

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** CS/CS/HB 491

H. Lee Moffitt Cancer Center and Research Institute

**SPONSOR(S):** Full Appropriations Council on Education & Economic Development; Civil Justice & Courts Policy Committee; Coley and others

**TIED BILLS:** None

**IDEN./SIM. BILLS:** SB 884

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	<b>REFERENCE</b>	<b>ACTION</b>	<b>ANALYST</b>	<b>STAFF DIRECTOR</b>
1)	State Universities & Private Colleges Policy Committee	11 Y, 0 N	Thomas	Tilton
2)	Civil Justice & Courts Policy Committee	9 Y, 1 N, As CS	Bond	De La Paz
3)	Full Appropriations Council on Education & Economic Development	21 Y, 0 N, As CS	Smith	Martin
4)	_____	_____	_____	_____
5)	_____	_____	_____	_____

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**SUMMARY ANALYSIS**

The H. Lee Moffitt Cancer Center and Research Institute ("Moffitt Center") is a leading cancer research and treatment center in Tampa that was created by the Legislature in 1987 and is affiliated with the University of South Florida. This bill amends laws regarding the center to:

- Expand the teaching and research programs of the Moffitt Center to other state universities, in addition to the University of South Florida.
- Specify that any authorized and approved subsidiary corporation of the H. Lee Moffitt Cancer Center and Research Institute is an instrumentality of the state, thus entitled to the sovereign immunity protections of Florida law, including provisions for the applicability of sovereign immunity with regard to claims of bodily injury or death.
- Require additional control over subsidiaries.
- Allow professional income generated by institute members from practice activities to be shared between the Moffitt Center and its subsidiaries, as determined by the chief executive officer.
- Allow state university faculty to hold concurrent appointments at the center.
- Allow the center to utilize faculty physician licensure provisions in the same manner as the medical schools in the state.

This bill does not appear to have a fiscal impact on state or local government.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **The H. Lee Moffitt Cancer Center and Research Institute**

###### *History*

In 1987, the Florida Legislature established the Moffitt Cancer Institute at the University of South Florida (USF).<sup>1</sup> The Board of Regents (BOR) was required to enter into an agreement for the utilization of the facilities on the USF campus known as the H. Lee Moffitt Cancer Center and Research Institute with a not-for-profit organization that was certified by the BOR as a direct support organization. The not-for-profit corporation, acting as an instrumentality of the state, was required to govern and operate the Moffitt Cancer Institute in accordance with the terms of the agreement between the BOR and the not-for-profit corporation. The agreement was required to provide for the following:

- Approval of the articles of incorporation of the not-for-profit corporation by the BOR.
- Certification of the not-for-profit corporation by the BOR as a university direct support organization.
- Utilization of hospital facilities and personnel for mutually approved teaching and research programs conducted by USF.

In 1993, the Legislature granted the not-for-profit corporation the ability to create not-for-profit subsidiaries to provide it the flexibility necessary to compete in the health care industry.<sup>2</sup> The legislative intent section of Ch. 93-167, L.O.F., includes the following statement:

“Whereas, the Legislature considers the not-for-profit corporation that governs and operates the H. Lee Moffitt Cancer Center and Research Institute to be performing a statewide function and to be a corporation primarily acting as an instrumentality of the state, and, therefore, considers any subsidiaries created by virtue of this act to be corporations acting primarily as instrumentalities of the state...”

The 2002 School Code Rewrite replaced references to the Board of Regents with references to the State Board of Education (SBE).<sup>3</sup> In 2004, the Legislature authorized the not-for-profit corporation, with

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<sup>1</sup> Ch. 87-121, L.O.F.

<sup>2</sup> Ch. 93-167, L. O. F.

<sup>3</sup> Ch. 2002-387, L.O.F.

prior approval of the SBE, to create for-profit corporate subsidiaries as well as not-for-profit corporate subsidiaries.<sup>4</sup> The responsibilities of the SBE with regard to the Moffitt Cancer Institute, including the agreement between the SBE and the not-for-profit corporation, were transferred to the Board of Governors in 2007.<sup>5</sup>

Today, the Moffitt Cancer Center employs over 3,800 people. The center covers 1,648,869 square feet. From 2007 to 2008, admissions increased from 7,261 to 7,482, and outpatient visits rose from 264,533 to 272,532. Grant funding increased from \$58.4 million in 2007 to \$59.7 million in 2008, of which \$45.7 million were funds from peer-reviewed grants. The Moffitt Cancer Center is licensed for 162 beds, plus a 26-bed blood and marrow transplant unit. The center has 11 operating rooms, together with diagnostic radiology, MRI, PET and digital mammography capabilities, plus radiation therapy with five linear accelerators.<sup>6</sup>

