SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: SB 72-E

SPONSOR: Senator Smith and others

SUBJECT: State University Boards of Trustees

DATE: May 2, 2002 REVISED: 05/07/02

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Matthews	Johnson	JU	Fav/3 amendments
2.				
3.				
4.				
5.				
6.				

I. Summary:

This bill amends several provisions governing actions against the *state university* boards of trustees (which assumes some of the rights and responsibilities previously afforded the now-defunct Board of Regents for the State University System) as follows:

- Makes the doctrine of comparative fault (in lieu of the doctrine of joint and severable liability) applicable to the individual board of trustees in medical malpractice actions;
- Specifies venue options for actions brought against a board of trustees to be either the county where the university's main campus is located or the county where it maintains a substantial presence for its customary business;
- Clarifies that a board of trustee is a state agency or subdivision for purposes of the sovereign immunity provisions in tort actions;
- Exempts someone who is acting as the adjuster for a self-insurance program on behalf of a state university board from the insurance adjuster provisions in part VI of chapter 626, F.S.; and
- Provides that the amended liability provisions apply to actions filed on or after July 1, 2002.

This bill substantially amends following sections of the Florida Statutes: 766.112, 768.28 and 626.852.

II. Present Situation:

- Reorganization of Education Governance

In November 1998, Florida voters approved changes in the State Constitution to mandate a new public education governance system led by an appointed, rather than elected, State Board of Education and Commissioner of Education.[1] The Florida Education Governance Reorganization Act of 2000 (ch. 2000-321, L.O.F.) refocuses control for day-to-day operation of educational administration at the local level and limits the state to administrative and support activities. Many sections in the Florida School Code, including all of chapters 239, 240, and 246, F.S., are to be repealed, effective January 7, 2003, including the elimination of most of the state level education boards and commissions and the laws that provide their administrative powers.

The Governor then appointed a task force to advise the Legislature on what policies need to be implemented in law in each of the years before the repeal takes effect. The task force made its report and recommendations March 1, 2001.[2] The 2001 Education Governance Implementation Act[3] directed the newly created Florida Board of Education to recommend further changes to rewrite the Florida School Code, to accommodate the mandatory repeals and to prepare for transition activities.

The Florida Board of Education appointed a task force to recommend the changes and approved the recommendations in December 2001. During Special Session E, the Legislature passed the Education Governance bill (SB 20-E). The Act not only adopts new provisions but restructures and reformats every section of the existing Florida School Code into new chapters 1000 through 1013, Florida States. The Act requires legislative review of these chapters in the 2003 regular legislative session.

The most significant legislative changes have been the elimination of the State Board of Community Colleges, the Board of Regents, the State Board of Nonpublic Career Education, the State Board of Independent Colleges and Universities, and the restructuring of the Department of Education. The duties and responsibilities of the Board of Regents of the State University System have shifted between the State Board of Education and the individual state university boards of trustees. Some of the more significant changes for universities:

- Universities are removed from state agency status and designated as public corporations.
- Universities may establish their own personnel and pay programs in accordance with law and state board rule.
- University boards may collectively bargain locally, and universities are public employers for collective bargaining. University boards are the legislative body for purposes of resolving impasses.
- Universities may establish their own purchasing and contracting systems in accordance with law and state board rule.

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[1] The state Board of Education consists of 7 members appointed by the Governor for staggered 4-year terms, subject to senate confirmation. The Board then appoints the Commissioner of Education.

[2] See also Florida Senate Education Committee, Reorganization of Education Governance, Interim Project Report 2001-011, November 2000.

[3] Chapter 2001-170, Laws of Florida.

- University Campuses

The State University System is defined currently in s. 240.2011, F.S., which provision stands to be repealed January 7, 2003. *See* ch. 2001-170, s. 3(7). The county of the main campus of each state university is identified. Aside from main branch campuses, most of the state universities operate branch campuses. The programs at branch campuses are designed to meet the needs of populous areas without 4-year public colleges and tend to differ from the programs offered at traditional campuses.

