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.)

Prepared By: Judiciary Committee

BILL:	SB 280
INTRODUCER:	Senators Fasano and Lynn
SUBJECT:	Community Behavioral Health Agencies
DATE:	March 14, 2006
REVISED:	03/16/06

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Goltry	Whiddon	CF	**Favorable**
2.	Luczynski	Maclure	JU	**Favorable**
3.			HA	
4.			WM	
5.				
6.				

I. Summary:

This bill limits liability in tort actions involving crisis services provided by detoxification programs defined in s. 397.311(18)(b), F.S., addictions receiving facilities defined in s. 397.311 (18)(a), F.S., or designated public receiving facilities defined in s. 394.455 (26), F.S. The bill requires that net economic damages be limited to $1 million per liability claim, including but not limited to past and future medical expenses, wage loss, and loss of earning capacity. Additionally, any noneconomic damages are limited to $200,000 per claim. The bill requires that damages be offset by any collateral source payment in accordance with s. 768.76, F.S., and allows for claims bills to be brought to the Legislature pursuant to s. 768.28, F.S., for amounts in excess of those specified by the bill. The provider or its insurers are to assume any costs for defending actions brought under this section.

The bill extends the immunities enjoyed by a provider to an employee of the provider under certain conditions. The bill specifies that the newly created section does not have the effect of designating a person who provides contractual services to the Department of Children and Family Services (DCF or the department) as an employee or agent of the state for the purposes of ch. 440, F.S., relating to Workers' Compensation. The bill requires that as a part of its contract with DCF, providers are required to obtain and maintain general liability coverage in the amount of $1 million per claim and $3 million per incident.

Conditional limitations on damages specified by the act are increased at the rate of 5 percent each year, to be prorated from its effective date to the date at which damages subject to such limitations are awarded by final judgment or settlement.

This bill creates section 394.9085, Florida Statutes.

II. Present Situation:

Part I of chapter 394 is the Florida Mental Health Act, also known as "the Baker Act." The Baker Act describes the criteria and process for the involuntary examination of a person who is believed to have a mental illness and, because of that illness, has refused voluntary examination or is unable to determine that an examination is necessary and is a danger to self or others or likely to suffer from self-neglect to the degree that it endangers his or her well-being.[1] The statute authorizes law enforcement, certain mental health clinical professionals, or the court to require that an individual be involuntarily detained for evaluation for a period up to 72 hours.

In addition to procedural requirements for involuntary examination and voluntary and involuntary treatment, the Baker Act provides a framework for the public mental health service delivery system. The "front door" to that system is the public receiving facility. Receiving facilities admit persons for involuntary examination and are defined in the statute as "any public or private facility designated by the Department of Children and Family Services (DCF or the department) to receive and hold involuntary patients under emergency conditions or for psychiatric evaluation and to provide short-term treatment."[2] Public receiving facilities are those facilities that receive public funds specifically for Baker Act examinations. Under s. 394.459(2), F.S., receiving facilities are required to examine and provide treatment to everyone, regardless of their ability to pay. The Florida Council for Community Mental Health (FCCMH) reports that virtually all funding for public receiving facilities comes from local, state, and federal sources.[3] Public receiving facilities are usually co-located with a community mental health provider agency or a public hospital.

A crisis stabilization unit is defined as "a program that provides an alternative to inpatient hospitalization and that provides brief, intensive services 24 hours a day, 7 days a week, for mentally ill individuals who are in an acutely disturbed state."[4] The definition of "crisis stabilization unit" and licensure requirements for these programs are found in part IV of ch. 394, F.S., the Community Substance Abuse and Mental Health Services Act.

Part V of ch. 397 F.S., provides criteria and procedures for the involuntary admission of an individual in an acute substance abuse crisis. A person meets the criteria for involuntary admission if he or she is substance abuse impaired and because of such impairment has lost the power of self-control with respect to substance use and either is likely to harm himself or herself or others or is in need of substance abuse services and his or her judgment has been so impaired that the person is unable to appreciate the need for treatment or services.[5] An individual may be compelled to emergency admission for detoxification, assessment, or stabilization through one of several pathways including law enforcement, physician certification, parent or guardian consent, or court order.

[1] Section 394.463, F.S.
[2] Section 394.455(26), F.S.
[3] FCCMH is a statewide association consisting of 69 community-based mental health and substance abuse agencies.
[4] Section 394.67(5), F.S.
[5] Section 397.675, F.S.

