HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1019 Foster Care Providers
SPONSOR(S): Plakon and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1500

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health & Human Services Access Subcommittee	11 Y, 4 N	Poche	Schoolfield
2) Civil Justice Subcommittee	9 Y, 5 N	Thomas	Bond
3) Health Care Appropriations Subcommittee			
4) Health & Human Services Committee			

SUMMARY ANALYSIS

House Bill 1019 reduces the general liability insurance requirement for an eligible lead community-based provider ("lead agency") and a subcontractor of a lead agency involved in the community-based care (CBC) program to provide foster care services to abused and neglected children in Florida. The bill also caps the economic and noneconomic damages recoverable in a tort action by a claimant or claimant(s) against a lead agency or subcontractor, or against multiple entities involved in the same incident.

The bill provides that the Department of Children and Families (DCF) is not liable in tort for acts or omissions of a lead agency, or a subcontractor of the lead agency, or the officers, agents, or employees of the lead agency or subcontractor. The bill prohibits DCF from requiring a lead agency or a subcontractor to indemnify DCF against the department's own acts or omissions. Further, the bill provides that DCF may not require a lead agency or subcontractor to include the department as an additional insured on any insurance policy.

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

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

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

DCF is one of the state agencies responsible for providing assistance and services to abused and neglected children. Prior to 1996, DCF accomplished its mission by directly delivering child protection services to recipients. In 1996, DCF began to privatize child protection services through a CBC pilot program.[1] Through the CBC program, private companies, known as "lead agencies", enter into a contract with DCF to provide foster care services, child abuse services, mental health services, and other types of assistance.

Upon evaluating the program, DCF found that the lead agencies were able to have more frequent in-person contact with children in the program, to achieve lower ratios of children per home, to maintain smaller caseloads per case worker, and to have a lower average number of per child placement changes.[2] Due to the success of the pilot program, the Legislature significantly amended s. 409.1671, F.S., to create the CBC program privatizing foster care services, which remains largely unchanged today.[3] There are currently 20 lead agencies providing these and other services across the state.[4] Lead agencies use subcontractors to deliver services directly to recipients.

Among many other facets of the CBC program, current law requires mandatory liability insurance limits to be maintained by lead agencies and their subcontractors.[5] In addition to the mandatory insurance limits, current law allows for a yearly increase of 5 percent in the conditional limitation on damages available to claimants to account for the annual increase in the cost of goods and services.[6] Lead agencies and subcontractors must maintain a minimum level of general liability insurance of $1 million per claimant and $3 million per liability incident.[7] Economic damages[8] per claimant are capped at $1,550,000.[9] Noneconomic damages[10] per claimant are capped at $310,000.[11] In addition, lead agencies and subcontractors must maintain minimum bodily injury liability insurance coverage of $100,000 per claim and $300,000 per incident.[12] Also, providers must maintain $1,000,000 in non-owned automobile insurance coverage.[13] This coverage is secondary to the primary insurance coverage of $100,000 per claim and $300,000 per incident that must be maintained by employees of lead agencies or subcontractors who use their personal vehicles to transport children and families in the course of providing services.[14]

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[1] State of Florida, Department of Children and Families, *Community-Based Care Implementation Plan*, July 1999, pg. 2.
[2] *Id.*
[3] *See* s. 2, Ch. 2009-206, L.O.F.
[4] Lead Agency Map, State of Florida, Department of Children and Families, at http://www.dcf.state.fl.us/programs/cbc/docs/lead_agency_map.pdf (last visited March 21, 2011).
[5] Section 409.1671(1)(h) and (j), F.S.
[6] Section 409.1671(1)(l), F.S.
[7] Section 409.1671(1)(h) and (j), F.S.
[8] *See, e.g.,* s. 766.202(3), F.S., defining "economic damages" as financial losses that would not have occurred but for the injury giving rise to the cause of action in tort, including, but not limited to, past and future medical expenses, wage loss, loss of future earnings capacity, funeral expenses, and loss of prospective net accumulations of an estate.
[9] The original limit on economic damages was set at $1,000,000 in Chapter 2009-206, L.O.F. The current limit on economic damages includes the annual 5 percent increase allowed by law.
[10] *See, e.g.,* s. 766.202(8), F.S., defining "noneconomic damages" as non-financial losses that would not have occurred but for the injury giving rise to the cause of action in tort, including, but not limited to, pain and suffering, loss of support and services, loss of companionship or consortium, inconvenience, physical impairment, mental anguish, disfigurement, and loss of capacity for enjoyment of life.
[11] The original limit on noneconomic damages was set at $200,000 in Chapter 2009-206, L.O.F. The current limit on noneconomic damages includes the annual 5 percent increase allowed by law.
[12] Section 409.1671(h) and (j), F.S.
[13] Section 409.1671(h), F.S.
[14] Section 409.1671(j), F.S.