- Venue in Actions Against the University

Chapter 47, F.S., primarily governs the determination of venue in tort and contract actions unless specifically stated elsewhere in statute. Except as may be provided constitutionally, a legislature may fix the venue of a civil action so long as it does not transgress fundamental guaranties of equal protection and does not arbitrarily and unreasonably discriminate against particular persons. *See Bertram & Co. v. Barrett*, 155 So.2d 409 (Fla. 1st DCA 1963). Although it is the defendant's privilege to be sued in a forum convenient to him or her so as to cause the least amount of inconvenience and expense in defending the action, it is the plaintiff's right or prerogative initially to select venue from the available statutory options although venue may be subsequently transferred for a number of reasons.

As to causes of actions against a university, a suit against a university implicates the Board of Regents as the representative and administrative body with oversight over the university system. As a state agency or subdivision, the university or Board was subject to the sovereign immunity provisions in s. 768.28, F.S. The venue options against a state or any agency or subdivision (which is defined to include corporations primarily acting as instrumentalities or agencies of the state) for an action in tort included the county where the property in litigation is located, or if the affected agency or subdivision has an office in such county for its customary business, where the cause of action accrued. However, as a state government entity, agency or subdivision, the university or Board could invoke home rule. That is, it could petition that the appropriate venue be Tallahassee, Leon County as the site of the official residence of the board.[4] However in practice, the universities and the Board of Regents appear to have either waived or otherwise consented to venue in other counties in most cases.

With the abolishment of the Board of Regents, effective July 1, 2001.Ultimately, most powers will shift to the individual state university boards of trustees, effective January 7, 2003. Unlike the defunct Board of Regents, the individual state university boards of trustees will be considered "corporations primarily acting as instrumentalities or agencies of the state" but will still be able to avail themselves of the sovereign immunity provisions. *See* s. 229.008, F.S. Therefore, venue in actions will be governed by s. 768.28(1), F.S., which provides that venue for actions against

[4] The constitution provides that the seat of government is the city of Tallahassee, in Leon County, where the offices of the executive officers and the Supreme Court are to be maintained and the sessions of the legislature to be held. Leon County is likewise the county of the official residence of various state boards and commissions.

the state or any or its agencies or subdivisions may be brought in the county where the property in litigation is located or in the county where the cause of action accrued if there is an office.[5]

- Medical Malpractice Actions: Comparative Fault and Joint & Several Liability

Under current law, in medical malpractice actions against the Board of Regents (i.e, on behalf of the teaching hospitals and clinics), the doctrine of comparative fault[6] applies (in lieu of the doctrine of joint and several liability) for purposes of entering a judgment for damages.[7] *See* s. 766.112(2), F.S. Under the doctrine of comparative fault, each party is responsible to extent of its proportion of fault and the court enters a judgment in a negligence case based on each party's proportion of liability. Until recently, the doctrine of joint and several liability applied to joint tortfeasors such that the court entered a judgment with respect to the economic damages against the party holding him or her responsible for those damages for all parties until the plaintiff recovered all damages completely. However, in 1999, Florida law was amended to abolish the doctrine of joint and several liability for non-economic damages, and to limit its applications as to economic damages. *See* ch. 99-225, L.O.F.; s. 768.81, F.S. As to economic damages, it established new limitations and maximum liability amounts, which increase with a defendant=s share of fault and dependent on whether the plaintiff was at fault or not.

Under current law, an employee or agent under the right of control of the Board of Regents who renders medical care or treatment at any hospital or health care facility is deemed for purposes of a civil action an employee or agent of the Board of Regents. *See* s. 240.215, F.S. This provision is repealed January 7, 2003. On January 7, 2003, a new section of law, section 1012.965 (see SB 20), provides such person will be deemed the employee or agent of the university board of trustees. However, in actuality, the Board of Regents no longer exists as of July 1, 2001, and the university boards of trustees have been created but these boards do not assume full powers and responsibilities until January 7, 2003. The law provides a transitional provision that states that all the powers, duties, functions, records, personnel, and property, pending issues and contracts of the Board of Regents is transferred to the Florida Board of Education. *See* s. 229.003(5)(b), F.S.; (see also SB 20-E, s. 1001.72(5), F.S.) Therefore, it appears such person in a medical malpractice action could be deemed to be an employee of the Board of Education until January 7, 2003.

