, andWHEREAS, on September 5, 1997, at 5:29 a.m., Mitzi Roden, at 41 and 5/7 weeks' gestation awoke to find that her membranes had ruptured, andWHEREAS, when Mitzi Roden presented to the hospital on the morning of September 5, she was placed on a fetal monitoring machine that confirmed that Aaron Edwards was doing well and in very good condition, andWHEREAS, Mitzi Roden tolerated well a period of labor from 9 a.m. until 12:30 p.m., but failed to

progress in her labor to the point of being in active labor. At that time, Nurse Midwife Patricia Hunsucker informed Mitzi Roden and Mark Edwards that she would administer Pitocin to Mitzi in an attempt to speed up the labor, but both Mitzi Roden and Mark Edwards strenuously objected to the administration of Pitocin because of their knowledge about the potentially devastating effects it can have on a mother and child, including fetal distress and even death. Mitzi Roden and Mark Edwards informed Nurse Midwife Patricia Hunsucker that they would rather undergo a cesarean section than be administered Pitocin, but in spite of their objections, Nurse Midwife Patricia Hunsucker ordered that a Pitocin drip be administered to Mitzi Roden at an initial does of 3 milliunits, to be increased by 3 milliunits every 30 minutes, andWHEREAS, there was universal agreement by the experts called to testify at the trial in this matter that the administration of Pitocin over the express objections of Mitzi Roden and Mark Edwards was a violation of the standard of care, andWHEREAS, for several hours during the afternoon of September 5, 1997, the dosage of Pitocin was consistently increased and Mitzi Roden began to experience contractions closer than every 2 minutes at 4:50 p.m., and began to experience excessive uterine contractility shortly before 6 p.m., which should have been recognized by any reasonably competent obstetric care provider, andWHEREAS, in spite of Mitzi Roden’s excessive

uterine contractility, the administration of Pitocin was inappropriately increased to 13 milliunits at 6:20 p.m. by Labor and Delivery Nurse Beth Jencks, which was a deviation from the acceptable standard of care for obstetric health care providers because, in fact, it should have been discontinued, andWHEREAS, reasonable obstetric care required that Dr. Duvall, the obstetrician who was ultimately responsible for Mitzi Roden’s labor and delivery, be notified of Mitzi Roden’s excessive uterine contractility and that she was not adequately progressing in her labor, but the health care providers overseeing Mitzi Roden’s labor unreasonably failed to do so, andWHEREAS, in spite of Mitzi Roden’s excessive uterine contractility, the administration of Pitocin was increased to 14 milliunits at 7:15 p.m., when reasonable obstetric practices required that it be discontinued, and a knowledgeable obstetric care provider should have known that the continued use of Pitocin in the face of excessive uterine contractility posed an unreasonable risk to both Mitzi Roden and Aaron Edwards, andWHEREAS, Lee Memorial’s own obstetrical expert, Jeffrey Phelan, M.D., testified that Mitzi Roden experienced a tetanic contraction lasting longer than 90 seconds at 8:30 p.m., and Lee Memorial’s own nurse midwife expert, Lynne Dollar, testified that she herself would have discontinued Pitocin at 8:30 p.m., andWHEREAS, at 8:30 p.m., the administration of Pitocin was unreasonably and inappropriately increased

to 15 milliunits when reasonable obstetric practices required that it be discontinued, andWHEREAS, at 9 p.m., Nurse Midwife Hunsucker visited Mitzi Roden at bedside, but mistakenly believed that the level of Pitocin remained at 9 milliunits, when, in fact, it had been increased to 15 milliunits, and further, she failed to appreciate and correct Mitzi Roden's excessive uterine contractility, andWHEREAS, Lynne Dollar acknowledged that it is below the standard of care for Nurse Midwife Patricia Hunsucker to not know the correct level of Pitocin being administered to her patient, Mitzi Roden, andWHEREAS, at 9:30 p.m., the administration of Pitocin was again unreasonably and inappropriately increased to 16 milliunits, when reasonable obstetric practice required that it be discontinued in light of Mitzi Roden's excessive uterine contractility and intrauterine pressure, andWHEREAS, as 9:40 p.m., Aaron Edwards could no longer compensate for the increasingly intense periods of hypercontractility and excessive intrauterine pressure brought on by the overuse and poor management of Pitocin administration, and suffered a reasonably foreseeable and predictable severe episode of bradycardia, where his heart rate plummeted to life-endangering levels, which necessitated an emergency cesarean section. Not until Aaron Edwards' heart rate crashed at 9:40 p.m. did Nurse Midwife Patricia Hunsucker consult with her supervising obstetrician, Diana Devall, M.D., having not discussed with Dr.

Devall her care and treatment of Mitzi Roden's labor since 12:30 p.m. Because Dr. Devall had not been kept informed about the status of Mitzi Roden's labor, she was not on the hospital grounds at the time Aaron Edwards' heart rated crashed, and another obstetrician who was unfamiliar with Mitzi Roden's labor performed the emergency cesarean section to save Aaron Edwards' life, and

THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

Location
402 Senate Office Building

Mailing Address
404 South Monroe Street
Tallahassee, Florida 32399-1100
(850) 487-5237

DATE	COMM	ACTION
2/24/11	SM	Fav/1 amendment
4/21/11	RC	**Pre-meeting**

February 24, 2011

The Honorable Mike Haridopolos
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 322 (2011)** – Senator Anitere Flores
Relief of Aaron Edwards, and his parents, Mitzi Roden and Mark Edwards

SPECIAL MASTER'S FINAL REPORT

THIS IS AN EXCESS JUDGMENT CLAIM FOR $30,792,936.13 OF LOCAL MONEY BASED ON A JURY VERDICT FOR CLAIMANTS AND AGAINST LEE MEMORIAL HEALTH SYSTEM TO COMPENSATE CLAIMANTS FOR AARON EDWARD'S CEREBRAL PALSY, WHICH WAS CAUSED AT BIRTH BY THE NEGLIGENT ADMINISTRATION OF PITOCIN TO HIS MOTHER TO INDUCE LABOR.

FINDINGS OF FACT:

On the morning of September 5, 1997, Mitzi Roden was scheduled to deliver her first child at HealthPark Medical Center, a hospital owned and operated by Lee Memorial Health System ("Lee Memorial"). Mitzi was accompanied by her husband, Mark Edwards. Mitzi had enjoyed a healthy pregnancy, free of complications.

Mitzi's labor and delivery were to be managed by her nurse-midwife, Patricia Hunsucker, who would be assisted by the obstetric nurses whose work shifts covered the time that Mitzi was at the hospital. From 9:00 a.m. until 12:30 p.m., Mitzi made little progress in her labor. At 12:30 p.m., Ms. Hunsucker ordered that Pitocin be given to Mitzi, by IV drip, to stimulate Mitzi's labor.

The use of Pitocin to assist labor is a very common practice, but its effect on the mother and child must be closely monitored. In a normal childbirth, the mother's contractions cause some stress to the baby because the contractions compress the placenta, reducing blood flow to the baby. Because blood flow is the baby's source of oxygen, contractions require the baby to, in effect, hold his or her breath until the contraction stops. The contractions in a normal labor do not reduce oxygen to the baby to such a degree that the baby's life is endangered. However, the overuse of Pitocin can cause contractions that come too fast, too strong, and last too long, which can cause the baby to become severely stressed and even asphyxiated.

The initial amount of Pitocin given to Mitzi was 3 milliunits and was to be increased periodically until Mitzi's labor had progressed to the point that she was having good contractions every 2 or 3 minutes. Although Mitzi's contractions soon reached the point of being 2 or 3 minutes apart, the nurses evidently believed that her contractions were not strong enough.

For the next several hours, the dosage of Pitocin was increased by the obstetric nurses. At 6:00 p.m., Mitzi's contractions were closer than two minutes, but the Pitocin was increased again at 6:20 p.m. The dosage was up to 13 milliunits. Mitzi's obstetrician, who was never present during these events, testified later that the Pitocin should not have been further increased. Nevertheless, a new obstetric nurse, Elizabeth Kelly-Jencks, started her shift at 7:00 p.m. and increased the Pitocin to 14 milliunits at 7:15 p.m.

The more persuasive evidence shows that Ms. Hunsucker and Ms. Kelly-Jencks were not giving appropriate attention to the fetal monitoring machine and the frequency and duration of the contractions. The monitors indicated that Mitzi's contractions were becoming too frequent, too intense, and were lasting too long, and that they were causing the baby's heart rate to decelerate after the contractions. In the vast majority of cases when Pitocin is used, babies are delivered after less than 8 milliunits of Pitocin. Claimants' expert medical witnesses testified persuasively that there were multiple indications that increasing the Pitocin to 14 milliunits was neither sensible nor safe. Mitzi's uterus was being over-stimulated.

At 8:30 p.m., Mitzi experienced a contraction lasting longer than 90 seconds, showing clearly that the Pitocin level was too high. Even though reasonable obstetric practice and the standing policy of the hospital regarding the use of Pitocin required that the Pitocin drip be reduced or stopped at that point, the Pitocin dosage was increased again, to 15 milliunits. At 9:00 p.m., Ms. Hunsucker looked in on Mitzi, but was unaware of the Pitocin dosage she was receiving and failed to recognize that Mitzi was having excessive contractions.

Certainly, by this point, it should have been recognized that Mitzi's labor was not going well. There had been almost no progress toward a safe vaginal delivery. Ms. Hunsucker should have contacted Dr. Devall to consult about the situation, but she did not.

At 9:30 p.m., the Pitocin was increased to 16 milliunits. Ten minutes later, alone in the room, Mitzi and Mark noticed that the fetal heart monitor showed their baby's heart rate had dropped to 40 beats per minutes. The normal fetal heart rate is 120 to 160 beats per minute. A low fetal heart rate for over ten minutes is referred to as "bradycardia." When no one responded to the emergency call button, Mark ran out of the room to get help. The obstetric staff realized the gravity of the situation, but incredibly, the Pitocin drip was not turned off while the nurses spent about 10 minutes trying to resuscitate the baby by turning Mitzi in the bed and by other means. Finally the Pitocin was turned off and an immediate cesarean section was ordered.

Aaron was delivered by cesarean 25 minutes later, but oxygen starvation to his brain left him with permanent damage to the parts of the brain that control muscle movement. The result is that Aaron has cerebral palsy. Aaron exhibits primarily dystonia, a lack of control of the direction and force of muscle movement, and some spasticity, which is involuntary contractions of the muscles.

A major issue at trial was whether Mitzi objected to receiving Pitocin, but her wishes were ignored. The evidence on this point was ambiguous. Mitzi says that she told Ms. Hunsucker that she did not want Pitocin, but did not mention it to the other obstetric nurses who were periodically increasing the dosage. Mitizi says that Ms. Hunsucker

called Dr. DeVall and then told Mitzi that Dr. DeVall approved the use of Pitocin. Ms. Hunsucker testified at trial that she did not remember Mitzi objecting to the Pitocin and that she does not think she would have administered the Pitocin if Mitzi had objected to it. I am not persuaded that Mitzi clearly communicated a strong objection about the Pitocin. That claim cannot be reconciled with the evidence that the Pitocin drip was started and was then administered for hours, but Mitzi made no mention of her objection to the obstetric nurses, and her husband apparently took no steps on her behalf to have the Pitocin stopped.

Aaron's brain damage did not affect his higher cognitive functioning. He is now an extremely bright and creative 13-year old. Unfortunately, he is trapped inside a body that he can barely control. He cannot feed, bathe, or dress himself. He cannot walk and uses a wheelchair. He cannot speak so as to be understood by anyone other than his mother. He uses a computer touch screen device to communicate. Still, it takes him a long time to compose simple sentences.

Aaron's limbs, especially his legs, are becoming rigid. He said at the claim bill hearing that he felt like Pinochio, a wooden boy who wants to be a real boy. His mother uses various physical therapies and Aaron also takes medication to reduce the contraction of the muscles.

The principal needs that Aaron currently has are regular speech and physical therapies and a better wheelchair. The wheelchair he has now is uncomfortable and difficult to operate. There are also more advanced communication devices becoming available that could help Aaron to communicate more quickly.

Mitzi Roden and Mark Edwards are now divorced. Aaron lives with his mother in Canyon City, Colorado. Aaron is home-schooled by his mother and, because she cannot afford to hire someone to care for him during the day, she brings him to the dog grooming shop where she works. Mitzi earns $14,000 annually as a dog groomer. She receives monthly Social Security disability payments of $674.

Lee Memorial is a special district that operates four acute care hospitals, a rehabilitation hospital, and some other health care facilities in Lee County. It does not have taxing

authority. It is a not-for-profit entity.

Lee Memorial is a "Safety Net Provider," meaning that it is a member of a group of hospital operators in Florida that provide access to medical services by Medicaid-eligible, Medicare-eligible, and uninsured patients far beyond the average for other hospitals in Florida. In 2010, Lee Memorial had about $170 million of losses attributable to these patients. However, with income from commercially-insured patients and from its investments, Lee Memorial had about $65 million in overall net income.

LITIGATION HISTORY:

In 1999, a negligence lawsuit was filed in the circuit court for Lee County by Mitzi Roden and Mark Edwards, on behalf of themselves and as the guardians of Aaron Edwards, against Lee Memorial. Following a six-week trial in 2007, the jury found that Lee Memorial was negligent and that its negligence was the sole cause of Aaron's injuries. The jury awarded damages of $28,477,966.48 to the guardianship of Aaron. They also awarded $1.34 million to Mitzi Roden and $1 million to Mark Edwards, for their damages as parents. The court entered a cost judgment of $174,969.65. The sum of these figures is $30,992,936.13.

Lee Memorial paid the $200,000 sovereign immunity limit. All of this payment was applied to legal fees. Aaron and his parents received nothing.

CONCLUSIONS OF LAW:

The claim bill hearing was a *de novo* proceeding for the purpose of determining, based on the evidence presented to the Special Master, whether Lee Memorial is liable in negligence for the injuries suffered by Aaron Edwards and his parents, and, if so, whether the amount of the claim is reasonable.

Ms. Hunsucker and Ms. Kelly-Jencks failed to recognize and respond appropriately to the risks to the baby that were indicated by the monitoring devices. Their actions failed to meet the standard of care applicable to the administration of Pitocin and the management of Mitzi's labor. Their negligence was the proximate cause of the injuries suffered by Aaron, and the related damages suffered by his parents. Because these individuals were acting within the course and scope of their employment when their negligent acts occurred, Lee Memorial is liable for their negligence.

I agree with Lee Memorial that the manner in which the "lack of consent" issue was raised for the first time at trial was wrong and the trial judge would have been justified in not allowing the issue to be presented to the jury. Nevertheless, I do not believe that the jury's verdict of liability was based solely on lack of consent. The preponderance of the evidence presented at trial and at the claim bill hearing establishes that Ms. Hunsucker and Ms. Kelly-Jencks were negligent in their management of the Pitocin and their care for Mitzi during her labor.

Aaron and his parents deserve to be compensated for his injuries, but the unusual size of this claim bill must be addressed. This claim bill for almost $31 million is the largest ever presented to the Legislature. In the past ten sessions, there have only been two claim bills passed by the Legislature that exceeded $5 million, one was for $7.6 million and the other was for $8.5 million.

In my report for the Brody claim bill, SB 68 (2010), which was a claim for nearly the same amount, I stated that the fiscal impact to Broward County would be substantial and would impair the County's ability to provide important public services. This claim would not have as substantial an adverse effect on Lee Memorial as the Brody claim would have on Broward County. Lee Memorial does not carry medical malpractice liability insurance, but it budgeted $15 million for potential liability claims. If Lee Memorial were allowed to pay this claim in several installments, the fiscal impact could be absorbed without preventing it from maintaining current levels of medical services to the public.

However, in addition to the issue of whether a local government can pay a large claim without unreasonable disruption of public services, is the issue of whether the Legislature should approve the payment of multi-million dollar claims, especially those that would be paid by local governments, when the claim exceeds the amount that is usually awarded by juries for similar injuries.

A trial court cannot set aside a jury verdict unless "it is so inordinately large as obviously to exceed the maximum reasonable range within which the jury may reasonably operate." See Kaine v. Government Employees Insurance Company, 735 So. 2d 599 (Fla. 3d DCA 1999). However,

that legal principle is not applicable to the Legislature's consideration of a claim bill because the payment of a claim bill is a matter of legislative grace. For very large claim bills, it is reasonable for the Senate to consider whether the amount of a claim deviates substantially above the median jury verdict for similar injuries. That was my reasoning when I recommended that the Senate pay a smaller amount to the claimant in SB 30 (2008), because the $5.5 million jury award was at the extreme high end of awards for similar injuries (severe fracture to one leg without paralysis). The Senate passed the claim bill after reducing the award to $4 million.

Jury verdict data for cases involving permanent brain injuries like the one suffered by Aaron do not allow a median award to be stated with precision, but it appears to be well under $20 million. The present value of the Life Care Plan for Aaron is $13.1 million and, if services available through Medicaid were subtracted, might be closer to $12.7 million.

I believe the Senate would be striking a reasonable balance between the purposes served by the doctrine of sovereign immunity and the goal to provide reasonable compensation to claimants in deserving circumstances if the claim was reduced to $15 million. If the Senate adopts this recommendation, then I would further recommend that the $15 million be divided as follows: $13,500,000 for the care of Aaron Edwards; $1 million for Mitzi Roden; and $500,000 for Mark Edwards.

ATTORNEY'S FEES:

Claimants' attorneys have agreed to limit attorney's fees and lobbyist's fees to 25 percent of the claim paid. However, they request that the fee for the attorneys who handled the appeal of the trial court judgment (5 percent of the claim bill award) not be included in the 25 percent. In other words, they request that 30 percent of the claim bill award go to attorneys fees and costs. I believe paying a separate and additional fee in this manner would create a precedent for many similar requests. Therefore, I recommend that all attorneys fees be limited to 25 percent of the award.

SPECIAL ISSUES:

The trial court ordered that the damage award and cost judgment would accrue interest at the rate of 11 percent per year. I do not believe that interest on an excess judgment can be required because the only amount owed and due is

the sovereign immunity limit. Any amount paid by the Legislature on claim bills is a matter of legislative grace. It is not "owed" to the claimants.

RECOMMENDATIONS: For the reasons set forth above, I recommend that Senate Bill 322 (2011) be reported FAVORABLY, as amended.

Respectfully submitted,

Bram D. E. Canter
Senate Special Master

cc: Senator Anitere Flores
R. Philip Twogood, Secretary of the Senate
Counsel of Record

Attachment

413356

LEGISLATIVE ACTION

Senate . House

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The Special Master on Claim Bills recommended the following:

Senate Amendment (with title amendment)

Delete lines 176 - 185

and insert:

Section 2. Lee Memorial Health System, formerly known as the Hospital Board of Directors of Lee County, is authorized and directed to appropriate from funds of Lee Memorial Health System not otherwise appropriated and to draw the following warrants as compensation for the medical malpractice committed against Aaron Edwards and Mitzi Roden:

(1) The sum of $13,500,000, payable to the Guardianship of Aaron Edwards;

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(2) The sum of $1,000,000, payable to Mitzi Roden; and

(3) The sum of $500,000, payable to Mark Edwards.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete lines 12 - 120

and insert:

WHEREAS, Mitzi Roden and Mark Edward's only child, Aaron Edwards, was born on September 5, 1997, at Lee Memorial Hospital, and

WHEREAS, during Mitzi Roden's pregnancy, Mitzi Roden and Mark Edwards attended childbirth classes through Lee Memorial Health System and learned of the potentially devastating effect that the administration of Pitocin to augment labor may have on a mother and her unborn child when not carefully and competently monitored, and

WHEREAS, Mitzi Roden and Mark Edwards communicated directly to Nurse Midwife Patricia Hunsucker of Lee Memorial Health System of their desire to have a natural childbirth, and

WHEREAS, Mitzi Roden enjoyed an uneventful full-term pregnancy with Aaron Edwards, free from any complications, and

WHEREAS, on September 5, 1997, at 5:29 a.m., Mitzi Roden, at 41 and 5/7 weeks' gestation awoke to find that her membranes had ruptured, and

WHEREAS, when Mitzi Roden presented to the hospital on the morning of September 5, she was placed on a fetal monitoring machine that confirmed that Aaron Edwards was doing well and in very good condition, and

WHEREAS, Mitzi Roden tolerated well a period of labor from


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9 a.m. until 12:30 p.m., but failed to progress in her labor to the point of being in active labor. At that time, Nurse Midwife Patricia Hunsucker informed Mitzi Roden and Mark Edwards that she would administer Pitocin to Mitzi in an attempt to speed up the labor, but both Mitzi Roden and Mark Edwards strenuously objected to the administration of Pitocin because of their knowledge about the potentially devastating effects it can have on a mother and child, including fetal distress and even death. Mitzi Roden and Mark Edwards informed Nurse Midwife Patricia Hunsucker that they would rather undergo a cesarean section than be administered Pitocin, but in spite of their objections, Nurse Midwife Patricia Hunsucker ordered that a Pitocin drip be administered to Mitzi Roden at an initial does of 3 milliunits, to be increased by 3 milliunits every 30 minutes, and

WHEREAS, there was universal agreement by the experts called to testify at the trial in this matter that the administration of Pitocin over the express objections of Mitzi Roden and Mark Edwards was a violation of the standard of care, and

WHEREAS, for several hours during the afternoon of September 5, 1997, the dosage of Pitocin was consistently increased and Mitzi Roden began to experience contractions closer than every 2 minutes at 4:50 p.m., and began to experience excessive uterine contractility shortly before 6 p.m., which should have been recognized by any reasonably competent obstetric care provider, and

WHEREAS, in spite of Mitzi Roden’s excessive uterine contractility, the administration of Pitocin was inappropriately increased to 13 milliunits at 6:20 p.m. by Labor and Delivery

Nurse Beth Jencks, which was a deviation from the acceptable standard of care for obstetric health care providers because, in fact, it should have been discontinued, and

WHEREAS, reasonable obstetric care required that Dr. Duvall, the obstetrician who was ultimately responsible for Mitzi Roden's labor and delivery, be notified of Mitzi Roden's excessive uterine contractility and that she was not adequately progressing in her labor, but the health care providers overseeing Mitzi Roden's labor unreasonably failed to do so, and

WHEREAS, in spite of Mitzi Roden's excessive uterine contractility, the administration of Pitocin was increased to 14 milliunits at 7:15 p.m., when reasonable obstetric practices required that it be discontinued, and a knowledgeable obstetric care provider should have known that the continued use of Pitocin in the face of excessive uterine contractility posed an unreasonable risk to both Mitzi Roden and Aaron Edwards, and

WHEREAS, Lee Memorial's own obstetrical expert, Jeffrey Phelan, M.D., testified that Mitzi Roden experienced a tetanic contraction lasting longer than 90 seconds at 8:30 p.m., and Lee Memorial's own nurse midwife expert, Lynne Dollar, testified that she herself would have discontinued Pitocin at 8:30 p.m., and

WHEREAS, at 8:30 p.m., the administration of Pitocin was unreasonably and inappropriately increased to 15 milliunits when reasonable obstetric practices required that it be discontinued, and

WHEREAS, at 9 p.m., Nurse Midwife Hunsucker visited Mitzi Roden at bedside, but mistakenly believed that the level of Pitocin remained at 9 milliunits, when, in fact, it had been


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increased to 15 milliunits, and further, she failed to appreciate and correct Mitzi Roden's excessive uterine contractility, and

WHEREAS, Lynne Dollar acknowledged that it is below the standard of care for Nurse Midwife Patricia Hunsucker to not know the correct level of Pitocin being administered to her patient, Mitzi Roden, and

WHEREAS, at 9:30 p.m., the administration of Pitocin was again unreasonably and inappropriately increased to 16 milliunits, when reasonable obstetric practice required that it be discontinued in light of Mitzi Roden's excessive uterine contractility and intrauterine pressure, and

WHEREAS, as 9:40 p.m., Aaron Edwards could no longer compensate for the increasingly intense periods of hypercontractility and excessive intrauterine pressure brought on by the overuse and poor management of Pitocin administration, and suffered a reasonably foreseeable and predictable severe episode of bradycardia, where his heart rate plummeted to life-endangering levels, which necessitated an emergency cesarean section. Not until Aaron Edwards' heart rate crashed at 9:40 p.m. did Nurse Midwife Patricia Hunsucker consult with her supervising obstetrician, Diana Devall, M.D., having not discussed with Dr. Devall her care and treatment of Mitzi Roden's labor since 12:30 p.m. Because Dr. Devall had not been kept informed about the status of Mitzi Roden's labor, she was not on the hospital grounds at the time Aaron Edwards' heart rated crashed, and another obstetrician who was unfamiliar with Mitzi Roden's labor performed the emergency cesarean section to save Aaron Edwards' life, and


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LEGISLATIVE ACTION

Senate . House

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The Committee on Rules (Smith) recommended the following:

Senate Amendment (with title amendment)

Between lines 69 and 70
insert:

Section 2. Subsection (1) of section 316.066, Florida Statutes, is amended to read:

316.066 Written reports of crashes.—

(1)(a) A Florida Traffic Crash Report, Long Form, must ~~is required to~~ be completed and submitted to the department within 10 days after ~~completing~~ an investigation is completed by the ~~every~~ law enforcement officer who in the regular course of duty investigates a motor vehicle crash:

1. That resulted in death, ~~or~~ personal injury, or any

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indication of complaints of pain or discomfort by any of the parties or passengers involved in the crash;~~.~~

2. That involved one or more passengers, other than the drivers of the vehicles, in any of the vehicles involved in the crash;

3.~~2.~~ That involved a violation of s. 316.061(1) or s. 316.193; or~~.~~

4.~~3.~~ In which a vehicle was rendered inoperative to a degree that required a wrecker to remove it from traffic, if such action is appropriate, in the officer's discretion.

(b) In every crash for which a Florida Traffic Crash Report, Long Form, is not required by this section, the law enforcement officer may complete a short-form crash report or provide a short-form crash report to be completed by each party involved in the crash. Short-form crash reports prepared by the law enforcement officer shall be maintained by the officer's agency.

(c) The long-form and the short-form report must include:

1. The date, time, and location of the crash.

2. A description of the vehicles involved.

3. The names and addresses of the parties involved.

4. The names and addresses of all passengers in all vehicles involved in the crash, each clearly identified as being a passenger and the identification of the vehicle in which they were a passenger.

5.~~4.~~ The names and addresses of witnesses.

6.~~5.~~The name, badge number, and law enforcement agency of the officer investigating the crash.

7.~~6.~~ The names of the insurance companies for the

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respective parties involved in the crash.

(d) ~~(c)~~ Each party to the crash must ~~shall~~ provide the law enforcement officer with proof of insurance, which must ~~to~~ be included in the crash report. If a law enforcement officer submits a report on the accident, proof of insurance must be provided to the officer by each party involved in the crash. Any party who fails to provide the required information commits a noncriminal traffic infraction, punishable as a nonmoving violation as provided in chapter 318, unless the officer determines that due to injuries or other special circumstances such insurance information cannot be provided immediately. If the person provides the law enforcement agency, within 24 hours after the crash, proof of insurance that was valid at the time of the crash, the law enforcement agency may void the citation.

(e) ~~(d)~~ The driver of a vehicle that was in any manner involved in a crash resulting in damage to any vehicle or other property in an amount of $500 or more~~,~~ which ~~crash~~ was not investigated by a law enforcement agency, shall, within 10 days after the crash, submit a written report of the crash to the department or traffic records center. The entity receiving the report may require witnesses of the crash ~~crashes~~ to render reports and may require any driver of a vehicle involved in a crash of which a written report must be made ~~as provided in this section~~ to file supplemental written reports if ~~whenever~~ the original report is deemed insufficient by the receiving entity.

