

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 491

H. Lee Moffitt Cancer Center and Research Institute

SPONSOR(S): Coley

TIED BILLS:

IDEN./SIM. BILLS: SB 884

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) State Universities & Private Colleges Policy Committee		Thomas	Tilton
2) Civil Justice & Courts Policy Committee			
3) Education Policy Council			
4) Full Appropriations Council on General Government & Health Care			
5)			

SUMMARY ANALYSIS

The H. Lee Moffitt Cancer Center and Research Institute (Moffitt Cancer Institute) is governed and operated by a not-for-profit corporation in accordance with the terms of an agreement between the Board of Governors and the not-for-profit corporation.

HB 491 provides that the Moffitt Cancer Institute is a statewide resource for basic and clinical research and multidisciplinary approaches to patient care.

The bill states that the not-for-profit corporation and any authorized and approved subsidiary are corporations primarily acting as instrumentalities of the state, pursuant to s. 768.28(2), F.S., for purposes of sovereign immunity. The not-for-profit corporation is authorized to create both not-for-profit and for-profit corporate subsidiaries.

The bill modifies provisions relating to the agreement between the Board of Governors and the not-for-profit corporation.

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

The bill permits state university faculty to hold concurrent appointments at the Moffitt Cancer Institute.

The bill notwithstanding the provisions of s. 458.3145, F.S., and allows a medical faculty certificate to be issued to individuals who have been offered and accepted a full-time appointment to practice medicine at the Moffitt Cancer Institute.

There appears to be minimal fiscal impact with the provisions of the bill designating the Moffitt Cancer Institute as a statewide resource, modifying the provisions of the agreement between the not-for-profit corporation and the Board of Governors, and allowing state university faculty to hold concurrent appointments at the Institute. The fiscal impact, if any, of the proposed changes relating to sovereign immunity, the sharing of professional income from practice activities, and medical faculty certificates is unknown.

The effective date of this act is July 1, 2009.

## 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:

##### **Present Situation**

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

##### Background

The mission of the H. Lee Moffitt Cancer Center and Research Institute (Moffitt Cancer Institute) is to contribute to the prevention and cure of cancer, working tirelessly in the areas of patient care, research and education to advance one step further in fighting cancer.<sup>1</sup>

Ch. 87-121, L.O.F., established the Moffitt Cancer Institute at the University of South Florida (USF). 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 the event the agreement was terminated for any reason, the BOR would resume governance and operation of said facilities.

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 WHEREAS clauses for Ch. 93-167, L.O.F., include 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...”

<sup>1</sup> <http://www.moffittcancercenter.org/Site.aspx?spid=CA1FC2FC5ABB471A8B17CB3523D51146> (last visited March 3, 2009).

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

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 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>

#### Role of the Board of Governors

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.
- 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>6</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>7</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. The chief executive officer has the following powers and duties:

- Establishing programs which fulfill the mission of the Moffitt Cancer Institute, with the exception of degree conferring programs unless approved by the Board of Governors;
- Controlling the budget and appropriations and donations to the Moffitt Cancer Institute, with the exception of practice income generated by university faculty, which is shared between the Moffitt Cancer Institute and university;
- Appointing members to carry out the research, patient care, and educational activities, and to determine compensation, benefits, and terms of service;
- Controlling the space and equipment within the facilities;
- Creating the administrative structure of the of the Moffitt Cancer Institute;
- Reporting to the Board of Governors or its designee; and

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

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

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

<sup>6</sup> Section 1004.43(3), F.S.

<sup>7</sup> Section 1004.43(4), F.S.

- Providing a copy of the Moffitt Cancer Institute's annual report to the Governor and Cabinet, the President of the Senate, the Speaker of the House of Representatives, and the chair of the Board of Governors.

### 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 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 were 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>8</sup>

### Sovereign Immunity

Sovereign immunity is the legal doctrine which provides that a government may not be sued for a claim without its consent. Such consent is found in s. 768.28, F.S., which provides for the waiver of sovereign immunity for "state agencies or subdivisions" in tort actions and sets recovery limitations. 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, including the Florida Space Authority.<sup>9</sup>

Although neither s. 768.28, F.S., nor s. 1004.43, F.S., explicitly references the extension of sovereign immunity to the not-for-profit corporation or its subsidiaries, the Second District Court of Appeals upheld a circuit court decision that Moffitt is a corporation primarily acting as an instrumentality of the State of Florida and that, as a matter of law, Moffitt is entitled to the protections of sovereign immunity and the limited waiver set forth in s. 768.28, F.S.<sup>10</sup> However, this decision did not consider not-for-profit or for-profit subsidiaries of Moffitt Cancer Institute.

### Medical Faculty Certificates

A medical faculty certificate allows medical school faculty physicians to practice medicine in Florida without sitting for and successfully passing a licensure examination. A physician who receives a medical faculty certificate has all the rights and responsibilities as other licensed physicians, except they may only practice in conjunction with a full-time faculty position at an accredited medical school and its affiliated clinical facilities or teaching hospitals. The initial medical faculty certificate is valid for 2 years and may be renewed (or extended) every two years thereafter.<sup>11</sup> The number of physicians holding renewed medical faculty certificates is statutorily limited by institution.<sup>12</sup>

To be eligible to receive a medical faculty certificate a physician must:<sup>13</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;

<sup>8</sup> Correspondence from the Moffitt Cancer Center (March 5, 2009).

<sup>9</sup> Section 768.28(2), F.S.