III. Effect of Proposed Changes:

Section 1 amends s. 766.112, F.S., to replace reference to the dismantled Board of Regents with a reference to a state university board of trustees. Therefore, it makes the doctrine of comparative fault applicable in actions against a board of trustees in medical malpractice actions as was previously applicable in medical malpractice actions against the Board of Regents. This section is also amended to clarify that a claimant's sole remedy to collect a judgment or settlement against a board of trustees medical malpractice actions is through the legislative claim bill process as provided in s. 768.28, F.S.

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[5] Notably actions against domestic corporations must be brought only in the county where such corporation has, or usually keeps, an office for transaction of its customary business, where the cause of action accrued, or where the property in litigation is located. See s. 47.051, F.S.

[6] In 1986, the Florida Legislature codified the doctrine of comparative fault, which had been adopted by the Florida Supreme Court in 1973, to replace contributory negligence.

[7] Economic damages include lost wages, medical costs, and property destruction. Non-economic damages encompass pain and suffering, mental anguish, inconvenience, physical impairment, disfigurement, loss of capacity for enjoyment of life, and other non-pecuniary losses.

Section 2 amends s. 768.28, F.S., relating to the waiver of sovereign immunity in tort actions. It specifies the venue options for bringing actions against a state university board of trustees. An action against a board of trustees can only be brought in the county where the university's main campus is located or where it maintains a substantial presence in transacting its customary business.

Section 3 amends s. 626.842, F.S., to replace reference to the dismantled Board of Regents with a reference to a state university board of trustees. Therefore, the insurance adjuster provisions in part VI of chapter 626, Florida Statutes, are not applicable to an employee or agent who provides services supporting a self-insurance program on behalf of the board of trustees.

Section 4 specifies that amendments made to ss. 766.112 and 768.28, F.S., in this bill apply to actions filed on or after July 1, 2002.

Section 5 provides that this law is to be considered to have been enacted at the same time as a law that previously amended the law during the 2002 regular session.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The state university boards of trustees will enjoy the same sovereign immunity protections afforded state agencies and subdivisions. These boards of trustees may also be more conveniently sued by virtue of specifying where an action may be brought.

C. Government Sector Impact:

The state will be responsible for liability claims against the Florida Board of Education (as the transitional entity) and the state university boards of trustees in a similar manner

as they were previously responsible for actions against the pre-existing university system Board of Regents.

The Department of Insurance and Treasury report that there will likely be a redistribution of the Board of Regents' general liability premiums from the Board of Regents to the separate Board of Trustees for each University.

VI. Technical Deficiencies:

Section 5 appears to have no substantive effect. None of the laws that are amended in this bill and that were amended during the 2002 regular session affect, conflict or directly relate in any way.

VII. Related Issues:

Under section 1 which amends s. 766.112, F.S., the rewording of "a claimant's sole remedy for collection of damages" to the collection of judgment and settlement (as provided in the sovereign immunity act in s.768.28, F.S.), might have the unintended consequence of or could be construed to remove the entire action against an individual state university board of trustees from all the provisions of the Medical Malpractice Act.

Section 2 amends s. 768.28, F.S., to create specific venue options for actions against individual state university boards of trustees. However, unlike venue options for other state agencies or subdivisions, venue for suits against boards of trustees may lie either in the county of the main campus or in the county where the board of trustee has a "substantial presence." These venue options may create ambiguity and generate litigation, particularly as the latter is not linked to where the cause of action may have accrued for litigation. Notably, effective January 7, 2003, the statutes will no longer list where the "main campuses" are located such that a main campus could then be construed to be either a general main campus and a medical main campus. Moreover, there is no interpretive statutory or case law for what constitutes "substantial presence." [*Addressed in part by Amendment #3*]

Section 3 amends s. 626.852, F.S., to exempt employees or agents who are providing services supporting a self-insurance program for the individual university board of trustees in the same manner that employees or agents of the Board of Regents were exempted from the insurance adjuster provisions in chapter 626, F.S. However, under legislation enacted during 2002 Special Session E, it is the State Board of Education, not the individual state university boards of trustees that have the authority to secure self-insurance programs and delegate responsibility for these programs. *See* SB 20-E (2002-E, s. 1000.24, F.S.). It is unclear whether these employees or agents "providing services" presumably as adjusters would actually be contracted as employees or agents of the Board of Education or the individual state university boards of trustees.