### Current Role of the Board of Governors related to the Center

The Board of Governors must provide for the following in the agreement with the not-for-profit corporation:

- Approval of the articles of incorporation of the not-for-profit corporation and any not-for-profit subsidiary;
- Use of lands, facilities, and personnel by the not-for-profit corporation and its subsidiaries for mutually approved teaching and research programs conducted by the University of South Florida or other accredited medical schools or research institutes;
- Preparation of an annual financial audit of the accounts and records of the not-for-profit corporation and all subsidiaries and submittal of the annual audit report and a management letter to the Auditor General and the Board of Governors for review. The Board of Governors, the Auditor General, and the Office of Program Policy Analysis and Government Accountability are authorized to require and receive any detail or supplemental data relative to the operation of the not-for-profit corporation or subsidiary; and
- Provision by the not-for-profit corporation and its subsidiaries of non-discrimination.

The Board of Governors is authorized to secure comprehensive general liability protection, including professional liability protection, for the not-for-profit corporation and its subsidiaries pursuant to s. 1004.24, F.S.<sup>7</sup>

In the event that the agreement between the not-for-profit corporation and the Board of Governors terminates, the Board of Governors resumes governance and operation of the facilities.<sup>8</sup>

### Administration of the Moffitt Cancer Institute

The not-for-profit corporation is managed by a board of directors consisting of the President of the University of South Florida, the chair of the Board of Governors or his/her designee, 5 representatives of the state universities, and between 10-14 additional directors who are not medical doctors or state employees. The Moffitt Cancer Institute is administered by a chief executive officer who serves at the pleasure of the board of directors.

State corporate records show that the H. Lee Moffitt Cancer Center and Research Institute, Inc., was incorporated as not-for-profit corporation in 1984. There are three apparent not-for-profit related Florida

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<sup>4</sup> Ch. 2004-2, L.O.F.

<sup>5</sup> Ch. 2007-217, L.O.F.

<sup>6</sup> From <http://www.moffitt.org/Site.aspx?spid=2C9AD5376A2545AEBC60CB4F4CFB1EED>, accessed on 3/17/2009.

<sup>7</sup> Section 1004.43(3), F.S.

<sup>8</sup> Section 1004.43(4), F.S.

corporations that were formed in 1994.<sup>9</sup> In 2006, the center announced that it was forming M2GEN, a for-profit subsidiary, with drug manufacturer Merck & Co. to develop personalized cancer treatments for patients using molecular technology.<sup>10</sup> There is one other for-profit corporation that appears to be related.<sup>11</sup>

### Employees of the Moffitt Cancer Institute

Members of the Moffitt Cancer Institute are eligible to hold concurrent appointments at affiliated academic institutions, and University of South Florida faculty members are eligible to hold concurrent appointments at the Moffitt Cancer Institute. Historically, the vast majority of the physicians on the medical staff at the Institute have been employees of USF. On January 1, 2008, as part of the realignment of the affiliation between Moffitt and USF, a majority of these physicians previously employed by USF transferred to the Institute.<sup>12</sup>

### Sovereign Immunity

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

Article X, s. 13 of the Florida Constitution, recognizes the concept of sovereign immunity and gives the Legislature the right to waive such immunity, in part or in full, by general law. Section 768.28, F.S., contains the limited waiver of sovereign immunity applicable to the state. Subsection (5) limits the recovery of any one person to \$100,000 for one incident and limits all recovery related to one incident to a total of \$200,000. Where the state's sovereign immunity applies, subsection (9) provides that the officers, employees and agents of the state that were involved in the commission of the tort are not personally liable to an injured party.

The term "state agencies or subdivisions" includes the executive departments, the Legislature, the judicial branch, and the independent establishments of the state, including state university boards of trustees; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities.<sup>13</sup>

It is common for the state to create corporations and the authority to create subsidiary corporations. Whether such corporations are instrumentalities of the state is dependent upon the degree of control over the corporation or subsidiary. Where the subsidiary corporation is significantly controlled by government, it is an instrumentality of the state<sup>14</sup>; however, where the subsidiary acts with significant autonomy, it is not.<sup>15</sup>

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<sup>9</sup> State corporate records researched March 17, 2009. The search was limited to a search of the name "H. Lee Moffitt". The apparent related corporations are: H. Lee Moffitt Cancer Center and Research Hospital, Inc.; H. Lee Moffitt Cancer Center and Research Institute Lifetime Cancer Screening Center, Inc.; and H. Lee Moffitt Cancer Center and Research Institute Foundation, Inc.