Substance abuse providers may be licensed by the department for one or several separate service components.[6] Included in these licensed service components are detoxification programs and addictions receiving facilities. Detoxification services may be provided within a facility that is licensed as a substance abuse treatment program or in a hospital licensed under ch. 395, F.S. Addictions receiving facilities (ARFs) are state-owned, state-operated, or state-contracted programs licensed by the department and designated as secure facilities to provide an intensive level of care. All persons admitted to ARFs are considered clients of the department and their admission cannot be denied solely on the basis of their inability to contribute to the cost of their care.[7] However, admission may be denied due to failure to meet admission criteria, medical or behavioral conditions beyond management capabilities of the program, or lack of space, services, or financial resources to pay for care.[8] Detoxification services may be provided on a residential or outpatient basis to assist an individual with the physiological and psychological withdrawal from the effects of substance abuse. While most of these programs are funded by the department, some of them are private, for-profit organizations that receive no funding from the department.

The department contracts with these community-based substance abuse and mental health treatment providers to deliver services on behalf of the state. Currently, contract language specifies that a provider is an independent contractor and not an agent of the state and the provider agrees to indemnify, defend, and hold the department, its agencies, officers, and employees harmless from all claims, suits, judgments, or damages, including attorneys' fees arising out of any act, actions, neglect or omissions by the provider, its agents, or employees. As of FY 2004-05, the department maintained contracts with 168 substance abuse providers and 249 community mental health provider agencies.[9] There are currently 75 public receiving facilities and 53 private receiving facilities designated by the department. Among the public facilities, 47 are licensed by the Agency for Health Care Administration and designated as Crisis Stabilization Units. The agency may not issue a license to a crisis stabilization unit unless the unit receives state funds. Of the substance abuse providers, 32 provide substance abuse detoxification services and 10 are licensed as addictions receiving facilities (ARFs). In FY 2004-05, services were provided to 69,059 individuals through mental health or substance abuse crisis services agencies contracting with the department.[10]

In 2004, in response to proviso language in the General Appropriations Act, the department conducted a study of medical malpractice issues relating to publicly funded mental health acute care services. The report states that the median cost of insurance for public receiving facilities rose by 72.5 percent during the three years 2001 to 2004, from $15,210 in FY 2001-02 to $26,239 in FY 2003-04. During this same period, the reporting agencies' acute care budgets have increased by 23.01 percent.[11] The study also reported on the number or lawsuits or settlement agreements involving the 31 agencies that responded to the survey. The number of lawsuits declined from 11 in FY 2001-02 to four in the first half of 2004-2005; the number of settlement agreements declined from seven in FY 2001-02 to one in the first half of FY 2004-05.

[6] Section 397.311(18), F.S.
[7] Section 397.431(5), F.S.
[8] Section 397.6751, F.S.
[9] Dep't of Children & Families Staff Analysis & Economic Impact Statement: Senate Bill 280, Oct. 13, 2005.
[10] *Id.*
[11] *Id.*

The impact of rising insurance costs on the entire community-based substance abuse and mental health service system has generated concern in the provider community. Community agencies' general and professional liability annual insurance premiums increased 93 percent from FY 2002-03 to FY 2005-06, with some rate increases exceeding 100 percent. The average cost per sampled agency in FY 2005-06 is $403,038.[12] In some cases, 5 percent or more of a facility's operating budget is being used to pay for liability insurance. The Florida Council for Community Mental Health reports that the cost of medical malpractice liability insurance is limiting the ability of publicly supported community substance abuse and mental health agencies to provide critical treatment services. The following chart illustrates the costs of liability insurance including medical malpractice, officers' and directors' insurance, and other liability insurance for a sample of provider agencies.

Sample of Community Providers' Annual Insurance Premium Increases
FY 2002-03 through FY 2005-06

Facility	FY 2002-03 Premiums	FY 2003-04 Premiums	FY 2004-05 Premiums	FY 2005-06 Premiums	% Increase from '02-03 to '05-06
Act Corporation	$391,000	$425,000	$582,061	$619,603	58.5%
Lakeview Center	$555,301	$793,063	$1,063,966	$1,236,461	122.7%
Personal Enrichment	$72,315	$225,662	$187,556	$159,454	120.5%
Meridian Behavioral Health	$306,364	$420,174	$520,896	$543,201	77.3%
Apalachee Center	$95,630	$247,239	$186,031	$272,355	184.8%
Bayview Center	$59,280	$88,952	$119,629	$137,646	132.2%
Manatee Glens	$99,744	$125,379	$137,404	$162,473	62.9%
LifeStream	$137,843	$167,463	$221,535	$257,879	87.1%
Bridgeway	$160,250	$281,539	$219,817	$238,270	48.7%
Average Cost / % Change	$208,636	$308,275	$359,877	$403,038	93.18%