(f) The investigating law enforcement officer may testify at trial or provide a signed affidavit to confirm or supplement the information included on the long-form or short-form report.

~~(e) Short-form crash reports prepared by law enforcement~~

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~~shall be maintained by the law enforcement officer's agency.~~

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete line 5

and insert:

license applicants; amending s. 316.066, F.S.; revising provisions relating to the type of traffic crashes that must be investigated by a law enforcement officer; revising the type of information that must be included in crash reports; authorizing the investigating officer to testify at trial or provide an affidavit concerning the content of the reports; amending ss. 440.12 and 440.20,

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LEGISLATIVE ACTION

Senate . House

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The Committee on Rules (Smith) recommended the following:

Senate Amendment (with title amendment)

Between lines 122 and 123
insert:

Section 4. Paragraph (b) of subsection (9) of section 440.49, Florida Statutes, is amended to read:

440.49 Limitation of liability for subsequent injury through Special Disability Trust Fund.—

(9) SPECIAL DISABILITY TRUST FUND.—

(b) ~~1.~~ The Special Disability Trust Fund shall be maintained by annual assessments on ~~upon~~ the insurance companies writing compensation insurance in the state, the commercial self-insurers under ss. 624.462 and 624.4621, the assessable mutuals

as defined in s. 628.6011, and the self-insurers under this chapter, which assessments are due and payable ~~shall become due and be paid~~ quarterly at the same time and in addition to the assessments provided in s. 440.51.

1. The department shall estimate annually in advance the amount necessary for the administration of this subsection and the maintenance of this fund and shall make such assessment as provided in this subparagraph ~~in the manner hereinafter provided~~.

a.~~2.~~ The annual assessment shall be calculated to produce during the ensuing fiscal year an amount which, when combined with that part of the balance in the fund on June 30 of the current fiscal year which is in excess of $100,000, is equal to the average of:

(I)~~a.~~ The sum of disbursements from the fund during the immediate past 3 calendar years~~;~~ ~~,~~ and

(II)~~b.~~ Two times the disbursements of the most recent calendar year.

b. The assessment shall be applied on a calendar year basis beginning January 1, 2012, and be included in the workers' compensation rate filings approved by the office which become effective on or after January 1, 2012. The assessment effective January 1, 2011, also applies to the interim period from July 1, 2011, through December 31, 2011, and is included in the workers' compensation rate filings, whether regular or amended, approved by the office which are effective on or after July 1, 2011. Thereafter, the annual assessment takes effect January 1 of the next calendar year and is included in the workers' compensation rate filings approved by the office which become effective on or

after January 1 of the next calendar year.

c. Such amount shall be prorated among the insurance companies writing compensation insurance in the state and the self-insurers. ~~Provided~~ However, for those carriers that have excluded ceded reinsurance premiums from their assessments on or before January 1, 2000, ~~no~~ assessments on ceded reinsurance premiums may not shall be paid by those carriers until ~~such time as~~ the ~~former~~ Division of Workers' Compensation ~~of the Department of Labor and Employment Security or the department~~ advises each of those carriers of the impact that the inclusion of ceded reinsurance premiums has on their assessment. The division ~~department~~ may not recover any past underpayments of assessments levied against any carrier that on or before January 1, 2000, excluded ceded reinsurance premiums from their assessment before ~~prior to~~ the point that the ~~former~~ Division of Workers' Compensation ~~of the Department of Labor and Employment Security or the department~~ advises of the appropriate assessment that should have been paid.

3. The net premiums written by the companies for workers' compensation in this state and the net premium written applicable to the self-insurers in this state are the basis for computing the amount to be assessed as a percentage of net premiums. Such payments shall be made by each carrier and self-insurer to the department for the Special Disability Trust Fund in accordance with such regulations as the department prescribes.

4. The Chief Financial Officer may ~~is authorized to~~ receive and credit to such Special Disability Trust Fund any sum or sums that may at any time be contributed to the state by the United

States under any Act of Congress, or otherwise, to which the state may be or become entitled by reason of any payments made out of such fund.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete line 8

and insert:

requirements; amending s. 440.49, F.S.; specifying that the assessment for the Special Disability Trust Fund be applied on a calendar year basis; amending s. 624.402, F.S.; revising

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LEGISLATIVE ACTION

Senate . House

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The Committee on Rules (Smith) recommended the following:

Senate Amendment

Delete line 334
and insert:
felonies so designated by the laws of this state, as well as any felony

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LEGISLATIVE ACTION

Senate . House

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The Committee on Rules (Richter) recommended the following:

Senate Amendment (with title amendment)

Between lines 407 and 408
insert:

Section 6. Section 626.9894, Florida Statutes, is created to read:

626.9894 Motor vehicle insurance fraud direct-support organization.—

(1) DEFINITIONS.—As used in this section, the term:

(a) "Division" means the Division of Insurance Fraud of the Department of Financial Services.

(b) "Motor vehicle insurance fraud" means any act defined as a "fraudulent insurance act" under s. 626.989, which relates

to the coverage of motor vehicle insurance as described in part XI of chapter 627.

(c) "Organization" means the direct-support organization established under this section.

(2) ORGANIZATION ESTABLISHED.—The division may establish a direct-support organization, to be known as the "Automobile Insurance Fraud Strike Force," whose sole purpose is to support the prosecution, investigation, and prevention of motor vehicle insurance fraud. The organization shall:

(a) Be a not-for-profit corporation incorporated under chapter 617 and approved by the Department of State.

(b) Be organized and operated to conduct programs and activities; to raise funds; to request and receive grants, gifts, and bequests of money; to acquire, receive, hold, invest, and administer, in its own name, securities, funds, objects of value, or other property, real or personal; and to make grants and expenditures to or for the direct or indirect benefit of the division, state attorneys' offices, the statewide prosecutor, the Agency for Health Care Administration, and the Department of Health to the extent that such grants and expenditures are to be used exclusively to advance the purpose of prosecuting, investigating, or preventing motor vehicle insurance fraud. Grants and expenditures may include the cost of salaries or benefits of dedicated motor vehicle insurance fraud investigators, prosecutors, or support personnel if such grants and expenditures do not interfere with prosecutorial independence or otherwise create conflicts of interest which threaten the success of prosecutions.

(c) Be determined by the division to operate in a manner

that promotes the goals of laws relating to motor vehicle insurance fraud, that is in the best interest of the state, and that is in accordance with the adopted goals and mission of the division.

(d) Use all of its grants and expenditures solely for the purpose of preventing and decreasing motor vehicle insurance fraud, and not for the purpose of lobbying as defined in s. 11.045.

(e) Be subject to an annual financial audit in accordance with s. 215.981.

(3) CONTRACT.—The organization shall operate under written contract with the division. The contract must provide for:

(a) Approval of the articles of incorporation and bylaws of the organization by the division.

(b) Submission of an annual budget for the approval of the division. The budget must require the organization to minimize costs to the division and its members at all times by using existing personnel and property and allowing for telephonic meetings when appropriate.

(c) Certification by the division that the direct-support organization is complying with the terms of the contract and in a manner consistent with the goals and purposes of the department and in the best interest of the state. Such certification must be made annually and reported in the official minutes of a meeting of the organization.

(d) Allocation of funds to address motor vehicle insurance fraud.

(e) Reversion of moneys and property held in trust by the organization for motor vehicle insurance fraud prosecution,

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investigation, and prevention to the division if the organization is no longer approved to operate for the department or if the organization ceases to exist, or to the state if the division ceases to exist.

(f) Specific criteria to be used by the organization's board of directors to evaluate the effectiveness of funding used to combat motor vehicle insurance fraud.

(g) The fiscal year of the organization, which begins July 1 of each year and ends June 30 of the following year.

(h) Disclosure of the material provisions of the contract, and distinguishing between the department and the organization to donors of gifts, contributions, or bequests, including providing such disclosure on all promotional and fundraising publications.

(4) BOARD OF DIRECTORS.—The board of directors of the organization shall consist of the following seven members:

(a) The Chief Financial Officer, or designee, who shall serve as chair.

(b) Two state attorneys, one of whom shall be appointed by the Chief Financial Officer and one of whom shall be appointed by the Attorney General.

(c) Two representatives of motor vehicle insurers appointed by the Chief Financial Officer.

(d) Two representatives of local law enforcement agencies, both of whom shall be appointed by the Chief Financial Officer.

The officer who appointed a member of the board may remove that member for cause. The term of office of an appointed member expires at the same time as the term of the officer who

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appointed him or her or at such earlier time as the member ceases to be qualified.

(5) USE OF PROPERTY.—The department may authorize, without charge, appropriate use of fixed property and facilities of the division by the organization, subject to this subsection.

(a) The department may prescribe any condition with which the organization must comply in order to use the division's property or facilities.

(b) The department may not authorize the use of the division's property or facilities if the organization does not provide equal membership and employment opportunities to all persons regardless of race, religion, sex, age, or national origin.

(c) The department shall adopt rules prescribing the procedures by which the organization is governed and any conditions with which the organization must comply to use the division's property or facilities.

(6) CONTRIBUTIONS.—Any contributions made by an insurer to the organization shall be allowed as appropriate business expenses for all regulatory purposes.

(7) DEPOSITORY.—Any moneys received by the organization may be held in a separate depository account in the name of the organization and subject to the provisions of the contract with the division.

(8) DIVISION'S RECEIPT OF PROCEEDS.—If the division receives proceeds from the organization, those proceeds shall be deposited into the Insurance Regulatory Trust Fund.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete line 19

and insert:

certain crimes; creating s. 626.9894, F.S.; providing definitions; authorizing the Division of Insurance Fraud to establish a direct-support organization for the purpose of prosecuting, investigating, and preventing motor vehicle insurance fraud; providing requirements for the organization and the organization's contract with the division; providing for a board of directors; authorizing the organization to use the division's property and facilities subject to certain requirements; authorizing contributions from insurers; providing that any moneys received by the organization may be held in a separate depository account in the name of the organization; requiring the division to deposit certain proceeds into the Insurance Regulatory Trust Fund; amending s. 627.4133, F.S.; changing

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LEGISLATIVE ACTION

Senate . House

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The Committee on Rules (Smith) recommended the following:

Senate Amendment

Delete lines 589 - 593

and insert:

(2) Notwithstanding s. 440.381(3), premium audits are not required for workers' compensation coverage, except as provided by the insurance policy, by an order of the office, or at least once per policy period if requested by the insured.

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LEGISLATIVE ACTION

Senate . House

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The Committee on Rules (Richter) recommended the following:

Senate Amendment (with title amendment)

Between lines 669 and 670

insert:

Section 12. Section 628.901, Florida Statutes, is amended to read:

628.901 Definitions ~~"Captive insurer" defined.~~ As used in ~~For the purposes of~~ this part, the term: ~~except as provided in s. 628.903, a "captive insurer" is a domestic insurer established under part I to insure the risks of a specific corporation or group of corporations under common ownership owned by the corporation or corporations from which it accepts risk under a contract of insurance.~~

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(1) "Association" means a legal association of nursing homes, hospitals, skilled nursing facilities, assisted living facilities, or continuing care retirement communities.

(2) "Association captive insurer" means a company that insures risks of the member organizations of the association and their affiliated companies.

(3) "Captive insurer" means a pure captive insurer, an industrial insured captive insurer, or an association captive insurer domiciled in this state and formed or licensed under this part.

(4) "Industrial insured" means an insured that:

(a) Has gross assets in excess of $50 million;

(b) Procures insurance through the use of a full-time employee of the insured who acts as an insurance manager or buyer or through the services of a person licensed as a property and casualty insurance agent, broker, or consultant in such person's state of domicile;

(c) Has at least 100 full-time employees; and

(d) Pays annual premiums of at least $200,000 for each line of insurance purchased from the industrial insured captive insurer, or at least $75,000 for any line of coverage in excess of at least $25 million in the annual aggregate. The purchase of umbrella or general liability coverage in excess of $25 million in the annual aggregate is deemed to be the purchase of a single line of insurance.

(5) "Industrial insured captive insurer" means a captive insurer that:

(a) Has as its stockholders or members only industrial insureds that the captive insurer insures, or has as its sole

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stockholder a corporation whose sole stockholders are industrial insureds that the captive insurer insures; and

1. Provides insurance only to the industrial insureds that are its stockholders or members, and affiliates thereof, or to the stockholders, and affiliates thereof, of its parent corporation; or

2. Provides reinsurance only on risks written by insurers of industrial insureds who are the stockholders or members, and affiliates thereof, of the captive insurer, or the stockholders, and affiliates thereof, of the parent corporation of the captive insurer;

(b) Maintains unimpaired capital and surplus of at least $20 million; and

(c) If licensed in this state before December 31, 1999, or if any subsidiary formed by the licensed insurer on or after December 31, 1999, has:

1. Gross assets in excess of $10 million and procures insurance through the use of a full-time employee of the insured who acts as an insurance manager or buyer or through the services of a person licensed as a property and casualty insurance agent, broker, or consultant in such person’s state of domicile;

2. At least 25 full-time employees; and

3. Annual aggregate premiums for all insurance risks which total at least $100,000.

As used in this subsection, the term “affiliate” means a person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with one

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or more of the stockholders or members of an industrial insured captive insurer or one or more of the stockholders of the parent corporation of an industrial insured captive insurer.

(6) "Pure captive insurer" means a company that insures the risks of its parent, affiliated companies, controlled unaffiliated businesses, or a combination thereof.

Section 13. Section 628.903, Florida Statutes, is repealed.

Section 14. Section 628.905, Florida Statutes, is amended to read:

628.905 Licensing; authority.—In order to conduct insurance business in this state, a captive insurer must obtain a license from the office.

(1) A ~~Any~~ captive insurer, if ~~when~~ permitted by its charter or articles of incorporation, may apply to the office for a license to provide commercial property, commercial casualty, and commercial marine insurance. ~~coverage other than workers' compensation and employer's liability insurance coverage, except that~~ An industrial insured captive insurer may also apply for a license to provide workers' compensation and employer's liability insurance as set forth in subsection (5) ~~(6)~~.

(2) A ~~No~~ captive insurer, other than an industrial insured captive insurer, may not ~~shall~~ insure or accept reinsurance on any risks other than those of its parent and affiliated companies.

(3) In addition to information otherwise required by this code, each applicant captive insurer shall file with the office evidence:

(a) Of the adequacy of the loss prevention program of its insureds.

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(b) That it intends to employ or contract with a reputable person or firm that possesses the appropriate expertise, experience, and character to manage the association captive insurer.

(4) If an association captive insurer operates with separate cells or segregated accounts, a certificate of insurance used to satisfy financial responsibility laws shall be issued in an amount not exceeding the total funds in the segregated accounts or separate cells of each member organization of the association.

(5) ~~(4)~~ An industrial insured captive insurer:

(a) Need not be incorporated in this state if it has been validly incorporated under the laws of another jurisdiction; ~~.~~

(b) ~~(5) An industrial insured captive insurer~~ Is subject to all provisions of this part except as otherwise indicated; and ~~.~~

(c) ~~(6) An industrial insured captive insurer~~ May not provide workers' compensation and employer's liability insurance except in excess of at least $25 million in the annual aggregate.

Section 15. Section 628.908, Florida Statutes, is created to read:

628.908 Principal place of business; annual meeting.—In order to conduct insurance business in this state, a licensed captive insurer must:

(1) Maintain its principal place of business in this state; and

(2) Annually hold in this state at least one board of directors' meeting; or, in the case of a reciprocal insurer, one subscriber's advisory committee meeting; or, in the case of a

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limited liability company, one managing board's meeting.

Section 16. Paragraph (a) of subsection (2) and paragraph (a) of subsection (3) of section 628.909, Florida Statutes, are amended to read:

628.909 Applicability of other laws.—

(2) The following provisions of the Florida Insurance Code shall apply to captive insurers who are not industrial insured captive insurers to the extent that such provisions are not inconsistent with this part:

(a) Chapter 624, except for ss. 624.407, 624.408, 624.4085, 624.40851, 624.4095, 624.425, and 624.426.

(3) The following provisions of the Florida Insurance Code shall apply to industrial insured captive insurers to the extent that such provisions are not inconsistent with this part:

(a) Chapter 624, except for ss. 624.407, 624.408, 624.4085, 624.40851, 624.4095, 624.425, 624.426, and 624.609(1).

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete line 49

and insert:

insurance coverage; amending s. 628.901, F.S.; providing definitions; repealing s. 628.903, F.S., relating to the definition of the term "industrial insured captive insurer"; amending s. 628.905, F.S.; requiring a captive insurer to obtain a license and to file evidence that a person or firm with whom it intends to conduct business is reputable; providing that a certificate of insurance for an association


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captive insurer does not exceed the total funds of the association members; creating s. 628.908, F.S.; requiring a licensed captive insurer to maintain its principal place of business in this state and hold an annual meeting in this state; amending s. 628.909, F.S.; applying additional provisions of the insurance code to captive insurers; creating s. 634.1711, F.S.;

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LEGISLATIVE ACTION

Senate . House

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The Committee on Rules (Smith) recommended the following:

Senate Amendment (with title amendment)

Between lines 669 and 670
insert:

Section 12. Subsections (4) and (7) of section 627.7295, Florida Statutes, are amended to read:

627.7295 Motor vehicle insurance contracts.—

(4) If subsection (7) does not apply, the insurer may cancel the policy in accordance with this code except that, notwithstanding s. 627.728, an insurer may not cancel a new policy or binder during the first 60 days immediately following the effective date of the policy or binder for nonpayment of premium unless the reason for the cancellation is the issuance

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of a check for the premium that is dishonored for any reason.

(7) Before the effective date of a binder or policy, a policy of private passenger motor vehicle insurance or a binder for such a policy may be initially issued in this state only if the insurer or agent has collected from the insured an amount equal to 2 months' premium. An insurer, agent, or premium finance company may not, directly or indirectly, take any action resulting in the insured having paid from the insured's own funds an amount less than the 2 months' premium required by this subsection. This subsection applies without regard to whether the premium is financed by a premium finance company or ~~is~~ paid pursuant to a periodic payment plan of an insurer or an insurance agent.

(a) This subsection does not apply if an insured or member of the insured's family is renewing or replacing a policy or a binder for such policy written by the same insurer or a member of the same insurer group.

(b) This subsection does not apply to an insurer that issues private passenger motor vehicle coverage primarily to active duty or former military personnel or their dependents.

(c) This subsection does not apply if all policy payments are paid pursuant to a payroll deduction plan or an automatic electronic funds transfer payment plan from the policyholder~~, provided that the first policy payment is made by cash, cashier's check, check, or a money order~~.

(d) This subsection and subsection (4) do not apply if all policy payments to an insurer are paid pursuant to an automatic electronic funds transfer payment plan from an agent, a managing general agent, or a premium finance company and if the policy

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includes, at a minimum, personal injury protection pursuant to ss. 627.730-627.7407 ~~627.730-627.7405~~; motor vehicle property damage liability pursuant to s. 627.7275; and bodily injury liability in at least the amount of $10,000 because of bodily injury to, or death of, one person in any one accident and in the amount of $20,000 because of bodily injury to, or death of, two or more persons in any one accident.

(e) This subsection and subsection (4) do not apply if an insured has had a policy in effect for at least 6 months, the insured's agent is terminated by the insurer that issued the policy, and the insured obtains coverage on the policy's renewal date with a new company through the terminated agent.

Delete lines 720 - 721

and insert:

of this state.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete line 49

and insert:

insurance coverage; amending s. 627.7295, F.S.; providing that a binder or policy for motor vehicle insurance is not effective until a certain amount of the premium is paid; creating s. 634.1711, F.S.;

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LEGISLATIVE ACTION

Senate . House

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The Committee on Rules (Smith) recommended the following:

Senate Amendment (with title amendment)

Delete lines 670 - 679.

================ T I T L E A M E N D M E N T ================

And the title is amended as follows:

Delete lines 49 - 53

and insert:

insurance coverage; amending s. 634.403, F.S.; exempting

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LEGISLATIVE ACTION

Senate . House

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The Committee on Rules (Smith) recommended the following:

Senate Amendment (with title amendment)

Between lines 743 and 744
insert:

Section 14. Subsections (10) and (12) of section 817.234, Florida Statutes, are amended to read:

817.234 False and fraudulent insurance claims.—

(10) In addition to any criminal liability, a person convicted of violating any provision of this section for the purpose of receiving insurance proceeds from a motor vehicle insurance contract is subject to a civil penalty.

(a) Except for a violation of subsection (9), the civil penalty shall be:

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1. A fine up to $5,000 for a first offense.

2. A fine greater than $5,000, but not to exceed $10,000, for a second offense.

3. A fine greater than $10,000, but not to exceed $15,000, for a third or subsequent offense.

(b) The civil penalty for a violation of subsection (9) must be at least $15,000, but may not exceed $50,000.

(c) The civil penalty shall be paid to the Insurance Regulatory Trust Fund within the Department of Financial Services and used by the department for the investigation and prosecution of insurance fraud.

(d) This subsection does not prohibit a state attorney from entering into a written agreement in which the person charged with the violation does not admit to or deny the charges but consents to payment of the civil penalty. ~~As used in this section, the term "insurer" means any insurer, health maintenance organization, self-insurer, self-insurance fund, or other similar entity or person regulated under chapter 440 or chapter 641 or by the Office of Insurance Regulation under the Florida Insurance Code.~~

(12) As used in this section, the term:

(a) "Insurer" means any insurer, health maintenance organization, self-insurer, self-insurance fund, or similar entity or person regulated under chapter 440 or chapter 641 or by the Office of Insurance Regulation under the Florida Insurance Code.

(b) ~~(a)~~ "Property" means property as defined in s. 812.012.

(c) ~~(b)~~ "Value" has the same meaning ~~means value~~ as defined in s. 812.012.

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44 ================ T I T L E A M E N D M E N T ================

45 And the title is amended as follows:

46 Delete line 55

47 and insert:

48 requirements under certain circumstances; amending s.

49 817.234, F.S.; providing civil penalties for

50 fraudulent insurance claims; providing

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 Rules Committee

BILL:	CS/SB 1252
INTRODUCER:	Budget Committee and Senator Smith
SUBJECT:	Insurance
DATE:	April 22, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Burgess	BI	**Favorable**
2.	Frederick	Meyer, C.	BC	**Fav/CS**
3.	Frederick	Phelps	RC	**Pre-meeting**
4.				
5.				
6.				

I. Summary:

This bill provides for circumstances under which an injured worker can receive workers' compensation benefits through the use of a prepaid card. The bill requires insurance carriers to keep records of all payments made under these circumstances and to submit those records to the Division of Insurance Fraud and the Division of Workers' Compensation within the Department of Financial Services (department) upon request.

The bill provides an exemption from certificate of authority requirements for life and health insurers domiciled outside of the U.S., that cover only persons who, at the time of issuance or renewal, are nonresidents of the U.S., but are residing legally in the U.S., under certain conditions.

The bill revises the requirements for disqualification of applicants convicted of certain crimes from licensure for financial services activities regulated by the department, the Office of Insurance Regulation (OIR), or the Office of Financial Regulation (OFR). The bill revises provisions relating to disqualifying periods for persons convicted of other crimes. The bill also grants the Division of Administrative Hearings (DOAH) the final authority of appeals with respect to licensure determinations by the department for certain applicants.

The bill revises the policyholder notification requirements for an insurer in transactions involving the nonrenewal, renewal, or cancellation of workers compensation, employer liability, commercial liability, motor vehicle, or other property and casualty insurance coverage. The bill changes the designated person or persons an insurer is required to notify from the "named insured" to the "first-named insured" in transactions involving the nonrenewal, renewal, or cancellation of such personal and commercial property and casualty insurance (i.e., workers'

compensation, employer liability, motor vehicle, or specified property and casualty insurance coverage).

The bill requires that a request for disclosure of liability insurance information from a self-insured corporation be sent by certified mail to the registered agent of the disclosing entity.

The bill permits workers' compensation insurers to perform premium audits only as required in the policy, as ordered by the OIR, or once every two years if requested by the insured.

The bill permits consumers to negotiate the price of a motor vehicle service agreement and provides an exemption from certificate of authority requirements for service warranty companies that meet certain requirements.

This bill substantially amends following sections of the Florida Statutes: 120.80, 440.12, 440.20, 624.402, 626.207, 627.4133, 627.4137, 627.442, 627.7277, 627.728, 627.7281, and 634.403.

The bill creates section 634.1711, Florida Statutes.

II. Present Situation:

Workers' Compensation

Workers' compensation is a form of insurance designed to provide wage replacement and medical benefits for employees who are injured in the course of employment, in exchange for giving up the right to sue the employer for negligence. Workers' compensation insurance was established to address the costs of lawsuits filed by employees against employers for work-related injuries. Through the Florida workers' compensation law, employers must provide medical benefits and indemnity (wage replacement) benefits to their employees who are injured in the course of their employment.

In Florida, the workers' compensation process is governed by ch. 440, F.S., titled the "Workers' Compensation Law." Section 440.015, F.S., expresses the legislative intent that the Workers' Compensation Law "be interpreted so as to assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker's return to gainful reemployment at a reasonable cost to the employer." Further the Legislature has expressed:

> It is the intent of the Legislature to ensure the prompt delivery of benefits to the injured worker. Therefore, an efficient and self-executing system must be created which is not an economic or administrative burden. The department (Department of Financial Services), agency (Agency for Health Care Administration), the Office of Insurance Regulation, the Department of Education, and the Division of Administrative Hearings shall administer the Workers' Compensation Law in a manner which

> facilitates the self-execution of the system and the process of ensuring a prompt and cost-effective delivery of payments.[1]

Chapter 440, F.S., provides a detailed framework for coverage and benefit issues, as well as the process for resolving disputes. These laws provide predictability for employees, employers, and workers' compensation insurance carriers. A greater degree of predictability helps the National Council of Compensation Insurance (NCCI), the rating organization that files annual workers' compensation rates in Florida, to more accurately evaluate the risks being covered and to seek the appropriate premium levels. Further, a greater degree of predictability helps the OIR to evaluate the annual rate filing and establish the most appropriate premium levels for Florida businesses.

Currently, all weekly compensation payments to an injured worker, except for the first payment, are paid by check or, if authorized by the employee, deposited directly into the employee's account at a financial institution.

Licensure and Regulation of Insurers and other Risk Bearing Entities that do Business in Florida

The OIR regulates and licenses insurers and other risk-bearing entities that do business in Florida. Regulatory oversight includes licensure, approval of rates and policy forms, market conduct and financial examinations, solvency oversight, administrative supervision, and licensure of viatical settlement and premium finance companies, as provided in the Florida Insurance Code (ch. 636, F.S.).

The Florida Insurance Code contains provisions designed to prevent insurers from becoming insolvent and to protect and provide recovery for policy holders in the event of insolvency. These provisions include minimum capital and surplus requirements and financial reporting requirements. In addition, five guaranty funds are established under ch. 631, F.S., to ensure that policy holders of liquidated insurers are protected with respect to insurance premiums paid and settlement of outstanding covered claims, up to limits provided by law. Generally, entities subject to regulation under the insurance code are subject to assessments of the applicable guaranty association.

Certificate of Authority Exemptions

Section 624.401, F.S., requires insurers and other risk-bearing entities to obtain a certificate of authority prior to engaging in insurance transactions unless specifically exempted. Section 624.402, F.S., exempts various insurers from obtaining a certificate of authority if certain conditions are met. For example, life insurance policies or annuity contracts issued by an insurer domiciled outside of the U.S., covering only persons who, at the time of issuance, are not residents of the U.S., are exempt from the certificate of authority requirements if certain requirements or met.