Section 4 provides that ss. 766.112 and 768.28 as amended will apply to an action against a state university board of trustees filed on or after July 1, 2002, not when the cause of action accrued. This provision presents some concern and potential conflict between the applicable immunity and liability provisions and the effective date for the overall implementation of the education governance scheme for the education system. There is particular concern that a loophole may be

created, particularly during the period July 1, 2002 (the date the immunity and liability provisions apply to actions filed) through January 7, 2003 (the effective date of the recently adopted provisions affecting the duties and responsibilities of the Florida Board of Education (as the interim successor to the Board of Regents) and the state university boards of trustees. As noted earlier, under current law, an employee or agent under the right of control of the Board of Regents who renders medical care or treatment at any hospital or health care facility is deemed for purposes of a civil action an employee or agent of the Board of Regents. *See* s. 240.215, F.S. This provision is repealed effective January 7, 2003. On and after that date, such person will be deemed an employee or agent of the university board of trustees. *See* SB 20 (s.1012.965, F.S.). However, in the interim, because the Board of Regents no longer exists (effective July 1, 2001), the law appears to provide a transitional provision that states that all the powers, duties, functions, records, personnel, and property, pending issues and contracts of the Board of Regents is transferred to the Florida Board of Education. *See* s. 229.003(5)(b), F.S. Therefore, it seems that until the university boards of trustees assume powers and responsibilities on January 7, 2003, such person in a medical malpractice action is deemed to be an employee of the Board of Education and thus for purposes of immunity and liability, the appropriate provision should state that the effective date is January 7, 2003, for causes of action that arise on or after that date. [*Addressed by Amendment #1*]

VIII. Amendments:

#1 by Judiciary
Provides that the immunity and liability provisions amended in ss. 766.112 and 768.28, apply to causes of actions arising on or after January 7, 2003, to conform with the effective date of related provisions in the Education Governance Re-organization bill (SB 20-E) passed during the 2002 Special Session E.

#2 by Judiciary
Defines a physician's "supervision" over a medical care resident for purposes of liability coverage under the Neurological Injury Compensation Act (NICA) applies by reference to the standards established by the Accreditation Council for Graduate Medical Education (ACGME).

Permits recovery of expenses for the personal provision of residential or custodial care of severely a injured child by family members in a NICA action.

Provides a severability clause.

Provides these provisions are effective upon becoming a law. (WITH TITLE AMENDMENT)

There is some concern that this amendment to the bill could be construed to violate the provisions of section 6 of article III of the Florida Constitution which provides that "[E]very law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title." The single-subject requirement requires a logical or natural connection between the various portions of a legislative enactment and this is satisfied if there is a reasonable explanation as to why the legislature joined multiple subjects within the same legislative act. See Grant v. State, 770 So.2d 655, 657 (Fla. 2000). Arguably, there is a logical or natural connection between the amendment and the bill, i.e., they relate to liability of actions by

or on behalf of the state university board of trustees and liability coverage under NICA as may arise in an action in a university setting. The proposed title amendment may better reflect that there is a connection between the provisions. Regardless of the inclusion or absence of a severability clause, courts are required to sever unconstitutional provisions from law and let the remaining provisions stand. However, if it is a single-subject violation, the courts are less likely to sever the provions and may void the entire act without knowledge of which provisions would have passed independent of the other.

#3 by Judiciary
Clarifies that for purposes of filing an action against a university board of trustees, the venue option of filing in the county where the university has a substantial presence applies only if the cause of action also accrued in that county.