Source: Florida Council for Behavioral Healthcare, Helping Florida Families in Crisis: Liability Limits for State Funded Detoxification and Public Receiving Facilities, January 1, 2006

Liability limits and immunity provisions comparable to those proposed in this bill are extended to health care[13] and other providers serving inmates of the state correctional system,[14] providers under contract with the Department of Juvenile Justice,[15] and eligible child welfare lead agencies.[16]

III. Effect of Proposed Changes:

The bill creates s. 394.9085, F.S., to provide that certain facilities or programs [a detoxification program defined in s. 397.311(18)(b), F.S, an addictions receiving facility defined in s. 397.311(18)(a), F.S., or a designated public receiving facility defined in s. 394.455(26), F.S.] have limited liability in tort actions based on services for stabilization of a mental health or substance abuse crisis. The bill requires that net economic damages be limited to $1 million per liability claim, including but not limited to past and future medical expenses, wage loss, and loss of earning capacity. Conditional limitations on damages specified by this act shall be increased at the rate of 5 percent each year, to be prorated from its effective date to the date at which damages

[12] Fla. Council for Behavioral Healthcare, *Helping Florida Families in Crisis: Liability Limits for State Funded Detoxification & Public Receiving Facilities*, Jan. 1, 2006.
[13] Section 456.048(2)(a), F.S.
[14] Section 946.5026, F.S.
[15] Section 985.31(5)(d), F.S.
[16] Section 409.1671(1)(h), F.S.

subject to such limitations are awarded by final judgment or settlement. The provider is required, as a part of the contract with the Department of Children and Family Services (DCF or the department), to obtain and maintain general liability minimum coverage in the amount of $1 million per claim and $3 million per incident. However, the bill does not require providers to increase their general liability coverage to coincide with the annual increase of 5 percent on the conditional limitations on damages. Over time, this could create a material gap between the required general liability coverage and the limitations on damages.

The bill also specifies that damages be offset by any collateral source payment that is paid in accordance with s. 768.76, F.S. Additionally, any noneconomic damages against the entities specified by this bill are limited to $200,000 per claim. The bill allows any claim to be settled up to the policy limits without action by the Legislature; claims for any amount exceeding limits specified by this bill may be brought to the Legislature in a claims bill as provided in s. 768.28, F.S. The provider or its insurer must assume any costs for defending action brought under this section. The bill does not indicate that the provider or its insurer must assume the costs for filing a claims bill.

The bill indicates that immunity enjoyed by a provider extends to an employee of the provider when the employee is acting in furtherance of the provider's responsibilities under its contract with the department. The bill's reference to "immunity" may be a technical error, because the bill provides for limitations of liability not immunity from liability. The bill further provides that a provider or employee who acts in a culpably negligent manner or with willful and wanton disregard or unprovoked physical aggression when such acts result in injury or death is not granted immunity by this legislation. The reference to "immunity" again appears to be a technical error. See section VI for a more detailed explanation of these potential technical deficiencies.

Current DCF contract language specifies that a provider is an independent contractor, not an agent of the state. The provisions of this bill specify that a person who provides contractual services for the department is not an employee or agent of the state for the purposes of ch. 440, F.S., Workers' Compensation.

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:

The statutory limits on net economic and noneconomic damages could make the bill subject to a constitutional challenge under the access to courts for redress of injury provision of s. 21, Art. I, Fla. Const.

Behavioral Health Care Providers: Not Agents of the State

As noted above, current contract language specifies that a provider is an independent contractor and not an agent of the state; however, it is "[t]he actual relationship . . . not the label [that] determines whether there is an agency."[17] This part of the analysis assumes that consistent with the current contract language, the behavioral health care providers are not agents of the state. The access to courts issue is raised because the bill's liability limits prevent a plaintiff who receives a jury verdict for more than the statutory cap from receiving a constitutional redress of injuries.[18] In *Kluger*, the Florida Supreme Court held:

> that where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such a right has become a part of the common law of the State pursuant to Fla.Stat. § 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.[19]

This bill does provide an alternative method, that is, the right to file a claims bill pursuant to s. 768.28, F.S., for any amount exceeding the limits. However, the claims bill alternative may not in fact provide a method to redress injuries. Section 768.28(5), F.S., provides that excess tort claims judgments against the state and its agencies and subdivisions may be reported to the Legislature and paid in part or in whole by further act of the Legislature. If the behavioral health care providers are not agents of the state, then a plaintiff would have a claim against the provider but arguably not against the state. Therefore, it would appear that the right to file a claims bill pursuant to s. 768.28, F.S., would not be available. Even if the claims bill alternative was available, it is not clear that the courts would find that such an alternative was a reasonable method to protect the rights of the people to redress for injuries. If the claims bill alternative is not available, then *Kluger* provides that unless the Legislature can show an overpowering public necessity for the abolishment of the right to an unlimited judgment, and no alternative method of meeting such public necessity can be shown, then the bill would violate the right of access to the courts provision of the Florida Constitution.