The limits on liability provided for lead agencies and their subcontractors are not applicable if the lead agency or the subcontractor "acts in a culpably negligent manner or with willful and wanton disregard or unprovoked physical aggression when such acts result in injury or death or such acts proximately cause such injury or death…"[15] Culpable negligence is defined as "reckless indifference or grossly careless disregard of human life."[16] Further, the statute authorizes "a claim bill may be brought on behalf of a claimant pursuant to s. 768.28 for any amount exceeding the limits" provided to lead agencies and their subcontractors.[17]

According to industry advocates, lead agencies collectively paid approximately $2,750,000 in insurance premiums in 2010.[18] While each lead agency contracts with many subcontractors to directly provide services and each subcontractor must maintain the same insurance coverage levels as the lead agency, it is unknown how much the subcontractors are paying in insurance premiums.

It has been reported that tort claims against lead community-based providers, and subcontractors of the providers, are increasing.[19] One possible reason for the increase in claims is the high liability insurance requirement, which guarantees a significant source of recovery for a plaintiff in a tort case, assuming the plaintiff can obtain a favorable verdict. Also, the statute of limitations for intentional torts based on abuse can be lengthy, leaving a lead community-based provider, or subcontractor of the provider, liable for potentially significant damages over an extended period of time.[20]

Effect of Proposed Changes

The bill reduces the mandatory general liability insurance coverage requirement for lead agencies and subcontractors to $500,000 per claim and a policy limit aggregate of $1,500,000. The limit on economic damages available to a claimant is reduced to $500,000 and capped at $1,500,000 for all claimants per incident. The total amount of economic damages recoverable by all claimants is limited to $2,000,000 against a lead agency and all subcontractors involved in the same incident.

The bill also limits noneconomic damages available to a claimant to $200,000 per claimant and $500,000 per incident. The total amount of noneconomic damages recoverable by all claimants is limited to $1,000,000 against a lead agency and all subcontractors involved in the same incident.

The bill repeals s. 409.1671(1)(l), F.S., eliminating the 5 percent annual increase in the conditional limitations on damages.

The bill adds language to s. 409.1671(2)(a), F.S., to state that DCF is not liable in tort for the acts or omissions of a lead agency, or a subcontractor of a lead agency, or the officers, agents, or employees of a lead agency, or subcontractor of a lead agency. The department may not require a lead agency or subcontractor of a lead agency to indemnify the department for its own acts or omissions. Lastly, the department may not require a lead agency or subcontractor to include the department as an additional insured on any insurance policy.

B. SECTION DIRECTORY:

Section 1: Amends s. 409.1671, F.S., relating to foster care and related services; outsourcing.

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[15] Section 409.1671(1)(i) and (k), F.S.
[16] *Id.*
[17] Section 409.1671(1)(h) and (j), F.S.
[18] *See* A Premium on Care: The Importance of Providing Affordable Insurance Coverage to Florida's Community-Based Care Agencies, Cynthia S. Tunnicliff, et al., at pg. 6, citing data provided by the Florida Coalition for Children.
[19] *Id.*
[20] Section 95.11, F.S., which, in part, provides for limitations on actions in tort, ranging from four years for actions founded on negligence or statutory liability [s. 95.11(3)(a) and (f), F.S.] to at least seven years, with a possibility of many years beyond, for intentional torts based on abuse [s. 95.11(7), F.S.].

Section 2: Provides an effective date of July 1, 2011.

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:

Lower liability limits could encourage insurers to enter, or re-enter, the market in Florida, creating competition for business and allowing lead agencies and subcontractors to maximize their premium dollars. Lead agencies and subcontractors should realize savings on insurance premiums.