<sup>10</sup> *McBride v. H. Lee Moffitt Cancer Center & Research Institute of Tampa, Inc.*, 683 So. 2d 122 (Fla. 2d Dist. Ct. App. 1996) (entering a per curiam affirmed order upholding the Hillsborough County Circuit Court's decision that the not-for-profit corporation is entitled to sovereign immunity in *McBride v. H. Lee Moffitt Cancer Center & Research Institute of Tampa, Inc.*, Case No. 95-CA-007231 (Fla. 13th Cir. Ct. 1996)).

<sup>11</sup> Section 458.3145(2), F.S.

<sup>12</sup> Section 458.3145(4), F.S.

<sup>13</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 any of the following:
  - 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>14</sup> All medical schools, except the Mayo Medical School at the Mayo Clinic in Jacksonville, Florida, are limited to 15 renewed medical faculty certificates. Mayo is limited to 5 renewed medical faculty certificates. The Moffitt Cancer Institute is also permitted to have up to 15 renewed faculty certificates.<sup>15</sup>

### **Effect of Proposed Changes**

HB 491 provides that the Moffitt Cancer Institute is a statewide resource for basic and clinical research and multidisciplinary approaches to patient care.

The 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.

The bill states that the not-for-profit corporation and any authorized and approved subsidiary are corporations primarily acting as instrumentalities of the state, pursuant to s. 768.28(2), F.S., for purposes of sovereign immunity. According to representatives of the Moffitt Cancer Institute, language in the bill is modeled after s. 1004.447, F.S., which relates to the Institute for Human and Machine Cognition, Inc.<sup>16</sup> The Moffitt Cancer Institute is authorized to create both for-profit and not-for-profit corporate subsidiaries to fulfill its mission. At the present time, the Institute for Human and Machine Cognition is only authorized to create not-for-profit corporate subsidiaries.<sup>17</sup>

The bill requires approval by the Board of Governors of the articles of incorporation of any corporate subsidiary, not just any not-for-profit corporate subsidiary.

The bill revises provisions of the agreement between the not-for-profit corporation and the Board of Governors to permit utilization of lands, facilities and personnel by the corporation and its subsidiaries for research, education, treatment, prevention and the early detection of cancer and for mutually approved teaching and research programs conducted by any state university, not just USF, in addition to other accredited medical schools or research institutes.

The bill permits professional income generated by institute members from practice activities to be shared between the not-for-profit corporation and its subsidiaries as determined by the chief executive officer. Professional income generated by state university faculty from practice activities at the institute must be shared between the institute and the university as determined by the chief executive officer and the appropriate dean or vice president.

The bill permits state university faculty to hold concurrent appointments at the Moffitt Cancer Institute.

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<sup>14</sup> Section 458.3145(4), F.S.

<sup>15</sup> Section 458.3145 (4), F.S.; 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.

<sup>16</sup> E-mail correspondence with the H. Lee Moffitt Cancer Center and Research Institute staff (March 2, 2009).

<sup>17</sup> Section 1004.447(1), F.S.

The bill notwithstanding the provisions of s. 458.3145, F.S., and allows a medical faculty certificate to be issued to individuals who have been offered and accepted a full-time appointment to practice medicine at the Moffitt Cancer Institute.

**B. SECTION DIRECTORY:**

Section 1. Amends s. 1004.43, F.S., revising provisions relating to the establishment of the institute; conforming provisions relating to the agreement by the Board of Governors and the not-for-profit corporation for the use of facilities on the campus of the University of South Florida; specifying that the not-for-profit corporation and its subsidiaries shall act as instrumentalities of the state for purposes of sovereign immunity; authorizing the use of land, facilities, and personnel for teaching and research programs conducted by state universities; revising provisions relating to the control and sharing of certain income; authorizing the issuance of a medical faculty certificate to an individual appointed to practice medicine at the institute.

Section 2. Provides an effective date of July 1, 2009.

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

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

1. Revenues:

See FISCAL COMMENTS.

2. Expenditures:

See FISCAL COMMENTS.

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

1. Revenues:

See FISCAL COMMENTS.

2. Expenditures:

See FISCAL COMMENTS.

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

See FISCAL COMMENTS.

**D. FISCAL COMMENTS:**

There appears to be minimal fiscal impact with the provisions of the bill designating the Moffitt Cancer Institute as a statewide resource, modifying the provisions of the agreement between the not-for-profit corporation and the Board of Governors, and allowing state university faculty to hold concurrent appointments at the Institute. The fiscal impact, if any, of the proposed changes relating to sovereign immunity, the sharing of professional income from practice activities, and medical faculty certificates is unknown.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require a city or county to expend funds or to take any action requiring the expenditure of funds.

The bill does not appear to reduce the authority that municipalities or counties have to raise revenues in the aggregate.

This bill does not appear to reduce the percentage of state tax shared with counties or municipalities.

2. Other:

**B. RULE-MAKING AUTHORITY:**

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

Lines 276 – 280 notwithstanding the provisions of s. 458.3145, F.S. and permit the issuing of a medical faculty certificate to an individual who has been offered and accepted a full-time appointment to practice medicine at the Moffitt Cancer Institute. Correspondence from the Moffitt Cancer Center indicates that the purpose of this language is to clarify that institute employed physicians who are otherwise eligible for the certificates can be issued medical faculty certificates.<sup>18</sup> It appears that the notwithstanding provision in the bill is overly broad and replacing the reference to “s. 458.3145” on line 277 with a reference to “s. 458.3145(1)(i)” would accomplish the desired purpose.

It is unclear whether the bill’s specification of sovereign immunity for the not-for-profit corporation and its for-profit and not-for-profit subsidiaries is statutorily correctly located or appropriate.

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

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<sup>18</sup> Correspondence from the Moffitt Cancer Center (March 5, 2009)  
**STORAGE NAME:** h0491.SPCP.doc  
**DATE:** 2/16/2009