

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Rules

BILL: CS/SB 256

INTRODUCER: Judiciary Committee and Senator Baxley

SUBJECT: Child Protection Teams

DATE: March 12, 2019

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|--------------|----------------|-----------|--------------------|
| 1. | <u>Delia</u> | <u>Hendon</u> | <u>CF</u> | Favorable |
| 2. | <u>Davis</u> | <u>Cibula</u> | <u>JU</u> | Fav/CS |
| 3. | <u>Delia</u> | <u>Phelps</u> | <u>RC</u> | Pre-meeting |

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 256 extends sovereign immunity protections to any member of a child protection team when the team member is carrying out her or his duties under the control, direction, and supervision of the state or any of its agencies or subdivisions. A child protection team is a group of professionals who receive referrals, primarily from child protective investigators and sheriff's offices, when child abuse, abandonment, or neglect is alleged. The team, directed by a physician, evaluates the allegations, assesses risks, and provides recommendations for child safety and support services.

The bill takes effect July 1, 2019.

II. Present Situation:

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 state or its political subdivisions for the torts of officers, employees, or agents of those governments unless the immunity is expressly waived.

Article X, section 13 of the Florida Constitution recognizes the concept of sovereign immunity and gives the Legislature the power to waive 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.

Under this statute, officers, employees, and agents of the state may not be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function. Instead, the state steps in as the party litigant and defends against the claim. However, people may be held personally liable for acts committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

The recovery by any one person is limited to \$200,000 for one incident and the total for all recoveries related to one incident is limited to \$300,000.¹ The sovereign immunity recovery caps do not prevent a plaintiff from obtaining a judgment in excess of the caps, but the plaintiff is not entitled to recover the excess damages without action by the Legislature.²

Child Protection Teams

Description

The Department of Health currently contracts with 22 independent, community-based organizations that serve as child protection teams.³ A child protection team is a group of professionals, directed by a physician, who receive referrals from the investigators of the Department of Children and Families (DCF) and sheriff's offices when child abuse or neglect is alleged.⁴ The teams perform medical evaluations, assess risks, and provide recommendations for child safety and support services.

Composition and Responsibilities

Each of the 22 teams operates under the oversight of a medical director who is a board-certified pediatrician with special training in child abuse and neglect. In the case of a large geographical areas, some may have an associate medical director to ensure adequate coverage. The physician must be approved by Children's Medical Services at the Department of Health (DOH). Teams consist of additional physicians, attorneys, advanced registered nurse practitioners, psychologists, physician assistants,⁵ registered nurses, team coordinators, support staff, case coordinators, and support and data personnel.⁶

Each office must be available 24 hours per day, every day, to provide immediate medical diagnosis and evaluation, for consultations by phone, or for other assessment services. The

¹ Section 768.28(5), F.S.

² *Id.*

³ Florida Department of Health, *Senate Bill 256 Agency Legislative Bill Analysis* (Jan. 8, 2019) (on file with the Senate Committee on Judiciary).

⁴ Department of Health, Children's Medical Services, *Child Protection Teams*, http://www.floridahealth.gov/AlternateSites/CMS-Kids/families/child_protection_safety/child_protection_teams.html and s. 39.303(3), F.S.

⁵ Florida Department of Health, Children's Medical Services, *Child Protection Team Program Handbook*, 6-7 (June 2015) http://www.floridahealth.gov/AlternateSites/CMS-Kids/providers/prevention/documents/handbook_cpt.pdf.

⁶ See note 3, *supra*.

groups that the teams target for assessments are children who may be physically abused, sexually abused, and those who lack health care, including medically neglected children.⁷

Services

When a child protection team accepts a referral from DCF or law enforcement, the team may provide these services:

- Medical diagnosis and evaluation services;
- Nursing assessments;
- Child and family social assessments;
- Multidisciplinary case staffings;
- Psychological and psychiatric diagnosis and evaluations;
- Specialized and forensic interviews; and
- Expert medical, psychological, and related professional testimony in court cases.⁸

Cases that must be referred to a Child Protection Team

The following cases involving child abuse, abandonment, or neglect that are reported to the Child Abuse Hotline must be referred to a child protection team:

- Head injuries, bruises to the head or neck, burns, or fractures in a child, regardless of age.
- Bruises that appear anywhere on a child who is five years old or younger.
- Alleged child sexual abuse.
- A sexually transmitted disease that occurs in a prepubescent child.
- Reported malnutrition or failure to thrive.
- Medical neglect.
- Instances of a child or sibling remaining in a home where a child has been pronounced dead on arrival at a hospital or a child has been injured and then died due to suspected abuse, abandonment, or neglect.
- Symptoms of serious emotional issues occurring in a child where emotional or other forms of abuse, abandonment, or neglect are suspected.⁹

Funding

The Child Protection Team Program receives funding through the Department of Health, Division of Children's Medical Services.¹⁰

⁷ Florida Department of Health, Children's Medical Services, *Child Protection Team Program Handbook*, 4 (June 2015) http://www.floridahealth.gov/AlternateSites/CMS-Kids/providers/prevention/documents/handbook_cpt.pdf

⁸ See note 4, *supra*, and s. 39.303, F.S.

⁹ Section 39.303(4), F.S.

¹⁰ Florida Department of Health, Children's Medical Services, *Child Protection Team Program Handbook*, 4 (June 2015) http://www.floridahealth.gov/AlternateSites/CMS-Kids/providers/prevention/documents/handbook_cpt.pdf. The Department of Health, Division of Children's Medical Services, Bureau of Child Protection and Special Technologies staff oversees the statewide Child Protection Team system.