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:

   DAMAGES CAPS - This bill caps the economic and noneconomic damages recoverable in certain tort actions. The Florida Constitution places limits on the Legislature's ability to cap damages in tort cases or otherwise restrict a litigant's access to courts. The "access to courts provision" of the declaration of rights in the Florida Constitution requires that the courts "be open to every person for redress of any injury."[21]

   In *Kluger v. White*,[22] the Florida Supreme Court considered a statute that abolished causes of action to recover for property damage caused by an automobile accident unless the damage exceeded

[21] Article I, s. 21, FLA. CONST.
[22] 281 So.2d 1 (Fla. 1973).

$550.[23] The court held that the statute violated the access to courts provision of the state constitution. In *Kluger*, the court held that where a right to access to the courts for redress for a particular injury predates the adoption of the declaration of rights in the 1968 state constitution, the Legislature cannot abolish the right without providing a reasonable alternative unless the Legislature can show (1) an overpowering public necessity to abolish the right and (2) no alternative method of meeting such public necessity.[24]

The court applied the *Kluger* test in *Smith v. Department of Insurance*.[25] In 1986, the Legislature passed comprehensive tort reform legislation that included a cap of $450,000 on noneconomic damages. The Florida Supreme Court held that the right to sue for unlimited economic damages existed at the time the constitution was adopted.[26] The court said that a cap on noneconomic damages must meet the *Kluger* test in order to pass constitutional muster.[27] The *Smith* court held that the Legislature did not provide an alternative remedy or commensurate benefit in exchange for limiting the right to recover damages and found that the cap on noneconomic damages violated the access to courts provision of the Florida Constitution.[28]

The issue of caps on noneconomic damages arose again in *University of Miami v. Echarte*.[29] In 1988, the Legislature instituted a voluntary binding arbitration process in medical malpractice cases. The Florida Supreme Court applied the *Kluger* test and found that arbitration statute provided a commensurate benefit for the loss of the right to recover full noneconomic damages.[30] In addition, the *Echarte* court found that the Legislature had shown an overpowering public necessity for instituting the caps and that there was no reasonable alternative.[31]

The arbitration statute at issue in *Smith* states that damages are capped at $250,000 "per incident." In *St. Mary's Hospital, Inc. v. Phillipe*,[32] the Florida Supreme Court considered whether the "per incident" language meant that each claimant could recover the full $250,000 or whether all claimants in a single incident must divide $250,000. The court held that the statute meant that each claimant was entitled to recover up to $250,000 per incident.[33] To hold otherwise, the court said, would raise equal protection concerns because a claimant's recovery would be limited simply because there were multiple claimants in a given case.[34]

Most recently, a federal district court upheld the caps on noneconomic damages in medical malpractice lawsuits put in place in 2003 (against an access to courts challenge and an equal protection challenge).[35] The court deferred to the Florida Legislature's findings of fact based upon the recommendations of the Governor's Select Task Force on Healthcare Professional Liability Insurance and held that these findings "presented an overpowering public necessity requiring the adoption of the liability caps."[36] The findings were extensive and convinced the court that a medical malpractice crisis did exist and the caps were the only means available to address this crisis.[37]

B. RULE-MAKING AUTHORITY:

Not applicable.

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[23] *See Kluger*, 281 So.2d at 2-3.
[24] *See Kluger*, 281 So.2d at 4.
[25] 507 So.2d 1080 (Fla. 1987).
[26] *See Smith*, 507 So.2d at 1087
[27] *See Smith*, 507 So.2d at 1087-1088.
[28] *See Smith*, 507 So.2d at 1089.
[29] 618 So.2d 189 (Fla. 1993).
[30] *See Echarte*, 618 So.2d at 194.
[31] *See Echarte*, 618 So.2d at 195-97.
[32] 769 So.2d 961 (Fla. 2000).
[33] *See St. Mary's*, 769 So.2d at 967-971.
[34] *See St. Mary's*, 769 So.2d at 971-973.
[35] *M.D., a Minor, v. United States*, Case No. 8:09-cv-438-EAK-MAP, Sept. 30, 2010; United States District Court, M.D. Florida.
[36] *Id.* at 2.
[37] *Id.*

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.