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[17] *Robinson v. Linzer*, 758 So. 2d 1163, 1164 (Fla. 4th DCA 2000) (citing *Keith v. News & Sun Sentinel Co*., 667 So. 2d 167, 171 (Fla. 1995)).
[18] *See Smith v Dep't of Ins.*, 507 So. 2d 1080, 1088 (Fla. 1987).
[19] *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973).

Behavioral Health Care Providers: Agents of the State

Despite the fact the Department of Children and Family Services (DCF) contracts with behavioral health care providers as independent contractors to deliver services on behalf of the state, "they are not precluded from being agents of the state—thereby entitling them to its statutory immunity from suit and liability" under s. 768.28, F.S.[20] Whether the behavioral health care providers are agents of the state turns on the degree of control retained or exercised by DCF. Assuming that the providers are agents, then "[t]he right of the legislature to waive sovereign immunity and to place conditions on the waiver is plenary under article X, section 13, Florida Constitution."[21] Moreover, assuming that there was no statutory right in a tort action for the type of services covered under this bill predating the adoption of the declaration of rights contained in the Florida Constitution, nor that there was a tort action at common law, then the requirements of *Kluger* concerning access to courts described above would not be applicable.[22] Thus, if the behavioral health care providers are agents of the state, it appears that there would be no constitutional violation of the right of access to courts.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The provisions of this bill limit the economic and noneconomic damages recoverable by certain individuals who have been damaged in tort.

The implementation of this bill will require that certain substance abuse and mental health providers purchase general liability coverage.

The Department of Children and Family Services reports that limiting the damages awarded to an individual may have a direct positive impact on certain mental health and substance abuse providers by containing the cost of their insurance premiums, thereby reducing their administrative costs.

To the extent that providers reduce their costs for insurance and legal fees, there may be increased funding available for services. Conversely, to the extent that injured persons are not able to recover fully for their injuries, more families may be dependent on government-funded assistance programs.

[20] *Stoll v. Noel*, 694 So. 2d 701, 703 (Fla. 1997).
[21] *Smith*, 507 So. 2d at 1089.
[22] *See Cauley v. City of Jacksonville*, 403 So. 2d 379, 385 (Fla. 1981).

C. Government Sector Impact:

The implementation of this legislation may result in the introduction of claims bills that seek to require the state to pay for judgments entered against certain providers that are in excess of the cap specified by this bill.

VI. Technical Deficiencies:

There appears to be a technical drafting error in s. 394.9085(2) of the bill. The first sentence appears to be missing the phrase "as described in this section," which should be inserted after the first two words of the first sentence.

There also appears to be a technical error in the second sentence of s. 394.9085(2) of the bill concerning the reference to "immunities from liability enjoyed by such providers extend as well to each employee of the provider . . . ." The bill does not provide for immunity from liability. The bill provides for limitations on liability. The appropriate language to convey what appears to be the intended meaning is "The same limitations of liability enjoyed by such providers extend as well to each employee of the provider . . . ." Finally, a similar modification appears to be needed with the last sentence of s. 394.9085(2) of the bill, where it again refers to "immunities," which seems to be a reference to "limitations of liability."

VII. Related Issues:

Advocates for this legislation maintain that public receiving facilities, detoxification programs, and addiction receiving facilities exercise the police power and parens patriae power of the state when they admit an individual for evaluation on an involuntary basis and as such are performing what is essentially a state duty. This argument may be more persuasive for public mental health receiving facilities as these facilities are an alternative to costly state mental health hospital admission. Individuals in need of detoxification would go to community acute care hospitals or jails if addictions receiving facilities or detoxification programs were not available.

The preferred organizational structure for health care service delivery is increasingly moving toward the use of managing entities or networks, which may include subcontractors. The liability limitations extended by this bill are not specifically extended to subcontractors of behavioral health care providers as is provided for in ch. 409, F.S., relating to community-based child welfare providers.[23]

[23] Section 409.1671 (1)(j), F.S.

VIII. Summary of Amendments:

None.