[1] Section 440.015, F.S.

Consumer Protection Agent and Adjuster Licensing

Section 626.207, F.S., requires the department to establish waiting periods for applicants to become eligible for licensure as an insurance agent or adjuster following denial, suspension, or revocation . The waiting periods are based on the type of conduct, length of time since the conduct occurred, and the propensity to reoffend. The waiting periods may be adjusted based on aggravating and mitigation factors. The department is required to refuse to issue a license based on enumerated factors in s. 626.611, F.S., such as a demonstrated lack of fitness or trustworthiness to engage in the business of insurance, and is given discretionary authority to refuse to issue a license pursuant to s. 626.621, F.S.

The department currently utilizes a "fit and trustworthiness" prong to deny licenses for applicants with specific criminal backgrounds that make them unsuitable for such a position, especially for those positions that the Legislature believes makes one unfit to be an agent or adjuster. The Division of Administrative Hearings has determined, however, that the current statute must be clarified to specifically list the crimes and offenses which makes one unfit for licensure in the financial services industry and the time periods to be used in the waiting period process. An applicant who is denied a license by the department may challenge the department's decision through the DOAH.

Notice of Cancellation and Policy Changes Policy Changes

Generally, the "named insured" is the person or persons listed by name on the insurance policy's declaration page. Although the named insured is commonly one person, for a partnership, corporation, or other entity with insurable interests, multiple named insureds may be included. In regards to personal property or motor vehicle coverage, the named insured is commonly one or more individuals (husband and wife, parent and child, etc).

The "first-named insured" is the first named insured listed on the policy declarations. This insured acts as the legal agent for all named insureds in initiating cancellation, requesting policy changes, reporting notices of loss, accepting any return premiums, or other administrative functions. The first-named insured may also be responsible for payment of the premiums.

For purposes of commercial coverage, generally all named insureds on a policy are related by common ownership or a common business venture. Therefore, multiple named insureds may exist and would be included on the policy. Often, the named insureds are located at the same address, resulting in the insurer mailing multiple copies of the same notice to the same address.

Usually, lenders are added as loss payees with the attached endorsement rather than as named insureds. Status as a loss payee under the attached endorsement entitles the lender to receive notice from the insurer as a loss payee.

The insurance code contains specific policyholder notification requirements for cancellations, renewals, and nonrenewals. These provisions require notification to the named insured or the policyholder. According to the insurance industry, until recently, the OIR had interpreted the "named insured" to be "first-named insured" for purpose of notice requirements for most lines of commercial insurance. Because of this change of notification to the named insured, the OIR

approved revisions to standard forms used in the commercial market related to notification requirements. As a result, all named insureds of personal and commercial policies will receive cancellation and nonrenewal notices.

Warranty Associations and Service Agreements

Chapter 634, F.S., governs the regulation of warranty associations, which are motor vehicle service agreements companies, home warranty associations, and service warranty associations. Motor vehicle service agreements provide vehicle owners with protection when the manufacturer's warranty expires. Home warranty associations indemnify warranty holders against the cost of repairs or replacement of any structural component or appliance in a home. Service warranty contracts for consumer electronics and appliances allow consumers to extend the product protection beyond the manufacturer's warranty terms.

Although a warranty is not considered a traditional insurance product, it protects purchasers from future risks and associated costs. In Florida, warranty associations are regulated by the OIR. The OIR's regulatory authority includes approval of forms, investigation of complaints, and monitoring of reserve requirements, among other duties. However, the OIR is not required to approve rates for warranties.

Under current law, a motor vehicle service agreement indemnifies the vehicle owner (or holder of the agreement) against loss caused by failure of any mechanical or other component part, or any mechanical or other component part that does not function as it was originally intended. It also includes agreements that provide for the coverage or protection which is issued or provided in conjunction with an additive product applied to the motor vehicle, payment of the vehicle protection expenses, and the payment for paintless dent removal services.

To offer motor vehicle service agreements in Florida, one must be licensed and pay and annual nonrefundable license fee to the OIR. All applicants for licensure must meet certain solvency requirements and, once licensed, must report to the OIR certain financial and statistical information on a quarterly basis. Companies are also required to file with the OIR the rates, rating schedules, or rating manuals used, including all modifications of rates and premiums, to be paid by the service agreement holder. Currently, motor vehicle sales persons are not authorized to negotiate the price of motor vehicle service agreements. The OIR does not have authority to approve rates but they are required to review and approve the forms used in the state.

III. Effect of Proposed Changes:

Section 1 amends s. 120.80, F.S., to provide that, notwithstanding ss. 120.569, 120.57, and 120.60, F.S., the Division of Administrative Hearings has final order authority on appeals relating to the Department of Financial Services' determinations on applications for licensure as an insurance agent or adjuster, under specific circumstances. Currently, the DOAH submits a recommended order to the department and the department issues a final order, pursuant to s. 120.57, F.S.

Sections 2 and 3 amends s. 440.12, F.S., allowing a workers' compensation carrier, if authorized by the employee, to make its weekly payment to the employee by means of a prepaid card if the employee is:

- Provided with at least one means of accessing the entire compensation payment each week without incurring fees.
- Provided with the terms and conditions of the program, including a description of any fees.
- Given the option of receiving compensation payments by direct deposit into a personal account at a financial institution.

The bill further requires a carrier to keep a record of all payments and the time and manner of the payments and to furnish the records, if requested, to the Division of Insurance Fraud and the Division of Workers' Compensation within the department.

Section 4 amends s. 624.402, F.S., to provide an exemption from certificate of authority requirements for life and health insurers domiciled outside of the U.S., and covering only persons who, at the time of issuance or renewal, are nonresidents of the U.S., but residing legally in the U.S., if the insurer meets the following conditions:

- The insurer does not solicit business from U.S. residents.
- The insurer registers with the OIR.
- The insurer provides the following information to the OIR on an annual basis:
  - Names of the owners, officers and directors and number of employees.
  - Types of products offered.
  - A statement from the applicable regulatory body of the insurer's domicile certifying that the insurer is licensed or registered in that domicile.
  - A copy of filings required by the insurer's domicile.
- The insurer is also required to include a disclosure in all certificates issued in Florida indicating that the policy has not been approved by the OIR.
- The insurer is required to provide written notice to the OIR within 30 days after ceasing the operations.

Currently, life insurance policies or annuity contracts issued by an insurer domiciled outside of the U.S., covering only persons who, at the time of issuance, are not residents of the U.S., are exempt from the certificate of authority requirements if certain conditions are met. The bill substantially reduces the requirements that these life insurance policies or annuity contracts must meet to be exempt from regulation by the OIR.

Finally, the section defines a "nonresident" as a person who has not: had his or her principal place of domicile in the U.S. for 180 days during the 365 days prior to purchasing or renewing the policy; registered to vote in any state; made a statement of domicile in any state; or filed for homestead tax exemption on property in any state.

Sections 5 amends s. 626.207, F.S., to specify that individual applicants who have committed a first degree felony, capital felony, a felony involving fraud, or a felony directly related to the financial services business are disqualified from obtaining licensure in the profession. The bill

defines the term "financial services business" to mean, any financial activity regulated by the department, the OIR, or the OFR.

Further, money laundering, fraud, embezzlement, and other felonies directly related to the financial services business, such as submitting false or fraudulent insurance claims or applications, theft of premiums or claims money and the sale of unregistered securities, also disqualifies an applicant from licensure.

In accordance with the provisions of the bill, felonies involving moral turpitude, while not permanently disqualifying, are subject to a waiting period, to give the applicant time to demonstrate a clean record of conduct prior to licensure. The bill requires the department to adopt rules establishing a process and application of the disqualifying periods for all other felony and misdemeanor crimes directly related to the financial services business.

Sections 6, 9, 10 and 11 amends s. 627.4133, F.S., relating to workers' compensation and employer's liability insurance, property, casualty, except for mortgage guaranty, surety, marine insurance, and motor vehicle, to require the "first-named insured" rather than the "named insured" to receive notice of nonrenewal or renewal premium, as well as cancellation or termination of coverage.

The bill also requires an insurer to provide notice to the "first-named insured" rather than the "named insured" with respect to the nonrenewal or renewal, as well as cancellation or termination of any personal lines or commercial property insurance policy. The bill amend ss. 627.7277, 627.728, and 627.7281, F.S., relating to motor vehicle insurance coverage, to require an insurer to provide notice of the nonrenewal, renewal, and cancellation to the "first-named insured" instead of the "named insured" or policyholder.

Section 7 amends s. 627.4137, F.S., to require that a request for disclosure of liability insurance information from a self-insured corporation be sent by certified mail to the registered agent of the corporation.

Section 8 amends s. 627.442, F.S., to allow workers' compensation insurers to perform premium audits only as required in the policy, as ordered by the OIR or once every two years, if requested by the insured. Currently, the Financial Services Commission is authorized by rule, in consultation with the department, to require more frequent audits of employers in specified classifications under certain circumstances.

Section 12 creates s. 634.11711, F.S., to allow consumers to purchase a motor vehicle service agreement for a premium amount negotiated with a salesperson under certain conditions. The service agreement company is responsible for establishing minimum premium rates to ensure its solvency under the bill's provisions. Other than the premium rates, no other terms or conditions of the service agreement may be revised, amended, or changed by the salesperson.

Section 13 amends s. 634.403, F. S., to provide an exemption of certain persons in service warranty companies from licensure requirements under the following conditions.

- The service warranties are sold only to persons who are nonresidents of this state and the person does not issue, market, or cause to be marketed service warranties to residents of this state and does not administer service warranties that were originally issued to residents of this state.
- The person provides the following information to the OIR on an annual basis:
  - The type of products offered.
  - A statement certifying that the products are not regulated in the state in which it is transacting business or that the person is licensed in the state in which it is transacting business.
  - The name of the person; the state of domicile; the home address of the person; the name of the owners and their percentage of ownership; the names of the officers and directors; the name, e-mail and telephone number of a contact person; the states in which it is transacting business; and how many individuals are employed in this state.
- The person is required to provide written notice to the OIR within 30 days after ceasing its operations in this state.

This section of the bill is effective upon becoming a law.

Section 14 provides an effective date of July 1, 2011, except as expressly provided.

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:

According to the office, out of state service warranty companies exempted from licensure requirements as provided by the bill, will not result in any reductions in revenues currently collected in this area, as these companies do not currently maintain businesses in Florida.

B. Private Sector Impact:

The bill will reduce administrative costs associated with notifications by providing notice only to the "first-named insured" rather than all "named insureds." This change is

anticipated to reduce administrative costs associated with mailing multiple notices to all named insureds of a policy.

According to the Division of Workers' Compensation, limiting the number of workers' compensation premium audits to those required by the policy or once every two years, if requested by the insured, will reduce the costs of such audits borne by private employers.

C. Government Sector Impact:

The Office of Insurance Regulation, will be required to approve any revised forms or notices needed to implement the bill. However, according to the office, the costs can be absorbed within existing resources. No additional funding is needed.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

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

CS by Budget Committee on April 15, 2011

The committee substitute makes the following changes.

- Grants the Division of Administrative Hearings final order authority on appeals in connection with certain licensure determinations by the Department of Financial Services.
- Permits weekly workers' compensation payments to be paid by an insurer using a prepaid card without the recipient incurring any fees, if certain conditions are met.
- Provides an exemption from certificate of authority requirements for life and health insurers domiciled outside of the U.S. and covering only persons who, at the time of issuance or renewal, are nonresidents of the U.S., but residing legally in the U.S., if the insurer meets certain conditions.
- Revises the requirements for the disqualification of applicants for licensure of financial services activities regulated by department, the Office of Financial Regulation, or the Office of Insurance Regulation, due to certain felony convictions. The committee substitute requires the department to adopt rules establishing the process and application of disqualifying periods for all other crimes not related to a first-degree felony; capital felony; a felony involving money laundering, fraud, or embezzlement; or a felony directly related to a financial services business.
- Requires that a request for disclosure of liability insurance information from a self-insured corporation be sent by certified mail to the registered agent of the corporation.

- Permits workers' compensation insurers to perform premium audits only as required in the policy, as ordered by the Office of Insurance Regulation, or once every two years, if requested by the insured.
- Permits the consumer to negotiate the price of a motor vehicle service agreement with a salesperson under certain conditions.
- Provides persons in a service warranty company an exemption from licensure requirements if certain requirements are met.

B. Amendments:

None.

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 Rules Committee

BILL: SJR 1438

INTRODUCER: Senator Hays

SUBJECT: Sovereignty of the State

DATE: April 22, 2011 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Maclure	Maclure	JU	**Favorable**
2.	Naf	Roberts	GO	**Favorable**
3.	Naf	Phelps	RC	**Pre-meeting**
4.				
5.				
6.				

I. Summary:

The Senate joint resolution proposes an amendment to the Florida Constitution expressing the sovereignty of the state under the Tenth Amendment to the United States Constitution. More specifically, the joint resolution provides that all powers not otherwise enumerated and granted to the federal government by the U.S. Constitution are reserved to the state, and that Floridians are not required to comply with mandates from the federal government which are beyond the scope of its constitutionally delegated powers.

The joint resolution also provides that all compulsory federal legislation that directs states to comply under threat of losing federal funding should be repealed and are not recognized by the state.

This resolution proposes the creation of article I, section 28, of the Florida Constitution.

II. Present Situation:

Tenth Amendment and State Sovereignty

By the provisions of the United States Constitution, certain powers are entrusted solely to the federal government alone, while others are reserved to the states, and still others may be exercised concurrently by both the federal and state governments.[1] All attributes of government that have not been relinquished by the adoption of the United States Constitution and its

[1] 48A FLA. JUR 2D, *State of Florida* s. 13 (2010).

amendments have been reserved to the states.[2] The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." As noted by one Supreme Court Justice:

> [t]his amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution. Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities.[3]

Therefore, courts have consistently interpreted the Tenth Amendment to mean that "'[t]he States unquestionably do retai[n] a significant measure of sovereign authority. . . to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.'"[4] Under the federalist system of government in the United States, states may enact more rigorous restraints on government intrusion than the federal charter imposes.[5] However, a state may not adopt more restrictions on the fundamental rights of a citizen than the United States Constitution allows.[6]

The United States Supreme Court has recognized that the framers of the Constitution explicitly chose a constitution that affords to Congress the power to regulate individuals, not states.[7] Therefore, the Court has consistently held that the Tenth Amendment does not afford Congress the power to require states to enact particular laws or require that states regulate in a particular manner.[8] For example, in *New York v. United States*, the Court, in interpreting the Tenth Amendment, ruled that the Constitution does not confer upon Congress the power to compel states to provide for disposal of radioactive waste generated within their borders, though Congress has substantial power under the Constitution to encourage states to do so.[9]

State Sovereignty Movement

A state sovereignty movement has emerged in the United States over the past couple of years. The premise of this movement is the belief that the balance of power has tilted too far in favor of the federal government. Proponents of this movement urge legislators and citizens to support resolutions or state constitutional amendments declaring the sovereignty of the state over all matters not delegated by the limited enumeration of powers in the United States Constitution to the federal government. The resolutions often mandate that the state government will hold the federal government accountable to the United States Constitution to protect state residents from federal abuse.

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[2] *Id.*
[3] *New York v. United States*, 505 U.S. 144, 156 (1992) (quoting 3 J. Story, *Commentaries on the Constitution of the United States* 752 (1833)).
[4] *Id.*
[5] 48A FLA. JUR 2D, *State of Florida* s. 13 (2010).
[6] *Id*. (quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 549 (1985)).
[7] *New York v. United States*, 505 U.S. at 156.
[8] *Id; see also Baggs v. City of South Pasadena*, 947 F. Supp. 1580 (M.D. Fla. 1996).
[9] *New York v. United States*, 505 U.S. at 156.

An advocacy organization supporting state sovereignty reports that multiple states have introduced similar resolutions asserting state sovereignty.[10] Nine legislatures have adopted some variation of the resolution[11] In late June 2009, the Tennessee governor became the first governor to sign such a resolution.[12]

In lieu of a resolution asserting state sovereignty, some state legislators have filed bills proposing binding legislation supporting state sovereignty. For example, a New Hampshire legislator filed a bill to create a "joint committee on the constitutionality of acts, orders, laws, statutes, regulations, and rules of the government of the United States of America in order to protect state sovereignty."[13] Some state legislators have filed legislation for a constitutional amendment asserting state sovereignty.[14] To date, no state constitutional amendment has been adopted.

Constitutional Amendment Process

Article XI of the Florida Constitution sets forth various methods for proposing amendments to the constitution, along with the methods for approval or rejection of proposals. One method by which constitutional amendments may be proposed is by joint resolution agreed to by three-fifths of the membership of each house of the Legislature.[15]Any such proposal must be submitted to the electors, either at the next general election held more than 90 days after the joint resolution is filed with the Secretary of State, or, if pursuant to law enacted by the affirmative vote of three-fourths of the membership of each house of the Legislature and limited to a single amendment or revision, at an earlier special election held more than 90 days after such filing.[16] If the proposed amendment is approved by a vote of at least 60 percent of the electors voting on the measure, it becomes effective as an amendment to the Florida Constitution on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment.[17]

III. Effect of Proposed Changes:

The Senate joint resolution proposes an amendment to the Florida Constitution expressing the sovereignty of the state under the Tenth Amendment to the United States Constitution.

The joint resolution recognizes Florida's residual and inviolable sovereignty under the Tenth Amendment to the United States Constitution over all powers not otherwise enumerated and granted to the federal government. The joint resolution states that the people of this state refuse

[10] Tenth Amendment Center, *10th Amendment Resolutions*, http://www.tenthamendmentcenter.com/nullification/10th-amendment-resolutions/ (last visited April 1, 2011).
[11] Those states include: Arizona, Idaho, Kansas, Louisiana, Nebraska, North Dakota, Oklahoma, South Carolina, and South Dakota.
[12] Tennessee HJR 108 (2009).
[13] New Hampshire HB 1343 (2010). A Missouri legislator filed a bill creating a "Tenth Amendment Commission." The commission refers cases to the Attorney General when the federal government enacts laws requiring the state or a state officer to enact or enforce a provision of federal law believed to be unconstitutional. See Missouri SB 587 (2010).
[14] *See, e.g.*, Oklahoma HJR 1063 (2010).
[15] FLA. CONST., art. XI, s. 1.
[16] FLA. CONST., art. XI, s. 5(a).
[17] FLA. CONST., art. XI, s. 5(e).

to comply with federal government mandates from any branch which are beyond the scope of those constitutionally delegated powers.

The joint resolution also provides that the people of this state refuse to recognize or comply with compulsory federal legislation that directs the state to comply or requires the state to pass certain legislation in order to retain federal funding. The joint resolution further demands the repeal of these mandates.

The specific statement to be placed on the ballot is provided. This language summarizes the provisions in the proposed constitutional amendment.

The joint resolution is silent regarding an effective date for the constitutional amendment. Therefore, in accordance with section 5, article XI, of the Florida Constitution, it would take effect on the first Tuesday after the first Monday in January following the election at which it was approved by at least 60 percent of the electorate voting on the measure.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Preemption
Depending upon the nature and scope of any federal mandates enacted after the effective date of the constitutional amendment, if it is adopted, the federal law could preempt the effect of this proposed constitutional amendment. The Supremacy Clause of the United States Constitution establishes federal law as the "supreme law of the land, and invalidates state laws that interfere with or are contrary to federal law."[18] However, the Tenth Amendment to the U.S. Constitution provides that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. Therefore, courts have consistently interpreted the Tenth Amendment to mean that "'[t]he States unquestionably do retai[n] a significant measure of sovereign authority. . . to the extent that the Constitution has not divested

[18] *ABC Charters, Inc. v. Bronson*, 591 F.Supp.2d 1272 (S.D. Fla. 2008) (quoting *Lozano v. City of Hazleton*, 496 F.Supp.2d 477, 518 (M.D. Pa. 2007)); *see also* U.S. CONST., art. VI.

them of their original powers and transferred those powers to the Federal Government.'"[19]

In conducting a preemption analysis in areas traditionally regulated by the states, there is a presumption against preemption.[20] There are three types of preemption:

- Express preemption;
- Field preemption; and
- Conflict preemption.

"Conflict preemption" occurs when "it is impossible to comply with both federal and state law, or when state law stands as an obstacle to the objectives of federal law."[21] "Field preemption" occurs when federal regulation in a legislative field is so pervasive that Congress left no room for the states to supplement it. "Express preemption" occurs when federal law explicitly expresses Congress' intent to preempt a state law.[22]

The Florida constitutional amendment could be subject to a constitutional challenge if the state, in reliance upon the proposed amendment, refuses to comply with a mandate from the federal government. The constitutionality of the Florida constitutional amendment may turn on whether the court determines that the federal legislation adopted is beyond the scope of the federal government's constitutionally guaranteed powers.

Joint Resolutions

In order for the Legislature to submit the joint resolution to the voters for approval, the joint resolution must be agreed to by three-fifths of the membership of each house.[23] If SJR 1438 is agreed to by the Legislature, it will be submitted to the voters at the next general election held more than 90 days after the amendment is filed with the Department of State.[24] As such, SJR 1438 would be submitted to the voters at the 2012 General Election. In order for SJR 1438 to take effect, it must be approved by at least 60 percent of the voters voting on the measure.[25]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

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[19] *New York v. United States*, 505 U.S. 144, 156 (1992) (quoting 3 J. Story, *Commentaries on the Constitution of the United States* 752 (1833)).
[20] 48A FLA. JUR 2D *State of Florida* s. 13.
[21] *Id.*
[22] *Id.*
[23] FLA. CONST. art. XI, s. 1.
[24] FLA. CONST. art. XI, s. 5(a).
[25] FLA. CONST. art. XI, s. 5(e).

C. Government Sector Impact:

Each constitutional amendment is required to be published in a newspaper of general circulation in each county, once in the sixth week and once in the tenth week preceding the general election.[26] Costs for advertising vary depending upon the length of the amendment. According to the Department of State, the average cost per word of publishing a constitutional amendment is $106.14.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

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

None.

B. Amendments:

None.

[26] FLA. CONST. art. XI, s. 5(d).

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 Rules Committee

BILL:	CS/SB 2010
INTRODUCER:	Criminal Justice Committee and Senator Braynon
SUBJECT:	Faith and Character Based Correctional Programs
DATE:	April 22, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Clodfelter	Cannon	CJ	**Fav/CS**
2.	Sneed	Meyer, C.	BC	**Favorable**
3.	Sneed	Phelps	RC	**Pre-meeting**
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

This bill amends s. 944.803, F.S., which governs faith-based programs in correctional institutions. Significant changes include:

- Reflecting current practice by adding references to "character-based programs" and "secular institutions."
- Removing the requirement that 80 percent of the inmates in a dormitory-based program must be within 36 months of release.
- Clearly making the statute applicable to all faith and character-based programs, not just dormitory-based programs.
- Expressing legislative encouragement for the department to phase-out dormitory-based programs in favor of faith and character-based institutions.
- Eliminating the statutory preference for admitting inmates who have a substance abuse issue.
- Providing that peer-to-peer programs, such as Alcoholics Anonymous and literacy instruction, must be allowed at faith and character-based institutions in the state correctional system when appropriate.

This bill substantially amends section 944.803 of the Florida Statutes.

II. Present Situation:

References to faith-based programs in correctional institutions first appeared in the Florida Statutes in 1997. Chapter 97-78, Laws of Florida, created s. 944.803, F.S., and expressed legislative intent for public and private correctional institutions to operate religious and chaplaincy programs with the help of volunteers from faith-based institutions in the community. In addition, it required the department to conduct a study of the effectiveness of faith-based programs, including those in other jurisdictions, and to make recommendations for improvement of current programs. In 1999, the department opened its first faith-based dormitory in cooperation with Kairos Horizon at Tomoka Correctional Institution. Several other faith-based dormitories were opened around the state beginning in 2000.

In 2001, the Legislature substantially amended s. 944.803, F.S., to require the department to have six additional faith-based dormitory programs fully operational by June 1, 2002.[1] In 2003, Lawtey Correctional Institution became the first faith-based institution. The department currently has faith and character-based programs at 11 institutions:[2]

Location	Capacity	Gender	Date Became Faith and Character Based Dormitory or Institution
Dormitories			
Tomoka C.I. (F Dorm)	132	Male	November 1999
Polk C.I. (A Dorm)	128	Male	November 2001
Lowell C.I. (A Dorm)	32	Female	January 2002
Gulf – Annex (J Dorm)	128	Male	January 2002
Everglades C.I (B Dorm)	128	Male	February 2002
Lancaster C.I. (I Dorm)	37	Male over 21	January 2003
Union C.I. (J Dorm)	96	Male over 50	February 2003
Total Dormitories	**681**		
Prisons			
Lawtey C.I.	835	Male	December 2003
Hillsborough C.I.	292	Female	April 2004
Wakulla C.I.	1,756	Male	November 2005
Glades C.I.	1,424	Male	March 2009
Total Prison	**4,307**		
TOTAL CAPACITY	**4,988**		

[1] Section 13, Chapter 2001-110, Laws of Florida.
[2] Department of Corrections Analysis of Senate Bill 2010, p. 2.

The 2001 amendments to s. 944.803, F.S., established requirements for faith-based dormitory programs that are still in effect:[3]

- Programs must be a joint effort between the department and faith-based service groups in the community.
- An inmate's faith orientation (or lack thereof) must not be considered in making admission decisions.
- There must not be an attempt to convert an inmate toward a particular faith or religious preference.
- Programs must emphasize the importance of personal responsibility, meaningful work, education, substance-abuse treatment, and peer support.
- Participation must be voluntary.
- Priority must be given to inmates with substance abuse issues.
- State funds must be used toward the goals of criminal rehabilitation, successful reintegration of offenders into the community, and reduction of recidivism, not toward religious indoctrination.
- At least 80 percent of inmates participating in the program must be within 36 months of release.[4]

Chapter 2001-110, Laws of Florida, also required the department to assign a chaplain and a full-time clerical support person for each dormitory to implement and monitor the program and to strengthen volunteer participation and support. In addition, it required assignment of chaplains to community correctional centers. Due to a lack of appropriations, these conditions have not been fulfilled in recent years.

The department refers to institution-based programs as Faith and Character-Based Institutions (FCBI) and dormitory-based programs as Faith-Based/Self Improvement Dormitories (FB/SID). Programming is similar for both FCBI programs and FB/SID programs, except that FB/SID programming is more intensive. Programs are run by volunteers and allow inmates to participate in both religious and secular programming. Inmates can take classes on topics such as writing, marriage and parenting, money management, interview and job skills, computer literacy, personal faith, and a variety of religious and secular topics.[5]

FB/SID programs invite secular and religious charitable organizations to mentor inmates and offer programming designed to transform inmates inwardly. There are separate faith and secular-

[3] The department has interpreted these requirements to apply only to dormitory-based programs. This is a reasonable interpretation because the statute is not clear on the point and there were no institution-wide programs at the time the requirements were established. In any event, the department reports that its requirements for institution-wide programs are basically the same as these statutory requirements except for the 80%/36 month restriction.

[4] The Office of Program Policy Analysis and Governmental Accountability (OPPAGA) has recommended that this requirement be removed or, in the alternative, that it be clarified that the requirement applies to the total population of all FCB dormitories and not to individual dormitories. *See* OPPAGA Report No. 09-38 (October 2009), "Faith- and Character-Based Prison Initiative Yields Institutional Benefits; Effect on Recidivism Modest," p. 7.