<sup>10</sup> From <http://www.moffitt.org/Site.aspx?spid=C54AF116F69244D49BACE202F69BC2A6>, accessed on 3/17/2009. M2GEN appears to be a trade name for Moffitt Genetics Corporation, a Florida for-profit corporation formed in 2007. The articles of incorporation of Moffitt Genetics provide that the sole shareholder of the corporation is the H. Lee Moffitt Cancer Center and Research Institute, Inc.

<sup>11</sup> Moffitt Technologies Corporation is a Florida for-profit corporation formed in 2005.

<sup>12</sup> Correspondence from the Moffitt Cancer Center (March 5, 2009), on file with the State Universities & Private Colleges Policy Committee.

<sup>13</sup> Section 768.28(2), F.S.

<sup>14</sup> *Pagan v. Sarasota County Hospital Board*, 884 So.2d 257 (Fla. 2nd DCA 2004); *Prison Rehabilitative Industries & Diversified Enterprises v. Betterson*, 648 So.2d 778 (Fla. 1st DCA 1994).

<sup>15</sup> In *Shands Teaching Hospital & Clinics, Inc. v. Lee*, 478 So.2d 77, 79 (Fla. 1st DCA 1985), the court concluded that the nonprofit corporation to which the State Board of Education leased the Shands Teaching Hospital was not entitled to the benefit of sovereign immunity because the corporate entity was determined to be "an autonomous and self-sufficient entity, one not primarily acting as an instrumentality on behalf of the state."

One circuit court in Hillsborough County has ruled that the "H. Lee Moffitt Cancer Center and Research Institute of Tampa, Inc.", is an instrumentality of the State of Florida and, therefore, the corporation is "entitled to the protections of sovereign immunity and the limited waiver set forth in Section 768.28, Florida Statutes."<sup>16</sup> The ruling did not consider whether any subsidiary corporation of the Moffitt Cancer Institute would similarly be considered an instrumentality of the state.

An entity that is an "instrumentality of the state" falls within the state's sovereign immunity. Section 1004.43(1), F.S., provides that the H. Lee Moffitt Cancer Center and Research Institute is an instrumentality of the state, thus making it clear that it is covered by sovereign immunity. The legislative intent of the bill allowing non-profit subsidiaries stated that any non-profit entity is an instrumentality of the state.<sup>17</sup> Such intent language is not law, but will be considered by any court that would be called upon to determine whether the non-profits are covered by sovereign immunity. With regard to control, all of the subsidiaries appear to be providing medical care and services for cancer research and treatment, operate out of the same campus next to the University of South Florida, share corporate officers, and are controlled by the H. Lee Moffitt Cancer Center and Research Institute, Inc. It appears that the current subsidiaries are protected by sovereign immunity, although this is not specifically provided for in statute.

### **Medical Faculty Certificates**

In general, a person must be granted a license to practice medicine from the state in order to practice medicine within the state. However, s. 458.3145, F.S., provides for exceptions to this rule whereby a physician may be granted a medical faculty certificate. A medical faculty certificate allows medical school faculty physicians to practice medicine at certain facilities in Florida without sitting for and successfully passing a licensure examination.<sup>18</sup> A physician who receives a medical faculty certificate has all the rights and responsibilities as other licensed physicians, except the certificate holder may only practice in conjunction with a full-time faculty position at an accredited medical school and its affiliated clinical facilities or teaching hospitals.<sup>19</sup> The initial medical faculty certificate is valid for 2 years and may be renewed (or extended) every two years thereafter.<sup>20</sup> The number of physicians holding renewed medical faculty certificates is statutorily limited by institution.<sup>21</sup> To be eligible to receive a medical faculty certificate, an individual must:<sup>22</sup>

- Be a graduate of an accredited medical school or its equivalent, or a graduate of a foreign medical school listed with the World Health Organization;
- Hold a valid, current license to practice medicine in another jurisdiction;
- Complete the application form and remit a nonrefundable application fee not to exceed \$500;
- Complete an approved residency or fellowship of at least one year or its equivalent;
- Be at least 21 years of age;
- Be of good moral character;

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<sup>16</sup> *McBride v. H. Lee Moffitt Cancer Center & Research Institute of Tampa, Inc.*, Case No. 95-CA-007231 (13th Judicial Circuit, February 2, 1996), at paragraph 1.b., recorded in OR Book 8039, Page 927, of the Public Records of Hillsborough County, Florida; *affirmed without opinion*, 683 So. 2d 122 (Fla. 2nd DCA 1996).