Employees and Sovereign Immunity

According to the Department of Health, the state's child protection teams have approximately 364 team members¹¹ who are employed by private, non-profit entities. Of the 22 child protection teams, five teams are employees of a governmental entity and *are covered* by sovereign immunity. Those teams, composed of 126 members, are: the University of Florida in Gainesville team, the University of Florida in Jacksonville team, the University of Miami team, the University of South Florida team, and the Broward County team, whose members are employees of the Broward County Sheriff's Office. The remaining 238 employees who make up the other 17 teams are independent contractors and *are not* covered by sovereign immunity in tort actions.¹² The teams that do not receive sovereign immunity protection must purchase their own liability coverage.

Lawsuits Filed Against Child Protection Teams

The Division of Risk Management within the Chief Financial Officer's office queried its files for recent lawsuits involving child protection teams. For fiscal years 2016-2017, 2017-2018, and the current year to date, the Division of Risk Management was not able to identify a lawsuit filed against a government employed child protection team.¹³

Sovereign Immunity and Child Protection Team Physicians

It is not definitively settled whether all child protection team *physicians* are covered under sovereign immunity. Whether sovereign immunity applies depends on the degree of control that the state maintains over the agent. In *Stoll v. Noel*,¹⁴ the Florida Supreme Court explained that, under the appropriate circumstances, independent contractor physicians may be agents of the state for purposes of sovereign immunity:

One who contracts on behalf of another and subject to the other's control except with respect to his physical conduct is an agent and also independent contractor.¹⁵

The *Stoll* Court examined the employment contract between the Children's Medical Services (CMS) physicians and the state to determine whether the state's right to control was sufficient to create an agency relationship and held that it did. The manuals and guides given to physician

¹¹ According to the Department of Health, the 364 employees figure does not include the child protection team medical directors.

¹² See note 3, *supra*.

¹³ Email prepared by Molly C. Merry, CPA, Director, Division of Risk Management, and forwarded by Chase Mitchell, Office of Legislative Affairs, Office of the Chief Financial Officer (Feb. 16, 2019) (on file with the Senate Committee on Judiciary). Risk Management noted that it did not have a specific code in its system that identified child protection teams that were involved in lawsuits. In updating a 2016 report, the workers queried all cases against DCF since July 1, 2012, and used cause codes such as child abuse, failure to protect, wrongful death by a foster parent, or similar category. The liability adjusters found no reported cases related to child protection teams in fiscal years 2016-2017 to the present. In fiscal years 2013-2014 through 2015-2016 notices were filed that litigation might ensue, but no lawsuits have been filed based upon those notices. The email shows that earlier lawsuits were filed dating back to fiscal year 2006-2007, but it is not readily apparent the extent to which child protections teams were named in the litigation.

¹⁴ *Stoll v. Noel*, 694 So. 2d 701 (Fla. 1997).

¹⁵ *Id.* at 703, quoting from the *Restatement (Second) of Agency* s. 14N (1957).

consultants demonstrated that CMS had final authority over all care and treatment provided to CMS patients, and that CMS could refuse to allow a physician consultant's recommended course of treatment of any CMS patient for either medical or budgetary reasons. Furthermore, the Court's conclusion was supported by the state's acknowledgement that the manual creates an agency relationship between CMS and its physician consultants, and the state acknowledged full financial responsibility for the physicians' actions. The Court noted that the state's interpretation of its manual is entitled to judicial deference and great weight.¹⁶

III. Effect of Proposed Changes:

The bill amends s. 768.28(9)(b), F.S., by expanding the definition of "officer, employee, or agent" to include "any member of a child protection team, as defined in s. 39.01, when carrying out her or his duties as a team member under the control, direction, and supervision of the state or any of its agencies or subdivisions" As a result, a member of a child protection team will receive sovereign immunity protection in a tort action only when the team member is determined to have acted under the control, direction, and supervision of the state or one of its entities. If the child protection team member is found to be acting outside of that control, then sovereign immunity will not protect the team member in a tort lawsuit.

This amendatory language appears to focus on the agency role of the team member in a manner similar to the Supreme Court's *Stoll* decision discussed in the Present Situation above. To receive sovereign immunity, the team member cannot be acting independently and separate from the supervision of the state or one of its entities. In the *Stoll* decision, the Court held that physician consultants were agents of the state and entitled to sovereign immunity because the state had to authorize the physician's services in advance and maintain supervisory authority over the physician. Additionally, final authority for the treatment of the patients did not reside with the physician consultants, but with the employing state entity.

The bill takes effect July 1, 2019.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

¹⁶ *Id.*

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may reduce the need for child protection teams to purchase liability insurance.

C. Government Sector Impact:

The Department of Health estimates that the fiscal impact of providing sovereign immunity coverage to child protection teams cannot be determined but might be significant. Potential costs to the Department could include legal representation, the cost to settle a suit, and related litigation expenses. Because 126 of the 364 statewide CPT employees are already covered by sovereign immunity, the number of additional persons contributing to any potential fiscal impact is approximately 238.¹⁷

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 768.28 Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Judiciary on March 4, 2019:

The underlying bill broadly granted sovereign immunity to any member of a child protection team when she or he was carrying out duties as a team member. The

¹⁷Florida Department of Health, *Senate Bill 256 Agency Legislative Bill Analysis* (Jan. 8, 2019) (on file with the Senate Committee on Judiciary).

committee substitute limits the scope of that grant. For a team member to receive liability protection under the committee substitute, he or she must have acted under the control, direction, and supervision of the state or one of its agencies or subdivisions.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