[5] Department of Corrections Analysis of Senate Bill 2010, p. 3.

based dormitories. Faith-based dormitory programs build upon the inmate's personal faith, while self-improvement dormitory programs take a secular approach.[6]

The only statutory eligibility requirement is that the inmate must enter the program voluntarily. However, the department has established procedures requiring that an inmate entering the program must:

- Not have received a disciplinary report that resulted in disciplinary confinement during the previous 90 days;
- Be in general population housing status;
- Not be in work-release, reception or transit status; and
- Fit within the institutional profile.[7]

Of course, placement in a program is also dependent upon the availability of space. As of November 29, 2010, there were 471 inmates on the state-wide waiting list for faith-based dormitories, 452 inmates for self improvement dormitories, and 6,785 inmates for FBCIs.[8]

An inmate can be housed in an FCBI until completion of his or her sentence (or permanently if sentenced to life) unless he or she commits a serious infraction.

Effectiveness of Faith and Character-Based Programs

OPPAGA's 2009 review of faith and character-based programs found that institution-wide programs had a positive effect on inmate institutional adjustment and security, and a positive but modest effect on reducing recidivism. Dormitory-based programs also had a positive effect on institutional adjustment and security, but had no effect on recidivism.[9]

III. Effect of Proposed Changes:

This bill amends s. 944.803, F.S., as follows:

- It reflects the department's current practice by changing references to "faith-based programs" and "religious programs" to "faith- and character-based programs," and adding references to "secular institutions" in the community to existing references to faith-based institutions.
- It deletes the requirement that 80 percent of the inmates in a dormitory-based program must be within 36 months of release. This implements an OPPAGA recommendation and the department indicates that it will have a positive impact on the department due to the flexibility that it allows.[10]
- It clearly makes the statute applicable to all faith and character-based programs, not just dormitory-based programs.

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[6] Faith-Based/Self Improvement Dormitories. The Department of Corrections. http://www.dc.state.fl.us/oth/faith/dorms.html, last viewed on March 30, 2011.
[7] *Id.*
[8] Department of Corrections Faith- and Character-Based Initiative, November 2010 Update, http://www.dc.state.fl.us/oth/faith /stats.html , last viewed on March 30, 2011.
[9] OPPAGA Report No. 09-38, *supra,* pages 3-6. *See also* Department of Corrections Analysis of Senate Bill 2010, pages 3-4.
[10] Department of Corrections Analysis of Senate Bill 2010, p. 4.

- It provides for allowing peer-to-peer programs, such as Alcoholics Anonymous and literacy instruction, at faith and character-based institutions in the state correctional system when appropriate. It appears that this would include any private faith and character-based institutions that may be established in the future.
- It provides legislative intent encouraging phasing out dormitory-based programs in favor of faith and character-based institutions.
- It deletes the statutory preference for admitting inmates who have a substance abuse issue.
- It deletes the requirement that a chaplain and support staff be assigned to each dormitory program, and that a chaplain be assigned to each community corrections center. This requirement has not been met in recent years due to lack of funding.
- It deletes a fulfilled requirement in the 2001 legislation to establish six new faith-based programs.

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:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Senate Bill 2018 also amends s. 944.803, F.S., but is limited to elimination of the requirement that 80 percent of inmates in a faith-based dormitory program be within 36 months of their release date.

VIII. Additional Information:

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

CS by Criminal Justice on April 4, 2011:

- Provides that peer-to-peer programs, such as Alcoholics Anonymous and literacy instruction, must be allowed at faith and character-based institutions in the state correctional system when appropriate.
- Providing legislative intent encouraging the department to phase-out dormitory-based programs in favor of faith and character-based institutions.

B. Amendments:

None.

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LEGISLATIVE ACTION

Senate . House

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The Committee on Rules (Thrasher) recommended the following:

Senate Amendment (with title amendment)

Between lines 118 and 119
insert:

Section 2. Section 112.3142, Florida Statutes, is created to read:

112.3142 Qualified blind trusts.—

(1) The Legislature finds that if a public officer creates a trust and does not control the interests held by the trust, his or her official actions will not be influenced or appear to be influenced by private considerations.

(2) If a public officer holds an economic interest in a qualified blind trust as described in this section, he or she

does not have a conflict of interest prohibited under s. 112.313(3) or (7) or a voting conflict of interest under s. 112.3143 with regard to matters pertaining to that economic interest.

(3) Except as otherwise provided in this section, the public officer may not attempt to influence or exercise any control over decisions regarding the management of assets in a qualified blind trust. The public officer and each person having a beneficial interest in the qualified blind trust may not make any effort to obtain information with respect to the holdings of the trust, including obtaining a copy of any trust tax return filed or any information relating thereto, except as otherwise provided in this section.

(4) Except for communications that consist solely of requests for distributions of cash or other unspecified assets of the trust, there shall be no direct or indirect communication with respect to the trust between the public officer or any person having a beneficial interest in the qualified blind trust and the trustee, unless such communication is in writing and unless it relates only to:

(a) A request for a distribution from the trust which does not specify whether the distribution is to be made in cash or in kind;

(b) The general financial interests and needs of the public officer or a person having a beneficial interest, including, but not limited to, an interest in maximizing income or long-term capital gain;

(c) The notification of the trustee of a law or regulation subsequently applicable to the public officer which prohibits

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the officer from holding an asset and which notification directs that the asset not be held by the trust; or

(d) Directions to the trustee to sell all of an asset initially placed in the trust by the public officer which, in the determination of the public officer, creates a conflict of interest or the appearance thereof due to the subsequent assumption of duties by the public officer.

(5) The public officer shall report as an asset on his or her financial disclosure forms the beneficial interest in the qualified blind trust and its value, if the value is required to be disclosed. The public officer shall report the blind trust as a primary source of income on his or her financial disclosure forms and its amount, if the amount of income is required to be disclosed. The public officer is not required to report as a secondary source of income any source of income to the blind trust.

(6) In order to constitute a qualified blind trust, the trust must be established by the public officer and meet the following requirements:

(a) The person appointed as a trustee must not be:

1. The public officer's spouse, child, parent, grandparent, grandchild, brother, sister, parent-in-law, brother-in-law, sister-in-law, aunt, uncle, or first cousin, or the spouse of any such person;

2. A person who is an elected or appointed public officer or a public employee; or

3. A person who has been appointed to serve in an agency by the public officer or by a public officer or public employee supervised by the public officer.

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(b) The trust agreement that establishes the trust must:

1. Contain a statement that its purpose is to remove from the grantor control and knowledge of investment of trust assets so that conflicts between the grantor's responsibilities as a public officer and his or her private interests will be eliminated.

2. Give the trustee complete discretion to manage the trust, including, but not limited to, the power to dispose of and acquire trust assets without consulting or notifying the covered public officer or any person having a beneficial interest in the trust.

3. Prohibit communication between the trustee and the public officer and any person having a beneficial interest in the trust concerning the holdings or sources of income of the trust, except amounts of cash value or net income or loss, if such report does not identify any asset or holding, except as provided in this section.

4. Provide that the trust tax return is prepared by the trustee or his or her designee and that any information relating thereto is not disclosed to the public officer or to any other beneficiary, except as provided in this section.

5. Permit the trustee to notify the public officer of the date of disposition and value at disposition of any original investment or interests in real property to the extent required by federal tax law so that the information can be reported on the public officer's applicable tax returns.

6. Prohibit the trustee from disclosing to the public officer and any person having a beneficial interest in the trust any information concerning replacement assets to the trust,

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except for the minimum tax information that lists only the totals of taxable items from the trust and does not describe the source of individual items of income.

(c) Within 5 business days after the agreement is executed, the public officer shall file a notice with the commission setting forth:

1. The date the agreement was executed;

2. The name and address of the trustee; and

3. Acknowledgement by the trustee that he or she has agreed to serve as trustee.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Between lines 4 and 5

insert:

creating s. 112.3142, F.S.; providing for qualified blind trusts; providing legislative findings; providing conditions when a public officer has no conflict of interest; prohibiting a public officer from influencing or exercising control over the management of the blind trust; providing exceptions; providing conditions for certain communications between the public officer or other persons having a beneficial interest and the trustee; providing that the public officer report certain information relating to the blind trust; providing requirements for the public officer in creating a qualified blind trust; prohibiting the trustee from disclosing certain information to the public officer or other persons

having a beneficial interest in the trust; requiring the public officer to provide notice and specified information to the Commission on Ethics;

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LEGISLATIVE ACTION

Senate . House

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The Committee on Rules (Gardiner) recommended the following:

Senate Amendment (with title amendment)

Delete lines 167 - 176

and insert:

(b) A vote on legislation does not inure to a member's special private gain or loss if:

1. The vote being taken is preliminary or procedural in nature;

2. The chance that any gain or loss received from the legislation is remote or speculative; or

3. The legislation affects a large number of people or entities but does not affect the member, the member's relative, business associate, employer, board upon which the member sits,

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principal, or corporate parent or subsidiary organization of a principal by whom the member is retained differently than the rest of those affected by the legislation.

(c) A member of the Legislature is not prohibited from voting on, and is not required to make any disclosure concerning, any legislation that would inure to the special private gain or loss of the member's employer, principal, or a board upon which the member sits, if the entity is an agency as defined in s. 112.312(2).

(d) A member of the Legislature serving as an independent contractor attorney or "of counsel" attorney in a law firm is not prohibited from voting on, and is not required to make any disclosure concerning, any legislation that would inure to the special private gain or loss of any of the firm's clients, if the member is not involved in the representation of the client, is not involved in the firm's management, and the member's compensation as an attorney is not derived from money received from that client.

(3) This section does not prevent a member of the Legislature from voting on a General Appropriations Act or implementing legislation on the floor of the Senate or House of Representatives.

(4) A member of the Legislature may request an advisory opinion from the general counsel of the house of which he or she is a member as to the application of this section to a specific situation. The general counsel shall issue the opinion within 10 days after receiving the request. The member of the Legislature may reasonably rely on such opinion.

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========== T I T L E A M E N D M E N T ==========
And the title is amended as follows:
Delete lines 37 - 41
and insert:
such entity is an agency; providing that a member's vote does not inure to the member's special private gain or loss under certain circumstances; providing that the act does not require disclosure if a member's vote will inure to the special private gain or loss of a member's employer, principal, or board upon which the member sits, if such entity is an agency; providing that a member of the Legislature who is serving as an independent contractor attorney or "of counsel" attorney in a law firm is not prohibited from voting on and is not required to make a disclosure concerning legislation that would inure to the special private gain or loss of any of the firm's clients; authorizing a member to request an advisory opinion from the general counsel of the house of which he or she is a member; providing that the

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 Rules Committee

BILL:	CS/SB 2088
INTRODUCER:	Rules Subcommittee on Ethics and Elections, Rules Committee, and Senator Gaetz
SUBJECT:	Ethics
DATE:	April 12, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Carlton	Roberts	EE	**Fav/CS**
2.	Carlton	Phelps	RC	**Pre-meeting**
3.			BC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

The bill amends the voting conflicts law by prohibiting a member of the Legislature from voting on certain legislation. It also requires a member to publicly state to the body or the committee to which the member belongs, prior to consideration of the legislation, all of the interests which give rise to the voting conflict. The bill would also require disclosure of the specific nature of those interests in a memorandum filed with either the Secretary of the Senate or Clerk of the House of Representatives within 15 days after the vote. The memorandum would be published in the journal of the house of which the legislator is a member.

The bill amends the financial disclosure laws applicable to elected constitutional officers by requiring the Florida Commission on Ethics ("Commission") to review timely-filed financial disclosures of elected constitutional officers, along with any supporting documents provided, to determine if the filing is sufficient. The bill requires the Commission to notify filers whether their disclosures are sufficient by July 31, and provides 30 days for the official to correct the filing without penalty. Also, if information is omitted from the form which is required to be disclosed, and that information was contained in the supporting documentation filed with the Commission but was not caught by the Commission, the officer shall not be liable for fines or penalties.

Finally, the bill incorporates recommendations made by the Nineteenth Statewide Grand Jury on Public Corruption ("Grand Jury"). Specifically, the bill amends the definition of the term "gift" so that campaign contributions made pursuant to federal elections laws are not a gift. Also, the bill requires two additional types of public servant to file an annual statement of financial interests pursuant to s. 112.3145, F.S. In addition, the bill implements the Grand Jury recommendations concerning use of the term "corruptly" in the criminal bribery and misuse of public position provisions.

This bill substantially amends the following sections of the Florida Statutes: s. 112.312, F.S., s. 112.3143, F.S., s. 112.3144, F.S., s. 112.3145, F.S., s. 838.015, F.S., s. 838.016, F.S., and s. 838.022, F.S. The bill also creates s. 112.31435, F.S. Finally, the bill repeals s. 838.014(4), F.S.

II. Present Situation:

Voting Conflicts:

Under Section 112.3143(2), Florida Statutes, no state public officer is prohibited from voting in an official capacity on any matter. However, any state public officer voting in an official capacity upon any measure which would inure to the officer's special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom the officer is retained or to the parent organization or subsidiary of a corporate principal by which the officer is retained; or which the officer knows would inure to the special private gain or loss of a relative or business associate of the public officer shall, within 15 days after the vote occurs, disclose the nature of his or her interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting.

Conversely, county, municipal, and other local officers are prohibited from voting on any measure which would inure to his/her special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom the officer is retained or to the parent organization or subsidiary of a corporate principal by which the officer is retained, other than an agency; or which the officer knows would inure to the special private gain or loss of a relative or business associate of the officer. In the event of a conflict, the county, municipal, and other local officers are required to publicly state to the assembly the nature of the officer's interests in the matter from which he or she is abstaining prior to the vote being taken. Additionally, the county, municipal, and other local officers are required to disclose the nature of his or her interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting.

Financial Disclosure:

Currently, all elected constitutional officers and candidates for such offices are required by Art. II, s. 8 of the State Constitution, to file a full and public disclosure of their financial interests annually. The annual full and public disclosure is also required of all statewide elected officers and any other officers, candidates, and employees as determined by law. Currently, the financial disclosure requirements are contained in s. 112.3144, F.S., and s. 112.3145, F.S. Section

112.3144, F.S., is the implementing language for the full and public disclosure of financial interests required of the constitutionally specified officers and candidates.

The Commission serves as the depository for the financial disclosure filings of state officers or employees. Those who serve at a local level file their financial disclosure with the local supervisor of elections. The Commission and supervisors of elections are statutorily required to assist each other in identifying those subject to the financial disclosure requirement, providing notice to those individuals, and tracking receipt of financial disclosures. In the event that an individual fails to timely file his or her financial disclosure, the Commission imposes an automatic fine of $25 per day for failure to timely file financial disclosure. The automatic fine is capped at $1,500. Neither the Commission nor the supervisor of elections is required to examine the financial disclosure filings.

If a filer is uncertain about whether he or she is required to disclose information, the filer may contact the Commission for guidance. Usually, the Commission's staff can answer simple questions by telephone or letter. In some circumstances, staff may not be able to provide such informal guidance. The Commission's staff will usually provide the filer the "safe harbor" advice to disclose the information or will advise the filer to seek a formal opinion from the Commission at its next available meeting. Upon receipt of the guidance, the onus is on the filer to include the information on their original form or, if necessary, file an amendment form. A member of the public can file a complaint with the Commission alleging that the person failed to disclose information which they were legally obligated to disclose. That complaint follows the same procedure as any complaint alleging a violation of one of the standards of conduct in the Code of Ethics. In the event that the Commission finds the filer in violation, he or she is subject to the penalties in s. 112.317, F.S.

Nineteenth Statewide Grand Jury Recommendations:

On November 30, 2009, Governor Crist convened the Grand Jury to review the ethics laws for possible improvement and to investigate any potential criminal activity within the Grand Jury's jurisdiction. On December 17, 2010, the Grand Jury issued a 124-page report interim report. The report contains various findings of fact, explanation of current ethics laws, and suggestions for improvement of those laws.

One recommendation was to clarify what constitutes a "gift." Currently, the definition of gifts for purposes of the Code of Ethics is located in s. 112.312(12), F.S. That section also identifies certain things which are specifically excluded from the definition of "gift." Currently, campaign contributions regulated by state law are specifically excluded from the definition of "gift." The exemption, which must be narrowly construed, does not include campaign contributions given which are reported pursuant to federal law. The Grand Jury recommended fixing this omission.

Another recommendation concerned who is required to file an annual statement of financial interests pursuant to s. 112.3145, F.S. Generally, only those specifically enumerated in that statute are required to file an annual statement of financial interests.[1] This filing requirement is

[1] Section 112.3145(1)(a)2.g., permits a unit of local government to require financial disclosure of individuals if permitted to do so by the enabling legislation or via ordinance or resolution.

less onerous than that required in Article II, s. 8 of the Florida Constitution. Currently, neither members of a community redevelopment agency board nor finance directors of county, municipal, or other political subdivisions are required to file annual financial disclosure. The Grand Jury recommended requiring annual financial disclosure of those individuals.

The final Grand Jury recommendation addressed in the bill concerns crimes such as bribery and criminal misuse of public position. Currently, s. 838.014(4), F.S., defines the term "corruptly."[2] "Corruptly" is then incorporated as the requisite mental state for the public corruption offenses in Chapter 838 of the Florida Statutes. The Grand Jury heard testimony that the use of that mental state prevents State Attorneys from being able to try or convict public officers for those offenses. Thus, the Grand Jury concluded that "corruptly" should be stricken from the criminal provisions.

III. Effect of Proposed Changes:

Voting Conflicts:

As previously mentioned, current law provides that no statewide elected officer is prohibited from voting in an official capacity on any matter. The bill creates an exception to the general rule in Section 112.3143(2), F. S., that state public officers may vote in an official capacity on any matter. The bill creates s. 112.31435, F.S., which prohibits a member of the Legislature from voting upon any legislation that would inure to his or her special private gain or loss. The bill also prohibits a member of the Legislature from voting on a matter which he or she knows would inure to the special private gain or loss of his or her relative, business associate, employer, board upon which the member sits, or a principal by whom the member is retained or the parent corporation or subsidiary of a corporate principal by whom the member is retained.

The bill also requires a member to disclose, prior to a vote being taken, all of the interests in the legislation that give rise to the voting conflict. Additionally, the member must disclose the specific nature of those interests as a public record in a memorandum filed with the Secretary of the Senate or the Clerk of the House of Representatives within 15 days after the date on which a vote on the legislation occurs. The memorandum shall be spread upon the pages of the journal of the house of which the legislator is a member.

The bill specifically provides that a member of the Legislature is not prohibited from voting on a General Appropriations Act or implementing legislation on the floor of the Senate or the House of Representatives. The bill also specifically provides that a member is not prohibited from voting on matters that would benefit his or her employer or a board upon which the member sits when the member's employer or board is a public agency.

Financial Disclosure:

The bill amends s. 112.3144, F.S., concerning the filing of annual full and public disclosure of the interests by elected constitutional officers. Specifically, the bill requires the Commission to review any full and public disclosure of financial interests filed by an elected constitutional

[2] It is important to note that the definition of "corruptly" in s. 838.014(4), F.S., is different in s. 112.312(9), F.S., which applies to the Code of Ethics.

officer no later than 5:00 p.m. on July 1.[3] The Commission is required to compare the form and any other supplemental or supporting documentation provided by the filer to determine whether the filing is sufficient. The Commission must then notify the filer whether his or her disclosure is sufficient. If the filing is sufficient, the Commission accepts the filing and shall consider the disclosure to be filed as of the date received.

If the Commission determines, based upon the full and public disclosure form and supporting or supplemental documents, that the filer omitted information required to be filed, the Commission must notify the filer by certified mail. The notice must be sent within thirty days of July 1 and must state with particularity the reason(s) for the deficiency. The officer must then file a new full and public disclosure of financial interests no later than September 1 of that year. A complaint cannot be filed alleging a violation of s. 112.3144, F.S., based on errors identified by the Commission, unless the filer fails to make the corrections necessary to comply with the disclosure requirement by September 1. If the officer fails to file the corrected form by September 1, he or she remains subject to the automatic fines for failure to timely file his or her disclosure. However, the officer would retain the right to appeal any automatic fine based on the existence of unusual circumstances.

When the filing is determined to be sufficient, the officer is not liable for any fines or penalties related to the filing. However, the exemption from liability for fines or penalties is not intended to apply where the filer omits information necessary for the Commission to make its sufficiency determination. This encourages the officer to disclose any information which would facilitate the Commission's review and prevents withholding information in an effort to receive the exemption.

Nineteenth Statewide Grand Jury Recommendations:

Consistent with the recommendations of the Grand Jury, the bill amends the definition of "gift" in s. 112.312(12), F.S. The bill exempts campaign contributions reported pursuant to federal elections law from the definition of a "gift."

The bill also incorporates two other recommendations of the Grand Jury by amending s. 112.3145, F.S. The first change requires members of a community redevelopment agency board to file annual financial disclosure. The second change requires a finance director of a county, municipality, or other political subdivision to file annual financial disclosure.

Consistent with the Grand Jury's recommendation concerning the criminal bribery and misuse of public position statutes, the bill removes "corruptly" from Chapter 838 of the Florida Statutes. Specifically, the definition of "corruptly" in s. 838.014(4), F.S., is repealed. Then, the phrase "corruptly" is replaced with "knowingly" in s. 838.015, s. 838.016, and s. 838.022 of the Florida Statutes. Thus, the mental state required for those offenses would become "knowingly."

[3] If a filing is not received before 5:00 p.m. on July 1, the bill does not require the Commission to conduct a review of the officer's full and public disclosure of financial interests.

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:

None.

C. Government Sector Impact:

Indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The Florida Commission on Ethics may incur additional costs related to sufficiency reviews for certain financial disclosure filings, but such amount is indeterminate at this time. Any potential increase in work caused by the sufficiency review could be offset by using seasonal OPS staff for the thirty day period in which the Commission conducts the review.

VIII. Additional Information:

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

CS by Rules Subcommittee on Ethics and Elections on April 4, 2011:
The Committee Substitute differs from the original bill in that it: clarifies that a member must disclose when the member knows that the legislation would inure to the special private gain of a business associate, employer, or board upon which the member sits, to

conform; clarifies that a member may vote on legislation that inures to a member's *public* employer, principal, or board without any disclosure.

B. Amendments:

None.

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 Rules Committee

BILL:	CS/CS/SB 1568
INTRODUCER:	Budget Committee, Banking and Insurance Committee, and Senator Montford
SUBJECT:	Insurer Insolvency
DATE:	April 22, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Matiyow	Burgess	BI	**Fav/CS**
2.	Betta	Meyer, C.	BC	**Fav/CS**
3.	Betta	Phelps	RC	**Pre-meeting**
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

This bill includes the following provisions.

- Allows the Department of Financial Services (department) to be named as an ancillary receiver of a non-Florida domiciled company in order to obtain records to adjudicate covered claims of policy holders in Florida.
- Requires that the Insurance Regulation Trust Fund within the department cover all unreimbursed costs to the department when opening ancillary delinquency proceedings for the purposes of obtaining records.
- Further clarifies the department's power to obtain records from third-party administrators.
- Provides for the State Risk Management Trust Fund[1] to cover employees, officers, and agents at the department for liability under 31 U.S.C. s. 3713, relating to priority of claims paid by the department while acting as a receiver.

[1]The State Risk Management Trust Fund provides the self-insurance pool for payment of workers' compensation claims, general liability claims, automotive liability claims, federal civil rights claims and court awarded attorney's fees. The revenues for this fund are premiums paid by state agencies from the agency's special appropriation category for risk management insurance.

- Makes changes to the Florida Insurance Guaranty Association (FIGA) and Florida Workers' Compensation Insurance Guaranty Association (FWCIGA) statutes relating to the definition of "covered claims" rejected by another state's guaranty fund.
- Amends qualifications of FIGA and FWCIGA board members representing, or employed by, an insurer in receivership.

This bill substantially amends the following sections of the Florida Statutes: 631.152, 631.391, 631.54, 631.56, 631.904, and 631.912.

The bill creates section 631.2715, Florida Statutes.

II. Present Situation:

Chapter 631, F.S., governs the rehabilitation and liquidation process for insurers in Florida. Federal law specifies that insurance companies are exempted from federal bankruptcy jurisdiction and are instead subject to state laws regarding receivership.[2] Insurers are "rehabilitated" or "liquidated" by the state. In Florida, the Division of Rehabilitation and Liquidation in the department is responsible for rehabilitating or liquidating insurance companies. Section 631.152, F.S., allows for the department to be named as an ancillary receiver for a delinquency proceeding of a non-Florida domiciled insurance company.

Typically, insurers are put into liquidation when the company is or is about to become insolvent;[3] whereas, insurers are placed into rehabilitation[4] for numerous reasons, one of which is that the insurer is impaired or failed to comply with an order of the office to address an impairment of capital or surplus or both. The goal of rehabilitation is to return the insurer to solvency. The goal of liquidation, however, is to liquidate the business of the insurer and use the proceeds to pay off the company's debts and outstanding insurance claims.

Under Florida law s. 631.271(1)(d), F.S., debts owed to the federal government by an insurer in receivership are to be paid after: all of the receiver's costs and expenses of administration are paid; all of the expenses of a guaranty association or foreign guaranty association in handling claims are paid; all claims under policies for losses incurred, including third-party claims are paid; and all claims are paid under nonassessable policies for unearned premiums or premium refunds. However, under 31 U.S.C. s. 3713(b), "a representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government." As a result s. 631.271(1)(d), F.S., could expose employees, officers and agents at the department to personal liabilities owed to the federal government while performing their duties as receiver.

Section 631.391, F.S., requires officers and employees of an insurance company cooperate with the department when the department is acting as receiver of that company. Many insurance companies utilize third-party administrators (TPA) to handle some of their administrative functions such as claims processing. Given that a TPA is a separate entity apart for the insurance

[2] U.S.C. s. 109(b)(2).
[3] Section 631.061, F.S.
[4] Section 631.051, F.S.

company, some argue the department lacks the legal authority to impose costs and fees to any TPA that refuses to furnish records of an insurance company the TPA had provided services for.

Guaranty Associations

In Florida, five insurance guaranty funds have been established to ensure that policyholders of liquidated insurers are protected with respect to insurance premiums paid and settlement of outstanding claims, up to limits provided by law. A guaranty association generally is a nonprofit corporation created by law directed to protect policyholders from financial losses and delays in claim payment and settlement due to the insolvency of an insurance company. Insurers are required by law to participate in guaranty associations as a condition of transacting business in Florida.

Covered Claims

Florida‘s associations provide coverage for policies written to employees within Florida. Some states’ guaranty associations do not provide coverage if the company in that state has a large deductible policy, unless the policyholder (employer) is insolvent.[5] When the guaranty association of another state denies coverage, the injured worker (claimant) could possibly look to other states where the employer may also does business. Many national companies have locations in all fifty states including Florida. As a result of other states associations denying claims, Florida’s guaranty associations could potentially end up paying claims to injured workers in other states.

Florida Insurance Guaranty Association (FIGA)

Part II of ch. 631, F.S., governs FIGA, which operates under a board of directors as a nonprofit corporation. FIGA is composed of all insurers licensed to sell property and casualty insurance in the state. When a property and casualty insurance company becomes insolvent, FIGA is required by law to assume the claims of the insurer and pay the claims of the company's policyholders. FIGA is responsible for claims on residential and commercial property insurance, automobile insurance, and liability insurance, among others.

The maximum claim amount FIGA will cover is $300,000, but special limits apply to damages relating to the structure and contents on homeowners', condominium, and homeowners' association claims. For damages to structure and contents on homeowners' claims, FIGA covers an additional $200,000, for a total of $500,000. For condominium and homeowners' association claims, FIGA covers the lesser of policy limits or $100,000 multiplied by the number of units in the association. In addition to any deductible in the insurance policy, all claims are subject to a $100 FIGA deductible.