<sup>17</sup> Chapter 93-167, L.O.F., provided in part: "Whereas, the Legislature considers the not-for-profit corporation that governs and operates the H. Lee Moffitt Cancer Center and Research Institute to be performing a statewide function and to be a corporation primarily acting as an instrumentality of the state, and, therefore, considers any subsidiaries created by virtue of this act to be corporations acting primarily as instrumentalities of the state..."

<sup>18</sup> Section 458.3145(1) & (2), F.S.

<sup>19</sup> Section 458.3145(2) & (3), F.S.

<sup>20</sup> Section 458.3145(2), F.S.

<sup>21</sup> Section 458.3145(4), F.S.

<sup>22</sup> Section 458.3145(1), F.S.

- Not have committed any act in Florida or any other jurisdiction which would constitute the basis for disciplining a physician; and
- Have accepted a full-time faculty appointment to teach in a program of medicine at a qualifying institution.

The qualifying institutions are:

- The University of Florida
- The University of Miami
- The University of South Florida
- The Florida State University
- The Florida International University
- The University of Central Florida
- The Mayo Medical School at the Mayo Clinic in Jacksonville, Florida

There is no limitation on the number of initial certificates a medical school or teaching institution may receive. However, the number of medical faculty certificates that may be renewed by each medical school or teaching institution is statutorily limited.<sup>23</sup> All medical schools, except the Mayo Medical School at the Mayo Clinic in Jacksonville, Florida, are limited to 15 renewed medical faculty certificates. The Mayo Clinic is limited to 5 renewed medical faculty certificates. The Moffitt Cancer Institute currently utilizes certificates assigned to the University of South Florida.<sup>24</sup>

### **Effect of Proposed Changes**

This bill expands the teaching and research programs of the Moffitt Center to other state universities, including the University of South Florida. The bill removes the initial reference to the University of South Florida and provides that the Moffitt Cancer Institute is a "statewide resource for basic and clinical research and multidisciplinary approaches to patient care." The bill provides that the Moffitt Center can set up teaching and research programs at any of the state universities, not just at the University of South Florida. However, the bill leaves unchanged the provision by which the President of the University of South Florida, or his or her designee, is one of the directors of the corporation.

This bill replaces the remaining reference to the State Board of Education with "Board of Governors" to conform to other references in s. 1004.43, F.S., and the Education Code.

The bill specifically provides that the H. Lee Moffitt Cancer Center and Research Institute, Inc., and any authorized and approved subsidiary of the H. Lee Moffitt Cancer Center and Research Institute, Inc., whether not-for-profit or for-profit, are corporations primarily acting as an instrumentality of the state and therefore entitled to the sovereign immunity protection of s. 768.28, F.S. The bill further specifies the circumstances under which sovereign immunity applies with regard to claims of bodily injury or death.

The bill imposes further control over subsidiaries by requiring the Board of Governors' approval of the articles of incorporation of all corporate subsidiaries.

The bill provides that professional income generated by institute members from practice activities may be shared between the not-for-profit corporation and its subsidiaries, as determined by the chief executive officer.

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<sup>23</sup> Section 458.3145(4), F.S.

<sup>24</sup> Section 458.3145(4), F.S.; The Department of Health does not distinguish between the Cancer Institute and the University of South Florida in relation to medical faculty certificates; E-mail correspondence with the Department of Health staff (February 11, 2009); HB 387 analysis, on file with the State Universities & Private Colleges Policy Committee.

The bill provides that only state university faculty may hold concurrent appointments at the Moffitt Cancer Institute.

The bill amends s. 458.3145(1)(i), F.S., to add the H. Lee Moffitt Cancer Center and Research Institute to the list of entities at which an individual may be issued a medical faculty certificate for that individual to practice medicine at such entity. The individual must comply with the requirements of s. 458.3145, F.S., which are the requirements applicable to such certificates at Florida medical schools.

**B. SECTION DIRECTORY:**

Section 1 amends s. 1004.43, F.S., regarding the H. Lee Moffitt Cancer Center.

Section 2 amends s. 458.3145, F.S., regarding medical faculty certificates.

Section 3 provides an effective date of July 1, 2009.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

None.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES**

On April 15, 2009, the Full Appropriations Council on Education & Economic Development adopted one amendment and passed the bill favorably with a committee substitute. The amendment specifies the conditions under which sovereign immunity applies with regard to claims of bodily injury or death.