[5] Missouri Law 375.772 2(c)j - Any amount that constitutes a claim under a policy issued by an insolvent insurer with a deductible or self- insured retention of three hundred thousand dollars or more. However, such a claim shall be considered a covered claim, if, as of the deadline set forth for the filing of claims against the insolvent insurer or its liquidator, the insured is a debtor under 11 U.S.C. Section 701, et seq.;

FIGA is divided into three accounts: auto liability, auto physical damage, and all other property and casualty insurance other than workers' compensation.[6] This "all other" account includes property insurance (such as claims resulting from hurricane-related insolvencies), personal liability, commercial liability, commercial multi-peril, professional liability, and all other types of property and casualty insurance other than automobile and workers' compensation.

Funding is provided by assessments against authorized insurers, as needed for the payment of covered claims and costs of administration. The maximum annual assessment against each insurer is 2 percent of the insurer's net direct written premiums in the state in the prior year, for the types of insurance in each account. FIGA may also impose annual emergency assessments on insurers of up to 2 percent of written premium if necessary to fund revenue bonds issued by a municipality or county to pay claims of an insurer rendered insolvent due to a hurricane. FIGA also obtains funds from the liquidation of assets of insolvent insurers domiciled in other states but having claims in Florida.

Insurers pay the assessment to FIGA and submit a rate filing with the Office of Insurance Regulation (office) to recoup the assessment from their policyholders.[7] Pursuant to s. 631.64, F.S., the rates and premiums charged for insurance policies may include amounts sufficient to recoup a sum equal to the amounts paid to FIGA by the member insurer, less any amounts returned to the member insurer by FIGA, and such rates shall not be deemed excessive because they contain an amount reasonably calculated to recoup assessments paid by the member insurer.

Section 631.56, F.S., establish requirements for selecting members to the FIGA board. The board shall consist of not less than five or more than nine members. Each board member serves for a 4 -year term and may be reappointed. The department approves and appoints each member recommended by the member insurers (all companies writing licensed business in that state). In the event the department finds a candidate does not meet the qualifications for service on the board, the department shall request the member insurers to recommend another candidate. Vacancies on the board are filled for the remaining term and are handled in the same manner as initial appointments. Currently members on the board representing an insurer in receivership are not required to step down.

Florida Workers' Compensation Insurance Guaranty Association (FWCIGA)

The FWCIGA pays workers' compensation claims of insolvent insurers and group self-insurance funds authorized in Florida, as well as unearned premium claims. FWCIGA does not have a coverage limit for workers' compensation claims of insolvent insurers. When FWCIGA was created, the responsibility for handling insolvent workers' compensation claims was transferred from FIGA to FWCIGA. However, claims under the employer's liability part of a workers' compensation insurance policy continue to be covered by FIGA. According to representatives of FIGA, FIGA experiences difficulties in the administration of employer liability claims if FIGA is required to assess workers' compensation carriers for a portion of their workers' compensation premium. A workers' compensation insurance policy is divided into Part A and Part B. Part A provides workers' compensation coverage to cover medical expenses, lost income wages,

[6]Section 631.55, F.S.
[7]Section 631.57(3)(a), F.S.

rehabilitation costs and, if needed, death benefits for employees who sustain an injury or illness as a result of their employment. Part B provides employer's liability coverage to cover the employer in the event the injured employee elects not to accept the coverage offered under Part A of the policy. In such case, the employee exercises his or her right to sue the employer and part B defends and protects the employer's interests.

Section 631.912, F.S., establishes requirements for selecting members to the FWCIGA board. The board shall consist of 11 persons, 1 of whom is the insurance consumer advocate appointed under s. 627.0613, F.S., and 1 of whom is designated by the Chief Financial Officer (CFO). The department shall appoint to the board 6 persons selected by private carriers from among the 20 workers' compensation insurers with the largest amount of net direct written premium as determined by the department, and 3 persons selected by the self-insurance funds. At least two of the private carriers shall be foreign carriers authorized to do business in this state. The board shall elect a chairperson from among its members. The CFO may remove any board member for cause. Each board member shall serve for a 4-year term and may be reappointed. A vacancy on the board shall be filled for the remaining term and in the same manner by which the original appointment was made. Currently members on the board who have material relationships with or are employed by an insurer in receivership are not required to step down.

Capital Build-up Incentive Program

In 2006, the Legislature created the Insurance Capital Build-up Incentive Program (program) to provide insurance companies low-cost capital to write additional residential property insurance to Florida residents (ch. 2006-12, L.O.F.). The program's goal is to increase the availability of residential property insurance coverage and to restrain increases in property insurance premiums. To accomplish this goal, the state loaned funds, in the form of surplus notes, to new or existing authorized residential property insurers. In order to receive these funds, the participating insurers agreed to write additional residential property insurance in Florida and to contribute new capital to their respective companies.

III. Effect of Proposed Changes:

By allowing the department to be named as an ancillary receiver, for the purposes of obtaining records, the bill will allow the department the legal grounds to seek records from third party administrators of insurance companies in other states. Allowing any unpaid cost to be covered by the Insurance Regulation Trust Fund will provide the department the proper resources needed to obtain records needed by the associations.

By extending coverage of the State Risk Management Trust Fund to protect the department employees, the bill provides state employees personal protection against actions brought by the federal government while they are performing the department's duties as the receiver of an insolvent insurance company.

The bill provides the department the authority to seek costs and fees of third party administrators who refuse to turn over records. This provision should aid the department in its efforts to obtain records on behalf of the associations.

The bill provides that a claim will not be covered by FIGA or FWCIGA if that claim had already been rejected by another state's guaranty fund. This provision will protect the associations and Florida policyholders from having to pay claims for workers of companies domiciled in other states.

The bill requires that a board member of FIGA or FWCIGA must immediately step down if the company the member represents goes into receivership.

The bill allows an insurer to request that the SBA renegotiate the terms of a surplus note issued under the Insurance Capital Build-up Incentive Program before January 1, 2011. The insurer's request must be submitted to the board by January 1, 2012. If the insurer agrees to accelerate the payment period of the note by at least five years, the board must agree to exempt the insurer from the required premium-to-surplus ratios. If the insurer agrees to an acceleration of the payment period for less than five years, the board may, after consultation with the Office of Insurance Regulation, agree to an appropriate revision of the required premium-to-surplus ratios if the revised ratios are not lower than a net premium to surplus of at least one to one and, alternatively, a gross premium to surplus of at least three to one.

The bill enacts prohibitions recommended by the National Association of Insurance Commissioners that prohibit an insurer from using the same accountant or partner of an accounting firm to prepare its annual audit and audited financial report for more than five consecutive years, and to require a five-year waiting period before the accountant or partner can be retained by the insurer for that purpose. Current law permits use of the same accountant or partner for seven straight years followed by a two-year waiting period.

To coincide with the National Association of Insurance Commissioners Model Act, the bill increases the surplus requirements from $100 million to $250 million for foreign insurers that provide reinsurance, in order for the reinsurance to be deemed acceptable by the Office of Insurance Regulation. The bill expands nationally recognized statistical rating organizations that must provide a secure financial rating, to include the specific rating agencies Standard & Poor's, Moody's Investors Service, Fitch Ratings, A.M. Best Company, and Demotech. Two of these organizations or others acceptable by the commissioner must provide a secure financial strength rating, in addition to the surplus requirements, for the reinsurance to be deemed acceptable by the Office of Insurance Regulation.

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:

Third-party administrators could be responsible to pay costs and fees for failing to turn over records to the department.

C. Government Sector Impact:

Department employees will be covered by the State Risk Management Trust Fund for potential liability to the federal government while performing their duties as receiver of an insolvent insurance company.

If an insurer does not have the funds to reimburse the department for costs incurred for the purposes of obtaining records, there could be an indeterminate cost to the Insurance Regulation Trust Fund.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

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

CS/CS by Budget on April 15, 2011

The committee substitute:

- Allows an insurer to request that the SBA renegotiate the terms of a surplus note issued under the Insurance Capital Build-Up Incentive Program before January 1, 2011.
- Enacts prohibitions recommended by the National Association of Insurance Commissioners that prohibit an insurer from using the same accountant or partner of an accounting firm to prepare its annual audit and audited financial report for more

than five consecutive years, and to require a five year waiting period before the accountant or partner can be retained by the insurer for that purpose.
- Increases the surplus requirements for foreign insurers in order to receive credit for reinsurance ceded to these foreign insurers from $100 million to $250 million.
- Expands the list of nationally recognized statistical rating organizations that may be utilized to provide a secure financial rating.

CS by Banking and Insurance on March 22, 2011

The Committee Substitute:

- Allows the department to be named as an ancillary receiver of a non-Florida domiciled company in order to obtain records to adjudicate covered claims of policy holders in Florida.

- Provides the Insurance Regulation Trust Fund shall cover all unreimbursed costs to the department when opening ancillary delinquency proceedings for the purposes of obtaining records.

- Provides the department, rather than the associations, the authority to seek costs and fees of third party administrators who refuse to turn over records.

- Removes the retroactive language from the bill.

B. Amendments:

None.

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 Rules Committee

BILL:	SB 474
INTRODUCER:	Senator Evers
SUBJECT:	Sales Representative Contracts
DATE:	April 25, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	McCarthy	Cooper	CM	**Favorable**
2.	Maclure	Maclure	JU	**Favorable**
3.	Maclure	Phelps	RC	**Pre-meeting**
4.				
5.				
6.				

I. Summary:

This bill repeals a statute which requires that a contract to solicit orders within this state between a principal and a commissioned sales representative be in writing and specify the terms of the commission. In the event that there is no written contract, this statute requires that the sales representative be paid within 30 days of termination of the unwritten contract. Should the principal not comply with this payment requirement, the sales representative has a cause of action for damages equal to triple the amount of commission found to be due, as well as reasonable attorney's fees and court costs. Licensed real estate brokers, sales associates, and appraisers are exempt from this statute.

This bill repeals section 686.201, Florida Statutes.

II. Present Situation:

Under s. 686.201, F.S., when a principal contracts with a sales representative to solicit orders within this state, the contract shall be in writing and set forth the method by which the commission is to be computed and paid. The principal must provide the sales representative with a signed copy of the contract and obtain a signed receipt for the contract from the sales representative.[1]

In the event the contract between the sales representative and the principal is terminated and the contract was not reduced to writing, all commissions due must be paid within 30 days after termination. If the principal fails to comply as required, the sales representative has a cause of

[1] Section 628.201(2), F.S.

action for damages equal to triple the amount of the commission found to be due. The prevailing party in any such action is entitled to an award of reasonable attorney's fees and costs.[2]

This provision does not apply to real estate brokers, sales associates or appraisers licensed pursuant to ch. 475, F.S., who are performing within the scope of their license.[3]

A sales representative is a person or business which contracts with a principal to solicit orders and who is compensated, in whole or in part, by commission. However, a sales representative does not include a person or business which places orders for his or her own account for resale, or a person who is an employee of the business.[4]

A principal is a person or business which:

- Manufactures, produces, imports, or distributes a product or service.
- Contracts with a sales representative to solicit orders for the product or service.
- Compensates the sales representative, in whole or in part, by commission.[5]

The Legislature enacted this statute in 1984[6] and originally applied it solely to out-of-state principals.[7] In 1992, the Third District Court of Appeal heard a case filed by a sales representative to recover commissions the sales representative claimed he was owed by an out-of-state principal.[8] The court upheld the trial court's decision to award the sales representative the sales commission that the sales representative had earned under an oral agreement with the principal.[9] However, the appellate court disagreed with the trial court that the sales representative was owed double[10] the damages because the appellate court found that s. 686.201, F.S., was unconstitutional under the Commerce Clause of the U.S. Constitution. The court found that the statute violated the Commerce Clause because it imposed requirements on an out-of-state principal or business which did not apply to an in-state principal or business.[11]

In 2004, the Legislature revised the statute to correct this constitutional problem – amending the definition of principal to remove language that applied the provisions of the statute only to out-of-state entities.[12]

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[2] Section 686.201(3), F.S.
[3] Section 686.201(4), F.S.
[4] Section 686.201(1)(c), F.S.
[5] Section 686.201(1)(b), F.S.
[6] Chapter 84-76, s. 1, Laws of Fla. One court noted that in enacting the law it "appears that the Florida [L]egislature sought to address the inherent problem of the disparity in bargaining power between a sales representative and a manufacturer or importer." *Rosenfeld v. Lu*, 766 F. Supp. 1131, 1140 (S.D. Fla. 1991).
[7] The statute defined a "principal" as a person without a permanent or fixed place of business in this state (s. 686.201(1)(b), F.S. (2003)).
[8] *D.G.D., Inc. v Berkowitz*, 605 So. 2d 496 (Fla. 3rd DCA 1992).
[9] *Id.* at 497.
[10] At that time, the statute provided for damages equal to double the amount of commission found to be due.
[11] *D.G.D., Inc.*, 605 So. 2d at 498. The district court of appeal follow the lead of a U.S. district court that has similarly declared the statute unconstitutional. *Rosenfeld*, 766 F. Supp. at 1142.
[12] Chapter 2004-90, s. 1, Laws of Fla. At that time, the Legislature made other revisions to the statute as well, including increasing the damages recoverable in a lawsuit to three times the amount of commission found to be due.

III. Effect of Proposed Changes:

This bill repeals s. 686.201, F.S. In doing so, the bill eliminates the statutory requirement that contracts between sales representatives and principals to solicit orders within this state be in writing and prescribe the method for calculating and paying commissions. Repeal of the statute would also eliminate the remedies associated with a failure of the parties to have a written contract upon termination of the relationship while commissions are still owed. These remedies include:

- Payment of owed commissions within 30 days of termination of the relationship;
- Authority for the sales representative to sue if the principal fails to pay within 30 days and to win damages equal to three times the amount of commission due; and
- An award of attorney's fees and costs to whichever party prevails in the litigation.

The bill provides an effective date of July 1, 2011.

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:

To the extent that a sales representative fails to obtain a written contract for his or her services, and the sales representative has a dispute with the principal over commissions, he or she will have less leverage in resolving the dispute. The principal will no longer be required to formalize in a written contract and will not be subject to triple the amount of commission found to be due should the principal lose in a litigated dispute with a commissioned sales representative when there is an unwritten contract.

To the extent that the relationship between sales representatives and principals is by practice already governed by contract, there will be minimal impact on both parties.

C. Government Sector Impact:

None

VI. Technical Deficiencies:

None.

VII. Related Issues:

There are currently 33 states with laws that offer sales representatives some form of protection with respect to their commissions.[13]

VIII. Additional Information:

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

None.

B. Amendments:

None.

[13] From the bill analysis of SB 474 prepared by professional staff of the Senate Committee on Commerce and Tourism, *available at* http://www.flsenate.gov/Session/Bill/2011/0474/Analyses/5wyhqFU3gqNoNfV7g2bq8nB2AZU=%7C7/Public/Bills/0400-0499/0474/Analysis/2011s0474.cm.PDF.

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LEGISLATIVE ACTION

Senate	.	House
Comm: FAV	.	
04/26/2011	.	
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The Committee on Budget (Flores) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause
and insert:

Section 1. Section 1002.321, Florida Statutes, is created to read:

1002.321 Digital learning.—

(1) DIGITAL LEARNING NOW ACT.—There is created the Digital Learning Now Act.

(2) ELEMENTS OF HIGH-QUALITY DIGITAL LEARNING.—The Legislature finds that each student should have access to a high-quality digital learning environment that provides:

(a) Access to digital learning.

(b) Access to high-quality digital content and online courses.

(c) Education that is customized to the needs of the student using digital content.

(d) A means for the student to demonstrate competency in completed coursework.

(e) High-quality digital content, instructional materials, and online and blended learning courses.

(f) High-quality digital instruction and teachers.

(g) Content and instruction that are evaluated on the metric of student learning.

(h) The use of funding as an incentive for performance, options, and innovation.

(i) Infrastructure that supports digital learning.

(j) Online administration of state assessments.

(3) DIGITAL PREPARATION.—Each student must graduate from high school having taken at least one online course, as provided in s. 1003.428.

(4) CUSTOMIZED AND ACCELERATED LEARNING.—A school district must establish multiple opportunities for student participation in part-time and full-time kindergarten through grade 12 virtual instruction. Options include, but are not limited to:

(a) School district operated part-time or full-time virtual instruction programs under s. 1002.45(1)(b) for kindergarten through grade 12 students enrolled in the school district. A full-time program shall operate under its own Master School Identification Number.

(b) Florida Virtual School instructional services authorized under s. 1002.37.

(c) Blended learning instruction provided by charter schools authorized under s. 1002.33.

(d) Full-time virtual charter school instruction authorized under s. 1002.33.

(e) Courses delivered in the traditional school setting by personnel providing direct instruction through a virtual environment or though a blended virtual and physical environment pursuant to s. 1003.498.

(f) Virtual courses offered in the course code directory to students within the school district or to students in other school districts throughout the state pursuant to s. 1003.498.

Section 2. Subsection (1), paragraph (a) of subsection (6), subsection (7), and paragraph (a) of subsection (20) of section 1002.33, Florida Statutes, are amended, and paragraph (f) is added to subsection (17) of that section, to read:

1002.33 Charter schools.—

(1) AUTHORIZATION.—Charter schools shall be part of the state's program of public education. All charter schools in Florida are public schools. A charter school may be formed by creating a new school or converting an existing public school to charter status. A charter school may operate a virtual charter school pursuant to s. 1002.45(1)(d) to provide full-time online instruction to eligible students, pursuant to s. 1002.455, in kindergarten through grade 12. A charter school must amend its charter or submit a new application pursuant to subsection (6) to become a virtual charter school. A virtual charter school is subject to the requirements of this section; however, a virtual charter school is exempt from subsections (18) and (19), subparagraphs (20)(a)2.-5., paragraph (20)(c), and s. 1003.03. A


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public school may not use the term charter in its name unless it has been approved under this section.

(6) APPLICATION PROCESS AND REVIEW.—Charter school applications are subject to the following requirements:

(a) A person or entity wishing to open a charter school shall prepare and submit an application on a model application form prepared by the Department of Education which:

1. Demonstrates how the school will use the guiding principles and meet the statutorily defined purpose of a charter school.

2. Provides a detailed curriculum plan that illustrates how students will be provided services to attain the Sunshine State Standards.

3. Contains goals and objectives for improving student learning and measuring that improvement. These goals and objectives must indicate how much academic improvement students are expected to show each year, how success will be evaluated, and the specific results to be attained through instruction.

4. Describes the reading curriculum and differentiated strategies that will be used for students reading at grade level or higher and a separate curriculum and strategies for students who are reading below grade level. A sponsor shall deny a charter if the school does not propose a reading curriculum that is consistent with effective teaching strategies that are grounded in scientifically based reading research.

5. Contains an annual financial plan for each year requested by the charter for operation of the school for up to 5 years. This plan must contain anticipated fund balances based on revenue projections, a spending plan based on projected revenues


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and expenses, and a description of controls that will safeguard finances and projected enrollment trends.

6. Documents that the applicant has participated in the training required in subparagraph (f)2. A sponsor may require an applicant to provide additional information as an addendum to the charter school application described in this paragraph.

7. For the establishment of a virtual charter school, documents that the applicant has contracted with a provider of virtual instruction services pursuant to s. 1002.45(1)(d).

(7) CHARTER.—The major issues involving the operation of a charter school shall be considered in advance and written into the charter. The charter shall be signed by the governing board ~~body~~ of the charter school and the sponsor, following a public hearing to ensure community input.

(a) The charter shall address and criteria for approval of the charter shall be based on:

1. The school’s mission, the students to be served, and the ages and grades to be included.

2. The focus of the curriculum, the instructional methods to be used, any distinctive instructional techniques to be employed, and identification and acquisition of appropriate technologies needed to improve educational and administrative performance which include a means for promoting safe, ethical, and appropriate uses of technology which comply with legal and professional standards.

a. The charter shall ensure that reading is a primary focus of the curriculum and that resources are provided to identify and provide specialized instruction for students who are reading below grade level. The curriculum and instructional strategies


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for reading must be consistent with the Sunshine State Standards and grounded in scientifically based reading research.

b. In order to provide students with access to diverse instructional delivery models, to facilitate the integration of technology within traditional classroom instruction, and to provide students with the skills they need to compete in the 21st century economy, the Legislature encourages instructional methods for blended learning courses consisting of both traditional classroom and online instructional techniques. Charter schools may implement blended learning courses which combine traditional classroom instruction and virtual instruction. Students in a blended learning course must be full-time students of the charter school and receive the online instruction in a classroom setting at the charter school. Instructional personnel certified pursuant to s. 1012.55 who provide virtual instruction for blended learning courses may be employees of the charter school or may be under contract to provide instructional services to charter school students. At a minimum, such instructional personnel must hold an active state or school district adjunct certification under s. 1012.57 for the subject area of the blended learning course. The funding and performance accountability requirements for blended learning courses are the same as those for traditional courses.

3. The current incoming baseline standard of student academic achievement, the outcomes to be achieved, and the method of measurement that will be used. The criteria listed in this subparagraph shall include a detailed description of:

a. How the baseline student academic achievement levels and prior rates of academic progress will be established.

b. How these baseline rates will be compared to rates of academic progress achieved by these same students while attending the charter school.

c. To the extent possible, how these rates of progress will be evaluated and compared with rates of progress of other closely comparable student populations.

The district school board is required to provide academic student performance data to charter schools for each of their students coming from the district school system, as well as rates of academic progress of comparable student populations in the district school system.

4. The methods used to identify the educational strengths and needs of students and how well educational goals and performance standards are met by students attending the charter school. The methods shall provide a means for the charter school to ensure accountability to its constituents by analyzing student performance data and by evaluating the effectiveness and efficiency of its major educational programs. Students in charter schools shall, at a minimum, participate in the statewide assessment program created under s. 1008.22.

5. In secondary charter schools, a method for determining that a student has satisfied the requirements for graduation in s. 1003.43.

6. A method for resolving conflicts between the governing board ~~body~~ of the charter school and the sponsor.

7. The admissions procedures and dismissal procedures, including the school’s code of student conduct.

8. The ways by which the school will achieve a


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racial/ethnic balance reflective of the community it serves or within the racial/ethnic range of other public schools in the same school district.

9. The financial and administrative management of the school, including a reasonable demonstration of the professional experience or competence of those individuals or organizations applying to operate the charter school or those hired or retained to perform such professional services and the description of clearly delineated responsibilities and the policies and practices needed to effectively manage the charter school. A description of internal audit procedures and establishment of controls to ensure that financial resources are properly managed must be included. Both public sector and private sector professional experience shall be equally valid in such a consideration.

10. The asset and liability projections required in the application which are incorporated into the charter and shall be compared with information provided in the annual report of the charter school.

11. A description of procedures that identify various risks and provide for a comprehensive approach to reduce the impact of losses; plans to ensure the safety and security of students and staff; plans to identify, minimize, and protect others from violent or disruptive student behavior; and the manner in which the school will be insured, including whether or not the school will be required to have liability insurance, and, if so, the terms and conditions thereof and the amounts of coverage.

12. The term of the charter which shall provide for cancellation of the charter if insufficient progress has been


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made in attaining the student achievement objectives of the charter and if it is not likely that such objectives can be achieved before expiration of the charter. The initial term of a charter shall be for 4 or 5 years. In order to facilitate access to long-term financial resources for charter school construction, charter schools that are operated by a municipality or other public entity as provided by law are eligible for up to a 15-year charter, subject to approval by the district school board. A charter lab school is eligible for a charter for a term of up to 15 years. In addition, to facilitate access to long-term financial resources for charter school construction, charter schools that are operated by a private, not-for-profit, s. 501(c)(3) status corporation are eligible for up to a 15-year charter, subject to approval by the district school board. Such long-term charters remain subject to annual review and may be terminated during the term of the charter, but only according to the provisions set forth in subsection (8).

13. The facilities to be used and their location.

14. The qualifications to be required of the teachers and the potential strategies used to recruit, hire, train, and retain qualified staff to achieve best value.

15. The governance structure of the school, including the status of the charter school as a public or private employer as required in paragraph (12)(i).

16. A timetable for implementing the charter which addresses the implementation of each element thereof and the date by which the charter shall be awarded in order to meet this timetable.

17. In the case of an existing public school that is being


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converted to charter status, alternative arrangements for current students who choose not to attend the charter school and for current teachers who choose not to teach in the charter school after conversion in accordance with the existing collective bargaining agreement or district school board rule in the absence of a collective bargaining agreement. However, alternative arrangements shall not be required for current teachers who choose not to teach in a charter lab school, except as authorized by the employment policies of the state university which grants the charter to the lab school.

18. Full disclosure of the identity of all relatives employed by the charter school who are related to the charter school owner, president, chairperson of the governing board of directors, superintendent, governing board member, principal, assistant principal, or any other person employed by the charter school who has equivalent decisionmaking authority. For the purpose of this subparagraph, the term "relative" means father, mother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister.

(b)1. A charter may be renewed provided that a program review demonstrates that the criteria in paragraph (a) have been successfully accomplished and that none of the grounds for nonrenewal established by paragraph (8)(a) has been documented. In order to facilitate long-term financing for charter school construction, charter schools operating for a minimum of 3 years and demonstrating exemplary academic programming and fiscal


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management are eligible for a 15-year charter renewal. Such long-term charter is subject to annual review and may be terminated during the term of the charter.

2. The 15-year charter renewal that may be granted pursuant to subparagraph 1. shall be granted to a charter school that has received a school grade of "A" or "B" pursuant to s. 1008.34 in 3 of the past 4 years and is not in a state of financial emergency or deficit position as defined by this section. Such long-term charter is subject to annual review and may be terminated during the term of the charter pursuant to subsection (8).

(c) A charter may be modified during its initial term or any renewal term upon the recommendation of the sponsor or the charter school's ~~school~~ governing board and the approval of both parties to the agreement.

(d)1. Each charter school's governing board must appoint a representative to facilitate parental involvement, provide access to information, assist parents and others with questions and concerns, and resolve disputes. The representative must reside in the school district in which the charter school is located and may be a governing board member, charter school employee, or individual contracted to represent the governing board. If the governing board oversees multiple charter schools in the same school district, a single representative may be appointed to serve all such schools. The representative's contact information must be provided annually in writing to parents and posted prominently on the charter school's website if a website is maintained by the school. The sponsor may not require that governing board members of the charter school


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reside in the school district in which the charter school is located if the charter school complies with this paragraph.

2. Each charter school's governing board must hold at least two public meetings per school year in the school district. The meetings must be noticed, open, and accessible to the public, and attendees must be provided an opportunity to receive information and provide input regarding the charter school's operations. The appointed representative and charter school principal or director, or his or her equivalent, must be physically present at each meeting.

(17) FUNDING.—Students enrolled in a charter school, regardless of the sponsorship, shall be funded as if they are in a basic program or a special program, the same as students enrolled in other public schools in the school district. Funding for a charter lab school shall be as provided in s. 1002.32.

(f) Funding for a virtual charter school shall be as provided in s. 1002.45(7).

(20) SERVICES.—

(a)1. A sponsor shall provide certain administrative and educational services to charter schools. These services shall include contract management services; full-time equivalent and data reporting services; exceptional student education administration services; services related to eligibility and reporting duties required to ensure that school lunch services under the federal lunch program, consistent with the needs of the charter school, are provided by the school district at the request of the charter school, that any funds due to the charter school under the federal lunch program be paid to the charter school as soon as the charter school begins serving food under

the federal lunch program, and that the charter school is paid at the same time and in the same manner under the federal lunch program as other public schools serviced by the sponsor or the school district; test administration services, including payment of the costs of state-required or district-required student assessments; processing of teacher certificate data services; and information services, including equal access to student information systems that are used by public schools in the district in which the charter school is located. Student performance data for each student in a charter school, including, but not limited to, FCAT scores, standardized test scores, previous public school student report cards, and student performance measures, shall be provided by the sponsor to a charter school in the same manner provided to other public schools in the district.

2. A total administrative fee for the provision of such services shall be calculated based upon up to 5 percent of the available funds defined in paragraph (17)(b) for all students. However, a sponsor may only withhold up to a 5-percent administrative fee for enrollment for up to and including 250 students. For charter schools with a population of 251 or more students, the difference between the total administrative fee calculation and the amount of the administrative fee withheld may only be used for capital outlay purposes specified in s. 1013.62(2).

3. In addition, a sponsor may withhold only up to a 5-percent administrative fee for enrollment for up to and including 500 students within a system of charter schools which meets all of the following:


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a. Includes both conversion charter schools and nonconversion charter schools;

b. Has all schools located in the same county;

c. Has a total enrollment exceeding the total enrollment of at least one school district in the state;

d. Has the same governing board; and

e. Does not contract with a for-profit service provider for management of school operations.

4. The difference between the total administrative fee calculation and the amount of the administrative fee withheld pursuant to subparagraph 3. may be used for instructional and administrative purposes as well as for capital outlay purposes specified in s. 1013.62(2).

5. Each charter school shall receive 100 percent of the funds awarded to that school pursuant to s. 1012.225. Sponsors shall not charge charter schools any additional fees or surcharges for administrative and educational services in addition to the maximum 5-percent administrative fee withheld pursuant to this paragraph.

6. The sponsor of a virtual charter school may withhold a fee of up to 5 percent. The funds shall be used to cover the cost of services provided under subparagraph 1. and for the school district's local instructional improvement system pursuant to s. 1006.281 or other technological tools that are required to access electronic and digital instructional materials.

Section 3. Paragraph (a) of subsection (3) of section 1002.37, Florida Statutes, is amended, and subsections (8), (9), (10), and (11) are added to that section, to read:


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1002.37 The Florida Virtual School.—

(3) Funding for the Florida Virtual School shall be provided as follows:

(a)1. For a student in grades 9 through 12, a "full-time equivalent student" ~~for the Florida Virtual School~~ is one student who has successfully completed six full-credit courses ~~credits~~ that ~~shall~~ count toward the minimum number of credits required for high school graduation. A student who completes fewer ~~less~~ than six full-credit courses is ~~credits shall be~~ a fraction of a full-time equivalent student. Half-credit course completions shall be included in determining a full-time equivalent student. Credit completed by a student in excess of the minimum required for that student for high school graduation is not eligible for funding.

2. For a student in kindergarten through grade 8, a "full-time equivalent student" is one student who has successfully completed six courses or the prescribed level of content that counts toward promotion to the next grade. A student who completes fewer than six courses or the prescribed level of content shall be a fraction of a full-time equivalent student.

3. Beginning in the 2014-2015 fiscal year, when s. 1008.22(3)(g) is implemented, the reported full-time equivalent students and associated funding of students enrolled in courses requiring passage of an end-of-course assessment shall be adjusted after the student completes the end-of-course assessment. However, no adjustment shall be made for home education program students who choose not to take an end-of-course assessment.

For purposes of this paragraph, the calculation of "full-time equivalent student" shall be as prescribed in s. 1011.61(1)(c)1.b.(V).

(8)(a) The Florida Virtual School may provide full-time instruction for students in kindergarten through grade 12 and part-time instruction for students in grades 4 through 12. To receive full-time instruction in grades 2 through 5, a student must meet at least one of the eligibility criteria in s. 1002.455(2). Part-time instruction for grades 4 and 5 may be provided only to public school students taking grade 6 through grade 8 courses.

(b) For students receiving part-time instruction in grades 4 and 5 and students receiving full-time instruction in kindergarten through grade 12 from the Florida Virtual School, the combined total of all FTE reported by both the school district and the Florida Virtual School may not exceed 1.0 FTE.

(9) Each elementary school principal must notify the parent of each student who scores at Level 4 or Level 5 on FCAT Reading or FCAT Mathematics of the option for the student to take accelerated courses through the Florida Virtual School.

(10)(a) Public school students receiving full-time instruction in kindergarten through grade 12 by the Florida Virtual School must take all statewide assessments required pursuant to s. 1008.22.

(b) Public school students receiving part-time instruction by the Florida Virtual School in courses requiring statewide end-of-course assessments must take all statewide end-of-course assessments required pursuant to s. 1008.22(3)(c)2.

(c) All statewide assessments must be taken within the


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school district in which the student resides. A school district must provide the student with access to the district's testing facilities.

(11) The Florida Virtual School shall receive a school grade pursuant to s. 1008.34 for students receiving full-time instruction.

Section 4. Section 1002.45, Florida Statutes, is amended to read:

1002.45 ~~School district~~ Virtual instruction programs.—

(1) PROGRAM.—

(a) For purposes of this section, the term:

1. "Approved provider" means a provider that is approved by the Department of Education under subsection (2), the Florida Virtual School, a franchise of the Florida Virtual School, or a community college.

2. "Virtual instruction program" means a program of instruction provided in an interactive learning environment created through technology in which students are separated from their teachers by time or space, or both~~, and in which a Florida-certified teacher under chapter 1012 is responsible for at least:~~

~~a. Fifty percent of the direct instruction to students in kindergarten through grade 5; or~~

~~b. Eighty percent of the direct instruction to students in grades 6 through 12~~.

(b) ~~Beginning with the 2009-2010 school year,~~ Each school district that is eligible for the sparsity supplement pursuant to s. 1011.62(7) shall provide all enrolled public school ~~eligible~~ students within its boundaries the option of


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participating in part-time and full-time ~~a~~ virtual instruction programs. Each school district that is not eligible for the sparsity supplement shall provide at least three options for part-time and full-time virtual instruction. All school districts must provide parents with timely written notification of an open enrollment period for full-time students of at least 90 days that ends no later than 30 days prior to the first day of the school year ~~program~~. The purpose of the program is to make quality virtual instruction available to students using online and distance learning technology in the nontraditional classroom. A school district virtual instruction ~~The~~ program shall provide the following ~~be~~:

1. Full-time virtual instruction for students enrolled in kindergarten through grade 12.

2. ~~Full-time or~~ Part-time virtual instruction for students enrolled in grades 9 through 12 courses that are measured pursuant to subparagraph (8)(a)2.

3. Full-time or part-time virtual instruction for students ~~who are~~ enrolled in dropout prevention and academic intervention programs under s. 1003.53, Department of Juvenile Justice education programs under s. 1003.52, core-curricula courses to meet class size requirements under s. 1003.03, or community colleges under this section.

(c) To provide students with the option of participating in virtual instruction programs as required by paragraph (b), a school district may:

1. Contract with the Florida Virtual School or establish a franchise of the Florida Virtual School for the provision of a program under paragraph (b). Using this option is subject to the


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requirements of this section and s. 1011.61(1)(c)1.b.(III) and (IV).

2. Contract with an approved provider under subsection (2) for the provision of a full-time program under subparagraph (b)1. or subparagraph (b)3. or a ~~full-time or~~ part-time program under subparagraph (b)2. or subparagraph (b)3.

3. Enter into an agreement with other ~~another~~ school districts ~~district~~ to allow the participation of its students in an approved virtual instruction program provided by the other school district. The agreement must indicate a process for the transfer of funds required by paragraph (7)(f) ~~(b)~~.

4. Establish school district operated part-time or full-time kindergarten through grade 12 virtual instruction programs under paragraph (b) for students enrolled in the school district. A full-time program shall operate under its own Master School Identification Number.

5. Enter into an agreement with a virtual charter school authorized by the school district under s. 1002.33.

Contracts under subparagraph 1. or subparagraph 2. may include multidistrict contractual arrangements that may be executed by a regional consortium for its member districts. A multidistrict contractual arrangement or an agreement under subparagraph 3. is not subject to s. 1001.42(4)(d) and does not require the participating school districts to be contiguous. These arrangements may be used to fulfill the requirements of paragraph (b).

(d) A virtual charter school may provide full-time virtual instruction for students in kindergarten through grade 12 if the


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virtual charter school has a charter approved pursuant to s. 1002.33 authorizing full-time virtual instruction. A virtual charter school may:

1. Contract with the Florida Virtual School.

2. Contract with an approved provider under subsection (2).

3. Enter into an ~~a joint~~ agreement with a ~~the~~ school district to allow the participation of ~~in which it is located for~~ the virtual charter school's students ~~to participate~~ in the school district's virtual instruction program. The agreement must indicate a process for reporting of student enrollment and the transfer of funds required by paragraph (7)(f).

(e) Each school district shall:

1. Provide to the department by October 1, 2011, and by each October 1 thereafter, a copy of each contract and the amounts paid per unweighted full-time equivalent student for services procured pursuant to subparagraphs (c)1. and 2.

2. Expend the difference in funds provided for a student participating in the school district virtual instruction program pursuant to subsection (7) and the price paid for contracted services procured pursuant to subparagraphs (c)1. and 2. for the district's local instructional improvement system pursuant to s. 1006.281 or other technological tools that are required to access electronic and digital instructional materials.

3. At the end of each fiscal year, but no later than September 1, report to the department an itemized list of the technological tools purchased with these funds.

(2) PROVIDER QUALIFICATIONS.—

(a) The department shall annually publish online ~~provide school districts with~~ a list of providers approved to offer

virtual instruction programs. To be approved by the department, a provider must document that it:

1. Is nonsectarian in its programs, admission policies, employment practices, and operations;

2. Complies with the antidiscrimination provisions of s. 1000.05;

3. Locates an administrative office or offices in this state, requires its administrative staff to be state residents, requires all instructional staff to be Florida-certified teachers under chapter 1012, and conducts background screenings for all employees or contracted personnel, as required by s. 1012.32, using state and national criminal history records;

4. Possesses prior, successful experience offering online courses to elementary, middle, or high school students as demonstrated by quantified student learning gains in each subject area and grade level provided for consideration as an instructional program option;

5. Is accredited by a regional accrediting association as defined by State Board of Education rule; ~~the Southern Association of Colleges and Schools Council on Accreditation and School Improvement, the North Central Association Commission on Accreditation and School Improvement, the Middle States Association of Colleges and Schools Commission on Elementary Schools and Commission on Secondary Schools, the New England Association of Schools and Colleges, the Northwest Association of Accredited Schools, the Western Association of Schools and Colleges, or the Commission on International and Trans-Regional Accreditation; and~~

6. Ensures instructional and curricular quality through a

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detailed curriculum and student performance accountability plan that addresses every subject and grade level it intends to provide through contract with the school district, including:

a. Courses and programs that meet the standards of the International Association for K-12 Online Learning and the Southern Regional Education Board.

b. Instructional content and services that align with, and measure student attainment of, student proficiency in the Next Generation Sunshine State Standards.

c. Mechanisms that determine and ensure that a student has satisfied requirements for grade level promotion and high school graduation with a standard diploma, as appropriate;

7. Publishes for the general public, in accordance with disclosure requirements adopted in rule by the State Board of Education, as part of its application as a provider and in all contracts negotiated pursuant to this section:

a. Information and data about the curriculum of each full-time and part-time program.

b. School policies and procedures.

c. Certification status and physical location of all administrative and instructional personnel.

d. Hours and times of availability of instructional personnel.

e. Student-teacher ratios.

f. Student completion and promotion rates.

g. Student, educator, and school performance accountability outcomes; and

8.~~6.~~ If the provider is a community college, employs instructors who meet the certification requirements for


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instructional staff under chapter 1012.

(b) An approved provider shall retain its approved status during the ~~for a period of~~ 3 school years after the date of the department's approval under paragraph (a) as long as the provider continues to comply with all requirements of this section. However, each provider approved by the department for the 2011-2012 school year must reapply for approval to provide a part-time program for students in grades 9 through 12.

(3) ~~SCHOOL DISTRICT~~ VIRTUAL INSTRUCTION PROGRAM REQUIREMENTS.—Each ~~school district~~ virtual instruction program under this section must:

(a) Align virtual course curriculum and course content to the Sunshine State Standards under s. 1003.41.

(b) Offer instruction that is designed to enable a student to gain proficiency in each virtually delivered course of study.

(c) Provide each student enrolled in the program with all the necessary instructional materials.

(d) Provide~~, when appropriate,~~ each full-time student enrolled in the program who qualifies for free or reduced-price school lunches under the National School Lunch Act, or who is on the direct certification list, and who does not have a computer or Internet access in his or her home with:

1. All equipment necessary for participants in the ~~school district~~ virtual instruction program, including, but not limited to, a computer, computer monitor, and printer, if a printer is necessary to participate in the program; and

2. Access to or reimbursement for all Internet services necessary for online delivery of instruction.

(e) Not require tuition or student registration fees.


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(4) CONTRACT REQUIREMENTS.—Each contract with an approved provider must at minimum:

(a) Set forth a detailed curriculum plan that illustrates how students will be provided services and be measured for attainment of ~~to attain~~ proficiency in the Next Generation Sunshine State Standards for each grade level and subject.

(b) Provide a method for determining that a student has satisfied the requirements for graduation in s. 1003.428, s. 1003.429, or s. 1003.43 if the contract is for the provision of a full-time virtual instruction program to students in grades 9 through 12.

(c) Specify a method for resolving conflicts among the parties.

(d) Specify authorized reasons for termination of the contract.

(e) Require the approved provider to be responsible for all debts of the ~~school district~~ virtual instruction program if the contract is not renewed or is terminated.

(f) Require the approved provider to comply with all requirements of this section.

(5) STUDENT ELIGIBILITY.—A student may enroll in a virtual instruction program provided by the school district or by a virtual charter school operated in the district in which he or she resides if the student meets eligibility requirements for virtual instruction pursuant to s. 1002.455. ~~at least one of the following conditions:~~

~~(a) The student has spent the prior school year in attendance at a public school in this state and was enrolled and reported by a public school district for funding during the~~


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~~preceding October and February for purposes of the Florida Education Finance Program surveys.~~

~~(b) The student is a dependent child of a member of the United States Armed Forces who was transferred within the last 12 months to this state from another state or from a foreign country pursuant to the parent's permanent change of station orders.~~

~~(c) The student was enrolled during the prior school year in a school district virtual instruction program under this section or a K-8 Virtual School Program under s. 1002.415.~~

~~(d) The student has a sibling who is currently enrolled in a school district virtual instruction program and that sibling was enrolled in such program at the end of the prior school year.~~

(6) STUDENT PARTICIPATION REQUIREMENTS.—Each student enrolled in a ~~school district~~ virtual instruction program or virtual charter school must:

(a) Comply with the compulsory attendance requirements of s. 1003.21. Student attendance must be verified by the school district.

(b) Take state assessment tests within the school district in which such student resides, which must provide the student with access to the district's testing facilities.

(7) VIRTUAL INSTRUCTION PROGRAM AND VIRTUAL CHARTER SCHOOL FUNDING.—

(a) Students enrolled in a virtual instruction program or a virtual charter school shall be funded through the Florida Education Finance Program as provided in the General Appropriations Act. However, such funds may not be provided for

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the purpose of fulfilling the class size requirements in ss. 1003.03 and 1011.685.

(b) For purposes of a ~~school district~~ virtual instruction program or a virtual charter school, "full-time equivalent student" has the same meaning as provided in s. 1011.61(1)(c)1.b.(III) or (IV).

(c) For a student enrolled part-time in a grades 6 through 12 program, a "full-time equivalent student" has the same meaning as provided in s. 1011.61(1)(c)1.b.(IV).

(d) A student may not be reported as more than 1.0 full-time equivalent student in any given school year.

(e) Beginning in the 2014-2015 fiscal year, when s. 1008.22(3)(g) is implemented, the reported full-time equivalent students and associated funding of students enrolled in courses requiring passage of an end-of-course assessment shall be adjusted after the student completes the end-of-course assessment.

(f) ~~(b)~~ The school district in which the student resides shall report full-time equivalent students for a ~~the school district~~ virtual instruction program or a virtual charter school to the department in a manner prescribed by the department, and funding shall be provided through the Florida Education Finance Program. Funds received by the school district of residence for a student in a virtual instruction program provided by another school district under this section shall be transferred to the school district providing the virtual instruction program.

(g) ~~(c)~~ A community college provider may not report students who are served in a ~~school district~~ virtual instruction program for funding under the Community College Program Fund.


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(8) ASSESSMENT AND ACCOUNTABILITY.—

(a) Each approved provider contracted under this section must:

1. Participate in the statewide assessment program under s. 1008.22 and in the state's education performance accountability system under s. 1008.31.

2. Receive a school grade under s. 1008.34 or a school improvement rating under s. 1008.341, as applicable. The school grade or school improvement rating received by each approved provider shall be based upon the aggregated assessment scores of all students served by the provider statewide. The department shall publish the school grade or school improvement rating received by each approved provider on its Internet website. The department shall develop an evaluation method for providers of part-time programs which includes the percentage of students making learning gains, the percentage of students successfully passing any required end-of-course assessment, the percentage of students taking Advanced Placement examinations, and the percentage of students scoring 3 or higher on an Advanced Placement examination.

(b) The performance of part-time students in grades 9 through 12 shall not be included for purposes of school grades or school improvement ratings under subparagraph (a)2.; however, their performance shall be included for school grading or school improvement rating purposes by the nonvirtual school providing the student's primary instruction.

(c) An approved provider that receives a school grade of "D" or "F" under s. 1008.34 or a school improvement rating of "Declining" under s. 1008.341 must file a school improvement

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plan with the department for consultation to determine the causes for low performance and to develop a plan for correction and improvement.

(d) An approved provider's contract must be terminated if the provider receives a school grade of "D" or "F" under s. 1008.34 or a school improvement rating of "Declining" under s. 1008.341 for 2 years during any consecutive 4-year period or has violated any qualification requirement pursuant to subsection (2). A provider that has a contract terminated under this paragraph may not be an approved provider for a period of at least 1 year after the date upon which the contract was terminated and until the department determines that the provider is in compliance with subsection (2) and has corrected each cause of the provider's low performance.

(9) EXCEPTIONS.—A provider of digital or online content or curriculum that is used to supplement the instruction of students who are not enrolled in a ~~school district~~ virtual instruction program under this section is not required to meet the requirements of this section.

(10) MARKETING.—Each school district shall provide information to parents and students about the parent's and student's right to participate in a ~~school district~~ virtual instruction program under this section and in courses offered by the Florida Virtual School under s. 1002.37.

(11) RULES.—The State Board of Education shall adopt rules necessary to administer this section, including rules that prescribe disclosure requirements under subsection (2) and school district reporting requirements under subsection (7).

Section 5. Section 1002.455, Florida Statutes, is created

to read:

1002.455 Student eligibility for K-12 virtual instruction.—

(1) A student may participate in virtual instruction in the school district in which he or she resides if the student meets the eligibility criteria in subsection (2).

(2) A student is eligible to participate in virtual instruction if:

(a) The student spent the prior school year in attendance at a public school in the state and was enrolled and reported by the school district for funding during October and February for purposes of the Florida Education Finance Program surveys;

(b) The student is a dependent child of a member of the United States Armed Forces who was transferred within the last 12 months to this state from another state or from a foreign country pursuant to a permanent change of station order;

(c) The student was enrolled during the prior school year in a virtual instruction program under s. 1002.45, the K-8 Virtual School Program under s. 1002.415, or a full-time Florida Virtual School program under s. 1002.37(8)(a);

(d) The student has a sibling who is currently enrolled in a virtual instruction program and the sibling was enrolled in that program at the end of the prior school year; or

(e) The student is eligible to enter kindergarten or first grade.

(3) The virtual instruction options for which this eligibility section applies include:

(a) School district operated part-time or full-time kindergarten through grade 12 virtual instruction programs under s. 1002.45(1)(b) for students enrolled in the school district.

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(b) Full-time virtual charter school instruction authorized under s. 1002.33.

(c) Courses delivered in the traditional school setting by personnel providing direct instruction through a virtual environment or though a blended virtual and physical environment pursuant to s. 1003.498 and as authorized pursuant to s. 1002.321(4)(e).

(d) Virtual courses offered in the course code directory to students within the school district or to students in other school districts throughout the state pursuant to s. 1003.498.

Section 6. Paragraph (c) is added to subsection (2) of section 1003.428, Florida Statutes, to read:

1003.428 General requirements for high school graduation; revised.—

(2) The 24 credits may be earned through applied, integrated, and combined courses approved by the Department of Education. The 24 credits shall be distributed as follows:

(c) Beginning with students entering grade 9 in the 2011-2012 school year, at least one course within the 24 credits required in this subsection must be completed through online learning. However, an online course taken during grades 6 through 8 fulfills this requirement. This requirement shall be met through an online course offered by the Florida Virtual School, an online course offered by the high school, or an online dual enrollment course offered pursuant to a district interinstitutional articulation agreement pursuant to s. 1007.235. A student who is enrolled in a full-time or part-time virtual instruction program under s. 1002.45 meets this requirement.

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Section 7. Section 1003.498, Florida Statutes, is created to read:

1003.498 School district virtual course offerings.—

(1) School districts may deliver courses in the traditional school setting by personnel certified pursuant to s. 1012.55 who provide direct instruction through a virtual environment or though a blended virtual and physical environment.

(2) School districts may offer virtual courses for students enrolled in the school district. These courses must be identified in the course code directory. Students who meet the eligibility requirements of s. 1002.455 may participate in these virtual course offerings.

(a) Any eligible student who is enrolled in a school district may register and enroll in an online course offered by his or her school district.

(b) Any eligible student who is enrolled in a school district may register and enroll in an online course offered by any other school district in the state, except as limited by the following:

1. A student may not enroll in a course offered through a virtual instruction program provided pursuant to s. 1002.45.

2. A student may not enroll in a virtual course offered by another school district if:

a. The course is offered online by the school district in which the student resides; or

b. The course is offered in the school in which the student is enrolled. However, a student may enroll in an online course offered by another school district if the school in which the student is enrolled offers the course but the student is unable


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to schedule the course in his or her school.

3. The school district in which the student completes the course shall report the student's completion of that course for funding pursuant to s. 1011.61(1)(c)b.(VI) and the home school district shall not report the student for funding for that course.

For purposes of this paragraph, the combined total of all school district reported FTE may not be reported as more than 1.0 full-time equivalent student in any given school year. The Department of Education shall establish procedures to enable interdistrict coordination for the delivery and funding of this online option.

Section 8. Paragraph (g) of subsection (3) of section 1008.22, Florida Statutes, is amended to read:

1008.22 Student assessment program for public schools.—

(3) STATEWIDE ASSESSMENT PROGRAM.—The commissioner shall design and implement a statewide program of educational assessment that provides information for the improvement of the operation and management of the public schools, including schools operating for the purpose of providing educational services to youth in Department of Juvenile Justice programs. The commissioner may enter into contracts for the continued administration of the assessment, testing, and evaluation programs authorized and funded by the Legislature. Contracts may be initiated in 1 fiscal year and continue into the next and may be paid from the appropriations of either or both fiscal years. The commissioner is authorized to negotiate for the sale or lease of tests, scoring protocols, test scoring services, and related materials developed pursuant to law. Pursuant to the


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statewide assessment program, the commissioner shall:

(g) Beginning with the 2014-2015 school year, all statewide end-of-course assessments shall be administered online. ~~Study the cost and student achievement impact of secondary end-of-course assessments, including web-based and performance formats, and report to the Legislature prior to implementation.~~

Section 9. Paragraph (c) of subsection (1) of section 1011.61, Florida Statutes, is amended to read:

1011.61 Definitions.—Notwithstanding the provisions of s. 1000.21, the following terms are defined as follows for the purposes of the Florida Education Finance Program:

(1) A "full-time equivalent student" in each program of the district is defined in terms of full-time students and part-time students as follows:

(c)1. A "full-time equivalent student" is:

a. A full-time student in any one of the programs listed in s. 1011.62(1)(c); or

b. A combination of full-time or part-time students in any one of the programs listed in s. 1011.62(1)(c) which is the equivalent of one full-time student based on the following calculations:

(I) A full-time student, except a postsecondary or adult student or a senior high school student enrolled in adult education when such courses are required for high school graduation, in a combination of programs listed in s. 1011.62(1)(c) shall be a fraction of a full-time equivalent membership in each special program equal to the number of net hours per school year for which he or she is a member, divided by the appropriate number of hours set forth in subparagraph

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(a)1. or subparagraph (a)2. The difference between that fraction or sum of fractions and the maximum value as set forth in subsection (4) for each full-time student is presumed to be the balance of the student's time not spent in such special education programs and shall be recorded as time in the appropriate basic program.

(II) A prekindergarten handicapped student shall meet the requirements specified for kindergarten students.

(III) A full-time equivalent student for students in kindergarten through grade 5 in a ~~school district~~ virtual instruction program under s. 1002.45 or a virtual charter school under s. 1002.33 shall consist of a student who has successfully completed a basic program listed in s. 1011.62(1)(c)1.a. or b., and who is promoted to a higher grade level.

(IV) A full-time equivalent student for students in grades 6 through 12 in a ~~school district~~ virtual instruction program under s. 1002.45(1)(b)1., ~~and~~ 2., or 3. or a virtual charter school under s. 1002.33 shall consist of six full credit completions in programs listed in s. 1011.62(1)(c)1.b. or c. and 3. Credit completions may ~~can~~ be a combination of full-credit courses or half-credit courses ~~either full credits or half credits~~. Beginning in the 2014-2015 fiscal year, when s. 1008.22(3)(g) is implemented, the reported full-time equivalent students and associated funding of students enrolled in courses requiring passage of an end-of-course assessment shall be adjusted after the student completes the end-of-course assessment.

(V) A Florida Virtual School full-time equivalent student shall consist of six full credit completions or the prescribed

level of content that counts toward promotion to the next grade in the programs listed in s. 1011.62(1)(c)1.a. and b. for kindergarten ~~grades 6~~ through grade 8 and the programs listed in s. 1011.62(1)(c)1.c. for grades 9 through 12. Credit completions may ~~can~~ be a combination of full-credit courses or half-credit courses ~~either full credits or half credits~~. Beginning in the 2014-2015 fiscal year, when s. 1008.22(3)(g) is implemented, the reported full-time equivalent students and associated funding of students enrolled in courses requiring passage of an end-of-course assessment shall be adjusted after the student completes the end-of-course assessment.

(VI) Each successfully completed full-credit course earned through an online course delivered by a district other than the one in which the student resides shall be calculated as 1/6 FTE.

(VII) ~~(VI)~~ Each successfully completed credit earned under the alternative high school course credit requirements authorized in s. 1002.375, which is not reported as a portion of the 900 net hours of instruction pursuant to subparagraph (1)(a)1., shall be calculated as 1/6 FTE.

2. A student in membership in a program scheduled for more or less than 180 school days or the equivalent on an hourly basis as specified by rules of the State Board of Education is a fraction of a full-time equivalent membership equal to the number of instructional hours in membership divided by the appropriate number of hours set forth in subparagraph (a)1.; however, for the purposes of this subparagraph, membership in programs scheduled for more than 180 days is limited to students enrolled in juvenile justice education programs and the Florida Virtual School.

The department shall determine and implement an equitable method of equivalent funding for experimental schools and for schools operating under emergency conditions, which schools have been approved by the department to operate for less than the minimum school day.

Section 10. Section 1012.57, Florida Statutes, is amended to read:

1012.57 Certification of adjunct educators.—

(1) Notwithstanding the provisions of ss. 1012.32, 1012.55, and 1012.56, or any other provision of law or rule to the contrary, district school boards shall adopt rules to allow for the issuance of an adjunct teaching certificate to any applicant who fulfills the requirements of s. 1012.56(2)(a)-(f) and (10) and who has expertise in the subject area to be taught. An applicant shall be considered to have expertise in the subject area to be taught if the applicant demonstrates sufficient subject area mastery through passage of a subject area test. The adjunct teaching certificate shall be used for part-time teaching positions.

(2) The Legislature intends that this section ~~intent of this provision is to~~ allow school districts to tap the wealth of talent and expertise represented in Florida's citizens who may wish to teach part-time in a Florida public school by permitting school districts to issue adjunct certificates to qualified applicants.

(3) Adjunct certificateholders should be used as a strategy to enhance the diversity of course offerings offered to all students. School districts may use the expertise of individuals


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in the state who wish to provide online instruction to students by issuing adjunct certificates to qualified applicants ~~reduce the teacher shortage; thus, adjunct certificateholders should supplement a school's instructional staff, not supplant it. Each school principal shall assign an experienced peer mentor to assist the adjunct teaching certificateholder during the certificateholder's first year of teaching, and an adjunct certificateholder may participate in a district's new teacher training program. District school boards shall provide the adjunct teaching certificateholder an orientation in classroom management prior to assigning the certificateholder to a school~~.

(4) Each adjunct teaching certificate is valid through the term of the annual contract between the educator and the school district. An additional annual certification and an additional annual contract may be awarded by the district at the district's discretion but only ~~for 5 school years and is renewable~~ if the applicant is rated effective or highly effective under s. 1012.34 ~~has received satisfactory performance evaluations~~ during each year of teaching under adjunct teaching certification.

(5)~~(2)~~ Individuals who are certified and employed under this section shall have the same rights and protection of laws as teachers certified under s. 1012.56.

Section 11. Subsection (1) of section 1000.04, Florida Statutes, is amended to read:

1000.04 Components for the delivery of public education within the Florida K-20 education system.—Florida's K-20 education system provides for the delivery of public education through publicly supported and controlled K-12 schools, community colleges, state universities and other postsecondary


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educational institutions, other educational institutions, and other educational services as provided or authorized by the Constitution and laws of the state.

(1) PUBLIC K-12 SCHOOLS.—The public K-12 schools include charter schools and consist of kindergarten classes; elementary, middle, and high school grades and special classes; ~~school district~~ virtual instruction programs; workforce education; career centers; adult, part-time, and evening schools, courses, or classes, as authorized by law to be operated under the control of district school boards; and lab schools operated under the control of state universities.

Section 12. Paragraph (a) of subsection (6) of section 1002.20, Florida Statutes, is amended to read:

1002.20 K-12 student and parent rights.—Parents of public school students must receive accurate and timely information regarding their child's academic progress and must be informed of ways they can help their child to succeed in school. K-12 students and their parents are afforded numerous statutory rights including, but not limited to, the following:

(6) EDUCATIONAL CHOICE.—

(a) *Public school choices.*—Parents of public school students may seek whatever public school choice options that are applicable to their students and are available to students in their school districts. These options may include controlled open enrollment, single-gender programs, lab schools, ~~school district~~ virtual instruction programs, charter schools, charter technical career centers, magnet schools, alternative schools, special programs, advanced placement, dual enrollment, International Baccalaureate, International General Certificate

of Secondary Education (pre-AICE), Advanced International Certificate of Education, early admissions, credit by examination or demonstration of competency, the New World School of the Arts, the Florida School for the Deaf and the Blind, and the Florida Virtual School. These options may also include the public school choice options of the Opportunity Scholarship Program and the McKay Scholarships for Students with Disabilities Program.

Section 13. Paragraph (b) of subsection (3) of section 1003.03, Florida Statutes, is amended to read:

1003.03 Maximum class size.—

(3) IMPLEMENTATION OPTIONS.—District school boards must consider, but are not limited to, implementing the following items in order to meet the constitutional class size maximums described in subsection (1):

(b) Adopt policies to encourage students to take courses from the Florida Virtual School and other ~~school district~~ virtual instruction options under s. 1002.45 ~~programs~~.

Section 14. By December 1, 2011, the Department of Education shall submit a report to the Governor, the President of the Senate, and the Speaker of the House of Representatives which identifies and explains the best methods and strategies by which the department can assist district school boards in acquiring digital learning at the most reasonable prices possible and provides a plan under which district school boards may voluntarily pool their bids for such purchases. The report shall identify criteria that will enable district school boards to differentiate between the level of service and pricing based upon factors such as the level of student support, the frequency

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of teacher-student communications, instructional accountability standards, and academic integrity. The report shall also include ways to increase student access to digital learning, including identification and analysis of the best methods and strategies for implementing part-time virtual education in kindergarten through grade 5.

Section 15. This act shall take effect July 1, 2011.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete everything before the enacting clause and insert:

A bill to be entitled

An act relating to digital learning; creating s. 1002.321, F.S.; creating the Digital Learning Now Act; providing legislative findings related to the elements to be included in high-quality digital learning; providing digital preparation requirements; providing for customized and accelerated learning; amending s. 1002.33, F.S.; authorizing the establishment of virtual charter schools; providing application requirements for establishment of a virtual charter school; authorizing a charter school to implement blended learning courses; requiring each charter school governing board to appoint a representative and specifying duties; requiring each governing board to hold two public meetings per school year; providing funding for a virtual charter school; establishing administrative fees for a virtual charter school;


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amending s. 1002.37, F.S.; redefining the term "full-time equivalent student" as it applies to the Florida Virtual School; providing instruction, eligibility, funding, assessment, and accountability requirements; amending s. 1002.45, F.S.; revising the definition of the term "virtual instruction program"; revising school district requirements for providing virtual instruction programs; requiring full-time and part-time virtual instruction program options; authorizing a school district to enter into an agreement with a virtual charter school to provide virtual instruction to district students; authorizing virtual charter school contracts; providing additional provider qualifications relating to curriculum, student performance accountability, and disclosure; revising student eligibility requirements; providing funding and accountability requirements; creating s. 1002.455, F.S.; establishing student eligibility requirements for K-12 virtual instruction; amending s. 1003.428, F.S.; requiring at least one course required for high school graduation to be completed through online learning; creating s. 1003.498, F.S.; authorizing school districts to offer virtual courses and blended learning courses; amending s. 1008.22, F.S.; requiring all statewide end-of-course assessments to be administrated online beginning with the 2014-2015 school year; amending s. 1011.61, F.S.; redefining the term "full-time equivalent student" for purposes of virtual instruction; amending s. 1012.57, F.S.;


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authorizing school districts to issue adjunct teaching certificates to qualified applicants to provide online instruction; revising requirements for adjunct teaching certificateholders; providing for annual contracts; amending ss. 1000.04, 1002.20, and 1003.03, F.S.; conforming provisions to changes made by the act; requiring the Department of Education to submit a report to the Governor and the Legislature relating to school district offering of, and student access to, digital learning; providing an effective date.

429944

LEGISLATIVE ACTION

Senate . House

. .

. .

. .

. .

The Committee on Rules (Flores) recommended the following:

Senate Amendment (with title amendment)

Delete lines 37 - 56

and insert:

(3) ~~Notwithstanding any other provision of this section, each current member of a judicial nominating commission appointed directly by the Board of Governors of The Florida Bar shall serve the remainder of his or her term, unless removed for cause. The terms of all other members of a judicial nominating commission are hereby terminated, and the Governor shall appoint new members to each judicial nominating commission in the following manner:~~

~~(a) Two appointments for terms ending July 1, 2002, one of~~

~~which shall be an appointment selected from nominations submitted by the Board of Governors of The Florida Bar pursuant to paragraph (1)(a);~~

~~(b) Two appointments for terms ending July 1, 2003; and~~

~~(c) Two appointments for terms ending July 1, 2004.~~

Every ~~subsequent~~ appointment, except an appointment to fill a vacant, unexpired term, shall be for 4 years. Each expired term or vacancy shall be filled by appointment in the same manner as the member whose position is being filled.

Section 2. A member of a judicial nominating commission serving on the effective date of this act shall serve the remainder of his or her term, unless removed for cause.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete lines 6 - 9

and insert:

on judicial nominating commissions; deleting obsolete provisions; specifying that a current member of a judicial nominating commission shall serve the remainder of his or her term; providing

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 Rules Committee

BILL:	SB 2170
INTRODUCER:	Judiciary Committee
SUBJECT:	Judicial Nominating Commissions
DATE:	April 25, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Boland	Maclure	JU	**Favorable**
2.	Boland	Phelps	RC	**Pre-meeting**
3.				
4.				
5.				
6.				

I. Summary:

Currently, vacancies in judgeships are filled by appointment of the Governor, as directed by the Florida Constitution. The Governor makes these appointments from a list of not fewer than three and not more than six persons nominated by a judicial nominating committee. The membership of each judicial nominating committee is a creature of statute and has varied throughout Florida's history. Presently, each judicial nominating committee is composed of nine members, and five of those members are appointed to the commission at the sole discretion of the Governor. The remaining four commission positions are also appointed by the Governor; however, the Governor must make his appointment for each of those four positions from a list of nominees recommended to the Governor by the Board of Governors of The Florida Bar. The Board of Governors of the Florida Bar recommends three people for each position on the judicial nominating commission, and the Governor must make his selection from that list of three or reject all three recommendations and request that a new list of three be provided.

The bill amends the current statute controlling the appointment process for members of judicial nominating commissions. Specifically, the bill eliminates the role of The Florida Bar in the appointment of members to the commissions by removing statutory direction for the Board of Governors of The Bar to make recommendations to the Governor for the appointment of four members of each commission. Instead, the bill vests the authority to make recommendations for these four positions with the Attorney General. Furthermore, the bill amends the current statute to provide that the terms of all current members of a judicial nominating commission are terminated, and the Governor shall appoint two new members for terms ending July 1, 2012 (one of which shall be an appointment selected from nominations by the Attorney General), two new members for terms ending July 1, 2013, and two new members for terms ending July 1, 2014.

This bill substantially amends section 43.291, Florida Statutes.

II. Present Situation:

When there is a vacancy on an appellate or trial court, the State Constitution directs the Governor to fill the vacancy by appointing one person from no fewer than three and no more than six persons nominated by a judicial nominating commission.[1] The commission shall offer recommendations within 30 days of the vacancy, unless the period is extended for no more than 30 days by the Governor, and the Governor shall make the appointment within 60 days of receiving the nominations.[2]

Article V, section 11(d) of the Florida Constitution provides for a separate judicial nominating commission, as provided by general law, for the Supreme Court, each district court of appeal, and each judicial circuit for all trial courts within the circuit. The nine-member composition of each judicial nominating commission is a creature of statute.[3] The statute provides for the Governor to make all nine appointments. However, four of those appointments are based on nominees from The Florida Bar, while five are within the Governor's sole appointment discretion. The four commission members recommended by the Bar must be members of The Florida Bar, must be engaged in the practice of law, and must reside in the territorial jurisdiction where they are appointed. In that same regard, the Board of Governors of The Florida Bar submits three recommended nominees for each open position to the Governor. The Governor has the authority to reject all the nominees and request a new list of recommended nominees who have not been previously recommended. Of the five commission members appointed by the Governor under his or her sole discretion, at least two must be members of The Florida Bar engaged in the practice of law, and all must reside in the territorial jurisdiction where they are appointed. Members serve four-year terms and may be suspended for cause by the Governor.[4]

The Legislature enacted the current statutory framework governing membership of the judicial nominating commissions in 2001.[5] Immediately prior to that change, the Board of Governors of The Florida Bar had authority to directly appoint members of each commission. Specifically, prior to the 2001 changes:

- Three members were appointed by the Board of Governors of the Florida Bar, each of whom had to be a member of the Florida Bar and actively engaged in the practice of law in the applicable territorial jurisdiction;
- Three members were appointed by the Governor, each of whom had to be a resident of the applicable territorial jurisdiction; and
- Three members were appointed by majority vote of the other six members, each of whom had to be an elector who resided in the applicable territorial jurisdiction.[6]

[1] FLA. CONST. art. V, s. 11(a).
[2] FLA. CONST. art. V, s. 11(c).
[3] Section 43.291, F.S.
[4] *Id*.
[5] Chapter 2001-282, s. 1, Laws of Fla.
[6] See s. 43.29, F.S. (2000) (repealed by ch. 2001-282, s. 3, Laws of Fla.)

III. Effect of Proposed Changes:

The bill eliminates The Florida Bar's statutory role in the recommendation of members of a judicial nominating commission and vests that function in the Attorney General. The bill provides that, in regard to four positions on each judicial nominating commission, the Attorney General shall submit to the Governor three recommended nominees for each position. The Governor shall select the appointee from the list of nominees recommended for that position, but the Governor may reject all of the nominees recommended for a position and request that the Attorney General submit a new list of three different recommended nominees for that position who have not been previously recommended by the Attorney General. The bill retains the provisions in current law under which the Governor is directed to appoint five additional members of each judicial nominating commission and each of those appointments remains within the Governor's sole discretion.

The bill removes the provision, currently in statute, that current members of a judicial nominating commission appointed directly by the Board of Governors of The Florida Bar shall serve the remainder of their terms. The bill provides that all current members of a judicial nominating commission are hereby terminated, and the Governor shall appoint new members to each judicial nominating commission in the following manner:

- Two appointments for terms ending July 1, 2012, one of which shall be an appointment selected from nominations submitted by the Attorney General;
- Two appointments for terms ending July 1, 2013; and
- Two appointments for terms ending July 1, 2014.

In setting the terms as shown above, the bill staggers the terms of six of the members of each judicial nominating commission. The bill maintains those staggered terms by providing that each expired term or vacancy shall be filled by appointment in the same manner as the member whose position is being filled. Additionally, it should be noted that the statute only enumerates conditions for the terms of six appointments on each judicial nominating commission, and only one of those appointments must be selected from nominations submitted by the Attorney General. Due to the bill's prior mandate that each judicial nominating commission be composed of nine members, four of which must be selected from nominations submitted by the Attorney General, each of the three subsequent appointments must be selected from nominations submitted by the Attorney General. The bill provides that each subsequent appointment, except an appointment to fill a vacant, unexpired term, shall be for four years.

The bill provides that this act shall take effect upon becoming a law.

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:

None.

C. Government Sector Impact:

This bill could have an impact on the Attorney General's office to the extent that the duty to recommend nominees to the Governor for appointment to judicial nominating commissions creates additional workload or expenses for the Attorney General or her or his staff.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

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

None.

B. Amendments:

None.

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 Rules Committee

BILL:	CS/CS/SB 1312
INTRODUCER:	Budget Committee, Agriculture Committee, and Senators Siplin and Gaetz
SUBJECT:	School Nutrition Programs
DATE:	April 22, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Akhavein	Spalla	AG	**Fav/CS**
2.	Blizzard	DeLoach	BGA	**Favorable**
3.	Blizzard	Meyer, C.	BC	**Fav/CS**
4.	Blizzard	Phelps	RC	**Pre-meeting**
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

This bill creates the "Healthy Schools for Healthy Lives Act." It provides for a type two transfer of the administration of school food and nutrition programs from the Department of Education (DOE) to the Department of Agriculture and Consumer Services (DACS). It provides for the administration of the U.S. Department of Agriculture child food and nutrition programs by the DACS. It also creates the Healthy Schools for Healthy Lives Council within the DACS. The bill requires the DOE, in consultation with the DACS, to develop and submit a waiver request to the U.S. Department of Agriculture (USDA) to transfer administration of the school food service and nutrition programs from the DOE to the DACS, within 30 days of the bill becoming law.

This bill transfers 45 full-time equivalent positions and an estimated $810 million in federal funds and $16.8 million in general revenue from the DOE to the DACS for the administration of the school food and nutrition programs.

This bill substantially amends section 1003.453, Florida Statutes. The bill substantially amends, transfers, and renumbers the following sections of the Florida Statutes: 1006.06 to 570.981; 1006.0606 to 570.982; and 1010.77, F.S. to 570.983.

The bill creates section 570.98, Florida Statutes. The bill creates an unnumbered section of the Florida Statutes.

II. Present Situation:

Both the federal and state governments have adopted policies for local school districts to operate school nutrition programs.[1] Federal regulations implementing the Richard B. Russell National School Lunch Act (7 C.F.R. § 210.3(b)) provide for the programs to be administered by a state's educational agency. This is the case in all but two of the 50 states.[2] Currently, the administration of school food and nutrition programs is divided between the DOE and the DACS. For instance, the School Lunch, Breakfast, and Summer Programs are administered by the DOE, while the commodity Food Distribution program, Disaster Feeding program, and the Emergency Food Assistance Program (EFAP) are managed by the DACS. In addition, the Marketing Division within the DACS administers the Fresh from Florida Kids and Xtreme Cuisine programs.

Florida Department of Education

The DOE is responsible for the administration, review, and evaluation of seven USDA-funded child nutrition programs. During the 2009-2010 fiscal year, the following programs generated $745 million in reimbursements to program sponsors, which include all of Florida's 67 public school districts, 78 charter schools, 3 university schools, 49 private schools, and 49 residential facilities.

National School Lunch, School Breakfast, and After School Snack Programs – $718.6 Million in Reimbursements

The National School Lunch Program (NSLP) and School Breakfast Program provide non-profit school lunch programs with reimbursement for nutritious meals served to school children. Participating schools may also receive USDA commodity food through an agreement with the DACS. Section 1006.06, F.S., requires Florida public school districts to offer the breakfast program in all elementary public schools. Reimbursement is based on student income eligibility.

The After School Snack Program provides a snack to students who are served in an afterschool educational or enrichment program that is provided at the end of the school day. The school district must operate the NSLP before the After School Snack Program can be offered.

Special Milk Program – $31,295 in Reimbursements

The Special Milk Program provides milk to children in schools, child care institutions, and eligible camps that do not participate in other federal child nutrition meal service programs. The program reimburses schools and institutions for the milk they serve. Schools in the NSLP or School Breakfast Program may also participate in the Special Milk Program to provide milk to

[1] The National School Lunch Act, as amended (42 U.S.C. 1751-1769), and the Child Nutrition Act of 1966, as amended (42 U.S.C. 1773) and s. 1006.06, F.S.

[2] Letter from the U.S. Department of Agriculture (USDA) to the Commissioner of Education dated March 4, 2011. On file with the committee.

children in half-day pre-kindergarten and kindergarten programs through which children do not have access to the school meal programs.

Summer Food Service Program – $22.7 Million in Reimbursements

The Summer Food Service Program provides reimbursement for sponsors to serve free meals to low-income children at participating sites during the summer months when schools are normally closed. The reimbursement rates for the Summer Food Service Program are slightly higher than the National School Lunch Program. Children who are 18 years of age or younger, or over 18 when determined to be mentally or physically handicapped, are eligible for the program. Sponsors of this program include school districts, community-based organizations, and county governments.

Seamless Summer Option – $1.8 Million in Reimbursements

School districts participating in the NSLP or School Breakfast Program are eligible to apply for the Seamless Summer Option to serve free meals to low-income children, 18 years old and under. This option reduces paperwork and administrative burdens, and reimbursement rates are the same as with NSLP and School Breakfast Program. Sponsors of this program are school districts.

Fresh Fruit and Vegetable Program – $2.7 Million in Reimbursements

The Fresh Fruit and Vegetable Program (FFVP) provides all children in participating schools with a variety of free fresh fruits and vegetables outside of the breakfast and lunch service. The FFVP currently operates in 26 districts and 133 schools throughout Florida.[3] The allocation for each school is between $50 and $75 per student. National allocations have not yet been released; however, Florida anticipates receiving approximately $6 million for the 2011-2012 FFVP. Unlike the other child nutrition programs, which are reimbursed by meals served, FFVP sponsors are reimbursed for operating and administrative costs in addition to the funds received for the purchase of fruits and vegetables.

DOE Administration of Child Nutrition Programs

The DOE employs 45 staff with an administrative budget of $6.5 million for the 2010-2011 fiscal year, to administer the school and child nutrition programs for the following sponsors.

- 248 NSLP sponsors, including 3,578 breakfast sites, 3,651 lunch sites, and 1,655 snack sites;
- 135 Summer Food Service Program and Seamless Summer Option sponsors;
- 18 Special Milk Program sponsors; and
- 133 elementary schools participating in the 2010-2011 FFVP.

Administrative services provided by the DOE include:

[3] *Id.*

- Maintaining a web-based computer application to process $745 million of claims reimbursements, sponsor applications, administrative program reviews, and federal reports;
- Providing sponsor training and technical assistance in child nutrition, food safety, and administrative services for all sponsors;
- Conducting on-site monitoring and administrative reviews of program administration and meal services for all sponsors;
- Evaluating and providing nutrient analysis of breakfast and lunch menus for all sponsors; and
- Providing outreach in the state to attract potential sponsors for the Summer Food Service Program and increase participation in the breakfast program.

To provide the services listed above effectively, DOE works with Florida Atlantic University to administer two grants as follows.

- $700,000 to deliver on-site training in a variety of areas, including producing and maintaining appropriate food service records, food preparation and safety, preparing and serving fresh fruits and vegetables, and the production of training videos.
- $900,000 to observe and evaluate the scope of difficulties related to compliance; provide technical assistance to individual sponsors; provide technical assistance to companies that contract to deliver food products and services; assist sponsors with completing paperwork and taking the steps necessary to achieve and maintain regulatory compliance related to Provision 2;[4] and provide the maintenance and technical support of the DOE's financial software, used to measure critical indicators of the financial effectiveness of a sponsor's child nutrition program.

Other DOE Initiatives

The DOE established the Farm to School (F2S) Alliance to combat childhood obesity and meet the Healthier US School Challenge criteria, which is a statewide training initiative for school food service professionals on how to prepare and serve meals that comply with the 2005 Dietary Guidelines for Americans. The DOE provides outreach and information to approximately 800 small farmers, their families, and the communities they serve, on how to participate in child nutrition programs and form business relationships with schools. In addition, the DOE provides guidance and training to Florida school food service directors, their staff, and parent-teacher organizations regarding the benefits of using locally grown products, procurement of local produce, and the use of local products in the NSLP to meet the Healthier US School Challenge menu criteria.

The DOE works to facilitate interagency coordination between the USDA, Florida Department of Health, Florida Department of Children and Families, Florida Coordinated School Health Partnership, Coordinated School Health Initiatives, the Florida Food and Nutrition Advisory Council, and various other entities.

[4]Provision 2 is a program in schools with a high proportion of students who are eligible for free and reduced-price meals that allows all students to receive free meals.

Integration into the Curriculum and Classroom

Nutrition education is provided through collaboration with the Office of Healthy Schools (OHS) within the DOE. The DOE's school food and nutrition programs partner with the OHS to assess and respond to the nutrition education and resource needs of school districts across the state. The OHS is partially funded with DOE school food and child nutrition administrative expense funds and employs a program director and nutrition coordinator. Through this partnership, the DOE integrates nutrition education into core subject areas like language arts and science. Examples of initiatives from this collaboration include:

- Participation in Celebrate Literacy Week: The OHS works in partnership with the Just Read, Florida! Office to promote literacy throughout the state by raising awareness of the nutrition-related programs and projects offered by the DOE, including the importance of school breakfast and school gardens. In January 2011, volunteers across 28 school districts and 1,100 classrooms read "Our Super Garden: Learning the Power of Healthy Eating by Eating What We Grow" by Anne Nagro.
- Seed Folks kits: In February 2011, the OHS, in partnership with the DOE's Language Arts Coordinator, Just Read, Florida!, and the Florida Department of Health's Comprehensive Cancer Control Program, provided Seed Folks kits, containing lesson plans and activities challenging language arts benchmarks, to middle school students.
- Gardening for Grades Regional Trainings: Through a partnership with the DOE's Science Coordinator, the OHS has collaborated with the Florida Agriculture in the Classroom Program to serve science teachers through nine regional Gardening for Grades training sessions in the spring of 2011. Gardening for Grades is a program funded by specialty crop grants, awarded by the DACS.
- Foods of the Month Kits: In March 2011, the OHS provided approximately 550 nutrition education resources specifically designed for the school cafeteria through the Foods of the Month (FOM) kits. FOM kits help schools enhance the nutrition education programming and improve dietary offerings in school meals by using the cafeteria as a learning laboratory.
- Healthy School District Trainings: Five regional Healthy School District Trainings will be conducted in March 2011, using the Coordinated School Health approach to provide district teams with the tools necessary to improve the health and wellness of their district's students and staff through Wellness Policy Committees and School Health Advisory Committees (SHACs).

The Department of Agriculture and Consumer Services

The DACS administers the commodity program portion of the National School Lunch Program and the Summer Food Service Program. Section 6(e) of the Richard B. Russell National School Lunch Act (NSLA), requires that no less than twelve percent of the federal support received by schools pursuant to the NSLA each year must be in the form of USDA food (commodities). Every year, the DACS receives an allocation from the USDA based on the number of meals served the previous year. As the state agency responsible for ordering the commodities for the schools, the DACS provides information to the schools on which foods the USDA intends to acquire, determines from the schools how much, if any, of each of the commodities available they would like to requisition, and orders the foods. The USDA is responsible for procuring and purchasing these commodities. During the 2010-2011 school year, the DACS provided over 69

million pounds of USDA food, valued at approximately $55.5 million, to about 193 participating schools (public school districts, private schools, residential child care institutions, etc.) throughout the state. An additional $4.4 million in fresh fruits and vegetables was also provided. During the 2011-2012 school year, the DACS will provide over 75 million pounds of USDA food, valued at over $66 million, in addition to another $3.1 million in fresh fruits and vegetables to participating Florida schools.

The DACS developed and maintains the Florida Farm to School Program website to bring schools and farmers together to determine each other's needs and how to best meet them. As a founding member of the Farm to School Alliance, the DACS participates and provides input at F2S meetings. For the past three years, the DACS has participated in various panel presentations and exhibitions promoting the consumption of fresh produce at the Florida Small Farms and Alternative Enterprises conferences.

The DACS has been an active participant in the Florida School Nutrition Association annual conference. In addition to conducting workshops on the administration of the USDA foods, the DACS, in conjunction with the U.S. Department of Defense, is an exhibitor at the conference, promoting the consumption of fresh produce in schools and Florida fresh fruits and vegetables in particular.

Research suggests that taste preferences and eating habits are fully developed by the time a child is three years old. In keeping with the DACS' mission of providing healthy nutrition to children at an early stage, the DACS has developed the Fresh From Florida Kids Program. The program is designated to help parents develop healthy eating habits in their children who are just beginning to eat solid food and beyond.

The DACS also introduces children to good nutrition through the Xtreme Cuisine Program. Xtreme Cuisine Cooking School teaches children about nutrition and introduces them to the variety of fresh, nutritious foods available in Florida.

Office of Program Policy and Government Accountability (OPPAGA), Report No. 09-03[5]

The OPPAGA reviewed Florida's school nutrition programs in January 2009. In the report, *No Changes Are Necessary to the State's Organization of School Nutrition Programs*, the OPPAGA found:

- The current structure aligns key program activities with the core missions of state agencies.
- There is no compelling reason to change the current structure of Florida's school nutrition programs.
- Changing the structure would not produce identifiable cost savings or other substantial benefits.
- Transferring programs and functions from one agency to another would likely result in short-term disruptions in services to school districts.

[5] http://www.oppaga.state.fl.us/Summary.aspx?reportNum=09-03

School Nutrition Program Transfers Experienced in Other States

Federal regulations implementing the Richard B. Russell National School Lunch Act (7 C.F.R. § 210.3(b)) provide for the NSLP to be administered by a state's educational agency. This is the case in all but two of the 50 states. In Texas and New Jersey, it was the desire to seek alternate agencies to administer the program. In 34 states, the commodity food program, which makes agricultural commodities available to sponsors, is administered by the education agency. The administration of the NSLP by an agency other than the state education agency requires a waiver by the Secretary of the USDA. USDA staff has been contacted for information regarding a potential waiver. At this time, it is unknown if a waiver would be approved or if a transfer could be accomplished by the bill's effective date of July 1, 2011.[6]

Officials in Texas and New Jersey indicate that consolidating the federal programs into their agriculture departments had two primary benefits. First, it improved coordination between the various programs. Second, it increased program visibility and administrative support by functioning within a smaller agency, rather than as a no-curriculum program within the larger state education agency.[7] Texas and New Jersey officials also indicate that the primary disadvantage of consolidation was that it created transitional issues during the transfer. For example, when consolidation was being discussed, several education department staff became concerned about the future of their positions. Another challenge to consolidation is that it could create either data sharing or duplicate data reporting issues.[8]

III. Effect of Proposed Changes:

The bill transfers the administration of the National School Lunch Program and related food and nutrition programs from the Department of Education (DOE) to the Department of Agriculture and Consumer Services (DACS).

The bill makes conforming changes to other sections of law to reflect the administration of these food and nutrition programs by the DACS. In particular, the DACS is required to administer all school food and nutrition programs, to cooperate with the federal government and its agencies and instrumentalities to receive the benefit of federal financial allotments, and to act as an agent of or contract with the federal government, another state agency, or any county or municipal government for the administration of the school food and nutrition programs.

The bill also requires the DACs to provide on its website a link to the nutritional content of foods and beverages. The bill requires the DOE, in consultation with the DACS, to develop and submit a request for a waiver to the USDA, to transfer administration of the school food service and nutrition programs from the DOE to the DACS. The request for a waiver must be submitted to the USDA within 30 days of the bill becoming law. The bill requires the DOE to immediately provide written notification to the Governor, the President of the Senate, and the Speaker of the House of Representatives, regarding the decision of the USDA. The notification must include a copy of the approval or denial of the request.

[6] Department of Education legislative bill analysis, March 1, 2011, on file with the committee.
[7] Letter from the United States Department of Agriculture (USDA) to the Commissioner of Education dated March 4, 2011. On file with the committee.
[8] *Id.*

The bill provides multiple effective dates. The provisions requiring the DOE to submit a waiver request and providing the effective dates are effective upon becoming a law. The effective date for all other provisions is January 1, 2012, and is contingent upon USDA approval of the waiver request on or before November 1, 2011.

The bill provides an effective date of July 1, 2011.

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:

None.

C. Government Sector Impact:

This bill transfers 45 full-time equivalent positions and approximately $810 million in federal funds to the DACS from the DOE for the administration of the school and child nutrition programs. In addition, the DACS will receive an estimated $16.8 million in general revenue for the School Lunch Program state match. These funds will be included in the type two transfer from the DOE.

Department of Education

The DOE will no longer receive indirect funds derived from assessments on federal grants based on the current cost rate agreement with the U.S. Department of Education. Indirect earnings are used to support management activities throughout the department, including purchasing, accounting, human resources, grants management, and legal services. Per the DOE, $631,410 was attributed to indirect earnings from the school food and nutrition programs in Fiscal Year 2009-2010.

Department of Agriculture and Consumer Services[9]

The DACS estimates costs of nonrecurring expenditures in the amount of $108,400 for data circuit requirements and telephone and network wiring in order to implement the provisions in this bill. The DACS will absorb these costs through existing resources.

The administration of the NSLP by an agency other than the state education agency requires a waiver by the secretary of the USDA. If the state does not receive a waiver from the USDA, the USDA will not recognize the state law.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The DOE has raised concerns with the transfer, as follows: [10]

- Loss of funding will affect the integration of nutrition education into the classroom. Reading child nutrition books in the classroom, Seed Folks kits containing lesson plans, gardening training sessions, and using the cafeteria as a training laboratory would be severely curtailed or eliminated.
- As with any change, there will be a disruption in services that DOE currently provides. For example, the distribution of monthly direct certification information of students who are eligible for free or reduced price meals because of eligibility for the Supplemental Nutrition Assistance Program through the Department of Children and Families will require changes in multiple agencies. All memorandums of understanding and grants will need to be revised and updated to reflect the transfer. The Dietetic Internship Program will require a recertification by the Commission on Accreditation for Dietetics Education and amended contracts with the various entities that provide instruction to the interns. The coordination with the Florida School Choice Program to increase the number of charter schools sponsoring NSLP would be affected.
- Transfer of these programs will create a financial cost to the State Administrative Fund for program operation to physically move the program from DOE to DACS. A physical program move could result in additional facilities renovation expenses to provide needed offices and technical support for the program. A relocation would likely result in short-term disruptions in services to school districts and additional workload relative to the moving process. Millions of dollars of program reimbursements could be delayed, causing fiscal concerns to sponsors. It is possible the program could remain housed in the Turlington Building, which would seem to negate any fiscal or policy benefit to transferring the program.
- Indirect earnings revenue is derived from assessments on federal grants based on the DOE's current approved Indirect Cost Rate Agreement with the United States Department of Education, dated May 5, 2010, for the period July 1, 2010, through June 30, 2013. The assessment is a percentage of total direct expenditures excluding capital expenditures, flow-through appropriations, and unallowable costs. Indirect earnings are used to support

[9] Department of Agriculture Fiscal Note, March 10, 2011, on file with the committee.
[10] Department of Education legislative bill analysis, March 1, 2011, on file with the committee.

management activities that are department-wide in nature and include activities such as purchasing, accounting, human resources, grants management, and legal services. The DOE will lose $631,410 attributed to indirect earnings from school and child nutrition programs in the 2009-2010 fiscal year.

- The federal government has not approved regulations implementing the Richard B. Russell National School Lunch Act (7 C.F.R. § 210.3(b) providing for the NSLP to be administered by the state educational agency. This is the case in all but two of the 50 states. Texas and New Jersey sought and received alternative administration. In 34 states, the commodity food program, which makes agricultural commodities available to sponsors, is administered by the education agency. The administration of the NSLP by an agency other than the state education agency requires a waiver by the Secretary of the USDA. USDA staff has been contacted for information regarding a potential waiver. At this time, it is unknown if a waiver would be approved or if a transfer could be accomplished by the bill's effective date of July 1, 2011.
- On October 1, 1997, the Child and Adult Care Food Program (CACFP) was split and transferred from DOE. Chapter 97-260, Laws of Florida, transferred the Child Care Food Program (CCFP) from DOE to the Department of Health (DOH). The Adult Care Food Program (ACFP) was transferred from FDOE to the Department Elder Affairs (DOEA) as a result of a type two transfer under s. 20.06(2) F.S. As a result of the transfer of ACFP to DOEA, it was realized that ACFP, when separated from the Child Care Food Program, could not earn sufficient state agency expenditure funds to administer the program. Therefore, on July 23, 1998, a cooperative agreement was established between DOE and DOEA to transfer funds from DOE to DOEA in the amount determined to be needed by DOEA to operate the State Administrative Expense Plan in excess of the amount determined by formula to operate AFCP. This agreement was established as temporary assistance until ACFP program generated sufficient funding to independently administer the program. The ACFP was not able to generate sufficient USDA funding. Therefore, it has obtained $200,000 in recurring general revenue to subsidize the administrative cost to operate ACFP. Currently, all states with the exception of Illinois and Florida operate ACFP and CCFP within the same agency, which is predominately the education agency.

VIII. Additional Information:

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

CS/CS by Budget on April 15, 2011:
The committee substitute requires the Department of Education, in consultation with the Department of Agriculture and Consumer Services, to develop and submit a request for a waiver to the U.S. Department of Agriculture, to transfer administration of the school food service and nutrition programs from the DOE to the DACS. The request must be submitted to the USDA within 30 days of the bill becoming law. The bill requires the DOE to immediately provide written notification to the Governor, the President of the Senate, and the Speaker of the House of Representatives, regarding the decision of the USDA. The notification must include a copy of the approval or denial of the requested waiver.

The committee substitute provides multiple effective dates. The provisions requiring the DOE to submit a waiver request and providing the effective dates are effective upon becoming law. The effective date of all other provisions is January 1, 2012, and is contingent upon the USDA approving the waiver request on or before November 1, 2011.

CS by the Agriculture Committee on March 28, 2011:
The Committee Substitute adds a section to create the Healthy Schools for Healthy Living Council within the Department of Agriculture and Consumer Services.

B. Amendments:

None.

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 Rules Committee

BILL:	CS/SB 1690
INTRODUCER:	Rules Subcommittee on Ethics and Elections and Senator Diaz de la Portilla
SUBJECT:	Campaign Contributions
DATE:	April 22, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Seay	Roberts	EE	**Fav/CS**
2.	Seay	Phelps	RC	**Pre-meeting**
3.			BC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

Committee Substitute for Senate Bill 1690 revises the limitations on contributions made to certain candidates and political committees. The bill proposes a tiered system of campaign contribution limitations; similar to what Florida has followed in the past. The bill provides that if a candidate withdraws his or her candidacy from one office to an office with a lower contribution limit; the candidate must dispose of any amount exceeding the contribution limit for the new office. The bill reenacts other sections to incorporate cross-references.

The bill provides an effective date of July 1, 2011.

This bill substantially amends ss. 106.08 and 106.021 and reenacts ss. 106.04(5), 106.075(2), 106.08(1)(b)-(c), 106.19, and 106.29 of the Florida Statutes.

II. Present Situation:

In 1991, the Legislature lowered campaign contributions to a $500 limit to any candidate for election to or retention in office or to any political committee supporting or opposing one or

more candidates.[1] Political parties are not subject to the $500 limit on campaign contributions.[2] Previously, Florida followed a "tiered" approach in regard to campaign contributions. An individual, political committee, or committee of continuous existence were permitted to contribute up to $ 3,000 for candidates for statewide office; up to $2,000 for merit retention of a judge on a district court of appeal; and up to $1,000 for all other elected offices and to a political committee supporting or opposing one or more candidates.[3]

According to the National Conference of State Legislatures (NCSL), there is a high degree of variability among individual states and their campaign contribution limits. Many states have no limit on how much an individual or political committee may contribute to a campaign – including Alabama, Indiana, Iowa, Mississippi, Missouri, Oregon, Pennsylvania, Texas, Utah and Virginia.[4] Florida, the fourth-most populous state in the country, has the fourth lowest campaign contribution limit among all states. Only three other states – Colorado, Connecticut, and Maine – have lower campaign contribution limits than Florida.[5] As a result, some have suggested that Florida's campaign contribution limits are "unrealistically low."[6] In contrast to Florida, neighboring Georgia has a smaller population and more legislative seats (180 house seats and 56 senate seats) – but allows campaign contributions for legislative races up to $2,000 for primary and general elections and up to $1,000 for primary and general election runoffs.[7]

III. Effect of Proposed Changes:

The committee substitute revises the limitations on contributions made to certain candidates and political committees. The section re-adopts a tiered approach to campaign contribution limits, similar to what existed in Florida prior to 1991. The bill maintains that the contribution limits apply separately to primary and general elections.

The new tiered approach proposes that individuals, political committees, or committees of continuous existence may contribute:

- Up to $10,000 to a candidate for the offices of Governor and Lieutenant Governor, or any political committee supporting or opposing only such candidates. The bill maintains that candidates for the offices of Governor and Lieutenant Governor are considered a single candidate for the purpose of this section.
- Up to $5,000 to a candidate for statewide office other than the offices of Governor and Lieutenant Governor, or any political committee supporting or opposing only such candidates (such as a candidate for Attorney General, Chief Financial Officer, or Commissioner of Agriculture).
- Up to $2,500 to a candidate for legislative or multicounty office, or any political committee supporting or opposing only such candidates.

[1] Section 106.08(1)(a), F.S.; *see also* s. 11, ch. 91-107, LAWS OF FLORIDA.
[2] Section 106.08(1)(a), F.S.
[3] s. 11, ch. 91-107, LAWS OF FLORIDA.
[4] State Limits on Contributions to Candidates, National Conference of State Legislatures, *available at* http://www.ncsl.org/Portals/1/documents/legismgt/limits_candidates.pdf.
[5] *Id.*
[6] Michael Bender, *The dollars are hard to track*, ST. PETERSBURG TIMES, Feb. 27, 2011, *available at* http://www.tampabay.com/news/politics/elections/article1153703.ece; *see also* Bill Cotterell, *McCollum wants to loosen financing limits*, TALLAHASSEE DEMOCRAT, Aug. 12, 2010.
[7] O.C.G.A. § 21-5-41 (2011).

- Up to $1,000 to a candidate for countywide office or any election conducted on a less than countywide basis; a candidate for county court judge or circuit judge; a candidate for retention as a judge of a district court of appeal or as a justice of the Supreme Court; or any political committee supporting or opposing only such candidates.
- If a political committee supports or opposes two or more candidates that are subject to different contribution limitations, the lowest of such contribution limitations applies.

The bill also requires candidates who withdraw their candidacy from an office to an office with a lower contribution limit to dispose of any amount exceeding the contribution limit for the new office.

The bill reenacts other sections to incorporate cross-references.

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:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

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

CS by Ethics and Elections on March 21, 2011:
The committee substitute adds an amendment to s. 106.021, F.S. to require candidates who withdraw their candidacy from one office to an office with a lower contribution limit to dispose of any amount exceeding the contribution limit for the new office. The committee substitute also reenacts additional sections to incorporate cross-references.

B. Amendments:

None.

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LEGISLATIVE ACTION

Senate . House

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The Committee on Rules (Flores) recommended the following:

Senate Amendment (with title amendment)

Delete lines 62 - 88
and insert:
member of that delegation. The charter shall provide for fixed term limits of Miami-Dade County Commissioners.

(f) MIAMI-DADE ~~DADE~~ COUNTY; POWERS CONFERRED UPON MUNICIPALITIES. To the extent not inconsistent with the powers of existing municipalities or general law, the Metropolitan Government of Miami-Dade ~~Dade~~ County may exercise all the powers conferred now or hereafter by general law upon municipalities.

(g) DELETION OF OBSOLETE SCHEDULE ITEMS. The legislature shall have power, by joint resolution, to delete from this

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article any subsection of this Section 6, including this subsection, when all events to which the subsection to be deleted is or could become applicable have occurred. A legislative determination of fact made as a basis for application of this subsection shall be subject to judicial review.

BE IT FURTHER RESOLVED that the following statement be placed on the ballot:

CONSTITUTIONAL AMENDMENT

ARTICLE VIII, SECTION 6

AUTHORIZING AMENDMENTS TO MIAMI-DADE COUNTY HOME RULE CHARTER BY SPECIAL LAW APPROVED BY REFERENDUM.—Authorizes amendments or revisions to the Miami-Dade County Home Rule Charter by a special law when the law is approved by a vote of the electors of Miami-Dade County. A bill proposing such a special law must be approved at a meeting of the local legislative delegation and filed by a member of that delegation. It also conforms references in the State Constitution to reflect the county's current name and requires that the Miami-Dade County charter provide for fixed term limits of commissioners.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete line 7

and insert:

proposing such a special law; requiring that the Miami-Dade County charter provide for fixed term limits of commissioners.

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 Rules Committee

BILL:	CS/SJR 1954
INTRODUCER:	Community Affairs Committee and Senator Garcia
SUBJECT:	Home Rule Charter of Miami-Dade County
DATE:	April 22, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Gizzi	Yeatman	CA	**Fav/CS**
2.	Munroe	Maclure	JU	**Favorable**
3.	Munroe	Phelps	RC	**Pre-meeting**
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

Senate Joint Resolution 1954 proposes an amendment to the Florida Constitution, to authorize amendments or revisions to the home rule charter of Miami-Dade County by a special law approved by a vote of the electors, and provides requirements for a bill proposing such a special law.

This joint resolution will require approval by a three-fifths vote of the membership of each house of the Legislature for passage.

This joint resolution amends Article VIII, section 6, of the Florida Constitution.

II. Present Situation:

Counties

Article VIII, section 1 of the Florida Constitution requires the state to be divided into political subdivisions known as counties, which shall provide state services at the local level. There are

two types of counties that are recognized under the Florida Constitution: 1) counties that are not operating under a county charter, and 2) counties that are operating under a county charter.[1]

A.) Non-Charter Counties

Non-charter county governments only have such powers of self-government as is provided by general or special law.[2] In addition, non-charter counties may enact ordinances not inconsistent with general or special law. A county ordinance in a non-charter county which is in conflict with a municipal ordinance is not effective within the municipality to the extent of such conflict.

B.) Charter Counties

Charter counties have greater powers of self-government than non-charter counties. Counties operating under a charter have all powers of self-government not inconsistent with general law or with special law approved by the vote of the electorate.[3] Although a non-charter county can be established through general law, a charter county can only be established by a charter adopted, amended, or repealed through a special election by the vote of the electors in that county.[4] In a charter county, the charter shall provide which shall prevail in the event of a conflict between a county and municipal ordinance. Special acts that do not require referendum approval do not apply to charter counties.

Miami-Dade Home Rule Charter[5]

In 1955, the voters of Dade County were authorized by the Legislature under an amendment to Article VIII, section 11, of the 1885 Florida Constitution to enact the first home rule charter in Florida.[6]

Article VIII, section 6(e), of the Florida Constitution, states that the provisions of the Metropolitan Dade (or Miami-Dade) County Home Rule Charter adopted by the electors of Miami-Dade County pursuant to Article VIII, section 11 of the Constitution of 1885 are valid and any subsequent amendments to the charter, authorized by Article VIII, section 11 of the Constitution of 1885 are valid.[7]

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[1] *See* FLA. CONST. art. VIII, s. 1(f)-(g).
[2] FLA. CONST. art. VIII, s. 1(f).
[3] FLA. CONST. art. VIII, s. 1(g).
[4] *See* FLA. CONST. art. VIII, s. 1(c). See generally, David G. Tucker, *A Primer on Counties and Municipalities, Part 1*, 81 FLA. B.J. 49, 49-50 (Mar. 2007) (procedures for enacting and implementing a county charter are outlined in ss. 125.60-125.64 and 125.80-125.88, F.S.).
[5] Section 125.011(1), F.S., defines the term "county" to mean:

> any county operating under a home rule charter adopted pursuant to ss. 10, 11, and 24, Art. VIII of the Constitution of 1885, as preserved by Art. VIII, s. 6(e) of the Constitution of 1968, which county, by resolution of its board of county commissioners, elects to exercise the powers herein conferred. Use of the word "county" within the above provisions shall include "board of county commissioners" of such county.

The constitutional sections that are contained in s. 125.011(1), F.S., refer to Key West/Monroe County, Miami-Dade County, and Hillsborough County, respectively.
[6] Memorandum to Rip Colvin, Legislative Committee on Intergovernmental Relations (LCIR), from Carolyn Horwich, Staff Attorney (April 20, 2006).
[7] FLA. CONST. art. VIII, s. 6(e).

A.) Unique Powers

Article VIII, section 11 of the Constitution of 1885 granted the electors of Miami-Dade County the authority to adopt a home rule charter government in Miami-Dade County, of which the Board of County Commissioners of Miami-Dade County is the governing body. In contrast to charter governments created pursuant to Article VIII, section 1 (g) of the State Constitution, Miami-Dade County is granted unique powers that include:

- Merging, consolidating, abolishing, and changing the boundaries of municipal, county, or district governments whose jurisdictions lie wholly within Miami-Dade County;
- Providing a method for establishing new municipal corporations, special taxing units, and other governmental units in Miami-Dade County;
- Providing an exclusive method for a municipal corporation to make, amend, or repeal its own charter, which, once adopted, cannot be changed or repealed by the Legislature;
- Abolishing the offices of sheriff, tax collector, property appraiser, supervisor of elections and clerk of the circuit court and providing for the consolidation and transfer of their functions; and
- Changing the name of Miami-Dade County.

In addition, Article VIII, section 11(5), of the Florida Constitution of 1885 does not limit or restrict the power of the Legislature to enact general laws that apply to Miami-Dade County and any one or more counties in Florida, or to any municipality in Miami-Dade County and one or more municipalities in Florida. However, Miami-Dade County ordinances control in the event of conflict with special or general law only applicable to Miami-Dade County. Hence, the Legislature is prohibited by Article VIII, section 11(5), of the Florida Constitution of 1885, as amended, from enacting special laws that apply only to Miami-Dade County, even if such a special act were approved by referendum.

B.) Special Provisions

The Miami-Dade County Home Rule Charter ("Charter") was officially adopted on May 21, 1957. The Charter authorizes the Board of County Commission to create new municipalities; change municipal boundaries; and to establish, merge and abolish special purpose districts. The Charter also abolishes the constitutional office of the Sheriff and authorizes the Board of County Commission to "exercise all powers and privileges granted to municipalities, counties and county officers by the Constitution and laws of the state."[8]

C.) Court Interpretations

Florida courts have consistently invalidated the applicability of special acts passed by the Legislature which attempt to supersede the home rule powers of Miami-Dade County. The Florida Supreme Court has held that the constitutional provisions granting home rule authority to Miami-Dade County transferred to the county "the powers formerly vested in the State Legislature with respect to the affairs, property and government of Dade County and all the municipalities within its territorial limits." *See State v. Dade County.*[9]

[8] Section 1.01(21), *Miami-Dade County Home Rule Charter.*
[9] 142 So. 2d 79, 85 (Fla. 1961).

In the case of *Chase v. Cowart*,[10] the Florida Supreme Court was asked to determine whether the Miami-Dade County Budget Commission had been abolished by the electors of Miami-Dade County through the enactment of its home rule charter. The Commission was originally established by the Florida Legislature with authority over the fiscal affairs of county boards and county officers of Miami-Dade County and whose jurisdiction fell entirely within Miami-Dade County.[11]

In deciding the issue, the Court weighed the meaning of subsections (5), (6), (7), and (9), section 11, Article VIII, of the Florida Constitution of 1885, as amended, which preserve to the Legislature the authority to enact general laws that apply to Miami-Dade County and any one or more counties. The Court also analyzed subsection (1)(c), section 11, Article VIII, of the Florida Constitution of 1885, which provides an express grant of power authorizing the voters of Miami-Dade County to adopt a charter, the provisions of which may abolish any board or governmental unit whose jurisdiction lies wholly within Miami-Dade County, whether created by the Constitution, the Legislature, or otherwise.

After conducting its analysis, the Court held that the electors of Miami-Dade County, through the enactment of its home rule charter, abolished the Budget Commission. The court reasoned that the limitations of subsections (5) and (9) do not prohibit the abolishment of the Budget Commission adopted by the Legislature in 1957 because of the charter provision allowing abolishment of any board or governmental unit whose jurisdiction lies completely within Miami-Dade County.[12] The court's rationale is based heavily on its findings regarding the exception to the limitations of subsections (5) and (9) on the county's home rule charter authority that states, "except as expressly authorized herein."[13] The Court specifically stated that section 11(1)(c) is:

> clearly an express grant of power which authorizes the voters of Dade County to adopt a charter, the provisions of which may abolish any board or governmental unit, whose jurisdiction lies wholly in Miami-Dade County, whether created by the Constitution or by the Legislature or otherwise. We think it crystal clear that the words 'except as expressly authorized or provided' as found in subsections (5) and (9) relates directly to the specific grants of power contained in the various sub-subsections of subsection (1).[14]

The Court further stated that its reasoning did not weigh on the analysis of whether the law creating the Budget Commission was a general law, general law of local application, or a special act.[15]

In *City of Sweetwater v. Dade County*,[16] the Third District Court of Appeal held that general law provisions governing the annexation of land into municipalities did not apply within Miami-Dade County since municipal boundary changes is "one of the areas of autonomy conferred on

[10] 102 So. 2d 147 (Fla. 1958).
[11] *Id.* at 151.
[12] *Id.* at152-53.
[13] *Id.*
[14] *Id.*
[15] *Id.* at 154.
[16] 343 So. 2d 953 (3rd DCA 1977).

Dade County" by its Home Rule Charter.[17] In reaching this holding, the Third District Court of Appeal upheld the trial court's ruling which relied on the autonomy granted to Miami-Dade County under Article VII, section 11(1), of the Florida Constitution of 1885, as amended:

> Subsections 1(a) through (i) of the Home Rule Charter Amendment constitute those organic areas of autonomy and authority in local affairs conferred upon Dade County by the Florida Constitution and may not be diminished and curtailed by general laws of the State enacted after 1956.[18]

Based on this information, the Third District Court of Appeal determined "that the method provided by the Home Rule Charter . . . is effective and exclusive, notwithstanding the existence from time to time of a general state law which makes provision for some other method."[19]

III. Effect of Proposed Changes:

This joint resolution would allow the Miami-Dade Home Rule Charter to be amended or revised by special law approved by the electors of Miami-Dade County, notwithstanding any provision of Article VII, section 11, of the Florida Constitution of 1885.

If such amendments or revisions are approved by the electors of Miami-Dade County, they shall be deemed an amendment or revision of the charter by the electors of Miami-Dade County.

A bill proposing such a special law must be approved at a meeting of the local legislative delegation and filed by a member of that delegation.

This joint resolution also conforms references in the Florida Constitution to reflect the county's current name, which is Miami-Dade County, and not Dade County.

An effective date for the amendment is not specified. Therefore, the amendment, if approved by the voters, will take effect on the first Tuesday after the first Monday in January following the election at which it is approved.[20]

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

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[17] *Id.* at 954.
[18] *Id.* (citations omitted).
[19] *Id*.
[20] FLA. CONST. art. XI, s. 5(e).

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Constitutional Amendments
Section 1, Article XI, of the Florida Constitution, authorizes the Legislature to propose amendments to the State Constitution by joint resolution approved by three-fifths vote of the membership of each house. The amendment must be placed before the electorate at the next general election held after the proposal has been filed with the Secretary of State, or at a special election held for that purpose.

Section 5(d), Article XI, of the Florida Constitution, requires proposed amendments or constitutional revisions to be published in a newspaper of general circulation in each county where a newspaper is published. The amendment or revision must be published once in the tenth week and again in the sixth week immediately preceding the week the election is held. The Division of Elections within the Department of State estimated that the average cost per word to advertise an amendment to the State Constitution is $106.14 for this fiscal year.

Section 5(e), Article XI, of the Florida Constitution, requires a 60 percent voter approval for a constitutional amendment to take effect. An approved amendment becomes effective on the first Tuesday after the first Monday in January following the election at which it is approved, or on such other date as may be specified in the amendment or revision.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Upon voter approval, this joint resolution would allow Miami-Dade County Home Rule Charter amendments or revisions to be made by special law approved by a vote of the electors. A bill proposing such a special law must be approved at a meeting of the local legislative delegation and filed by a member of that delegation.

Each constitutional amendment is required to be published in a newspaper of general circulation in each county, once in the sixth week and once in the tenth week preceding

the general election.[21] Costs for advertising vary depending upon the length of the amendment. The Division of Elections within the Department of State estimated that the average cost per word to advertise an amendment to the State Constitution is $106.14 for this fiscal year.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

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

CS by Community Affairs on March 28, 2011:
Makes a technical amendment to clarify that the joint resolution is amending Article VIII, section 6 of the Florida Constitution.

B. Amendments:

None.

[21] FLA. CONST. art. XI, s. 5(d).