



# The Florida Senate

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Committee on Health Regulation

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## EVALUATE EXTENSION OF SOVEREIGN IMMUNITY TO CONTRACT HEALTH CARE PROVIDERS IN REGIONAL PERINATAL INTENSIVE CARE CENTERS

### SUMMARY

The Regional Perinatal Intensive Care Center (RPICC) program was created by the Legislature to provide specialized medical treatment to women with high-risk pregnancies and neonatal intensive care services to critically ill and low birth-weight infants. Twelve hospitals participate in the RPICC program. The RPICC program is administered by the Children's Medical Services (CMS) program in the Department of Health (DOH) and provides a coordinated statewide network of obstetrical and perinatal care for Medicaid or Medicaid-eligible women and their infants.

Some of the RPICCs have experienced difficulties in recruiting physician specialists. Some stakeholders at the RPICCs assert that the extension of sovereign immunity to contract health care providers would help the RPICCs recruit and retain maternal-fetal physician specialists to provide services in the RPICC program clinical sites. Sovereign immunity insulates the state and its officers or agents from a lawsuit.

This report provides background information and an analysis of complex legal issues involving sovereign immunity, agency law, public records and meetings laws, and constitutional law. Senate professional staff recommends that the Legislature not statutorily designate RPICC contract providers as agents of the state for purposes of sovereign immunity.

### BACKGROUND

#### Regional Perinatal Intensive Care Centers

Under sections 383.15 through 383.21, Florida Statutes, the RPICC program delivers obstetrical services to women identified as having high-risk pregnancies and neonatal intensive care services to critically ill and low birth-weight newborns. The RPICC program is a comprehensive, statewide perinatal health care delivery system administered by the CMS program in the Florida DOH.

The program provides medical care through DOH contracts with hospitals that provide RPICC program services to all medically and financially eligible patients at designated clinical sites that serve as RPICCs. The contracts provide that patients will receive services from the center and that the parents or guardians of patients who participate in the program and who are in compliance with Medicaid eligibility requirements may not be additionally charged for treatment and care under the contract.

Both pregnant women and neonates must be determined medically eligible for the RPICC program services. The medical eligibility standards for neonates are specified in Rule 64C-6.003(1)(c), Florida Administrative Code (F.A.C.). The medical eligibility standards for pregnant women are specified in Rule 64C.6.003(3)(c), F.A.C.

A pregnant woman or neonate is considered financially eligible for the RPICC program if the applicant meets the Medicaid eligibility requirements in ss. 409.903(5) and 409.904(7), F.S. Essentially, pregnant women and infants up to 1 year of age are eligible for Medicaid if their household gross income does not exceed 185 percent of the Federal Poverty Level. Pregnant women who are income eligible for Medicaid remain eligible throughout the pregnancy and for the two months following the birth of the child. Newborns are eligible for up to one year of Medicaid coverage automatically if the mother is eligible. In 2005, 120,274 births, or 53.3 percent of all births in Florida, were to Medicaid-eligible pregnant women.<sup>1</sup>

The DOH must designate at least one center to serve a geographic area representing each region of Florida in which at least 10,000 live births occur per year. Twelve

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<sup>1</sup> "Florida Medicaid Maternal and Child Health Status Indicators: 2001-2005," April 2007 prepared for the Agency Health Care Administration by the Lawton and Rhea Chiles Center for Healthy Mothers and Babies.

hospitals participate in the RPICC program and serve as clinical sites throughout Florida:

- Sacred Heart Hospital (Pensacola);
- Shands Teaching Hospital (Gainesville);
- Shands Jacksonville (Jacksonville);
- Tampa General Hospital (Tampa);
- Arnold Palmer Hospital (Orlando);
- All Children's Hospital and Bayfront Medical Center (St. Petersburg);<sup>2</sup>
- St. Mary's Hospital (West Palm Beach);
- Broward General Medical Center (Fort Lauderdale);
- Memorial Hospital (Hollywood);
- Lee Memorial Hospital (Fort Myers); and
- Jackson Memorial Hospital (Miami).

During fiscal year 2005-06, about \$34 million was saved in hospital and physician reimbursements associated with neonatal intensive care unit services by the provision of prenatal care through the RPICC program. Over 178,902 women with high-risk pregnancies have received prenatal and obstetrical intensive care services under the RPICC program since 1977.<sup>3</sup> The mortality rate for neonates in Florida has dropped from 13.6 deaths per 1000 live births (1974) to 4.6 deaths per 1000 live births (2005).<sup>4</sup> The RPICC hospitals have given care to over 150,264 critically ill newborns since the inception of the RPICC program.<sup>5</sup>

### Sovereign Immunity

The doctrine of sovereign immunity is a legal doctrine rooted in common law that insulates the state and its officers or agents from a lawsuit. At common law, the doctrine is based, in part, on the maxim that "The king can do no wrong." Under the doctrine, the king, as sovereign, is beyond the jurisdiction of any court.<sup>6</sup> The justification of this common law doctrine in modern times is based on some of the following public policy objectives:

- Protection of the public treasury from excessive encroachment;
- Protection of the orderly administration of government from disruption by suit;
- Preservation of governmental discretion;
- Enhancement of the separation of powers by preventing interference by the judiciary with discretionary functions of the legislative and executive branches, except where a constitutional or statutory right is violated; and
- Elimination of any chilling effect on law enforcement officials who might be less willing to investigate, pursue, and arrest criminals due to errors resulting in liability.<sup>7</sup>

Article X, s. 13 of the State Constitution authorized the Florida Legislature in 1868 to waive sovereign immunity by stating that, "Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating." The doctrine of sovereign immunity prohibits lawsuits in state court against a state government, and its agencies and subdivisions without the government's consent.

Section 768.28, F.S., provides that sovereign immunity for tort liability is waived for the state, and its agencies and subdivisions. Section 768.28(5), F.S., imposes a \$100,000 limit on the government's liability to a single person. For multiple claims arising out of a single incident, the limit is \$200,000. Section 768.28, F.S., outlines requirements for claimants alleging an injury by the state or its agencies. The individuals who are involved in a claim for medical negligence will not be named in the suit and the exclusive remedy is to institute an action against the governmental entity.

Section 11.066, F.S., requires a claimant to petition the Legislature in accordance with its rules, to seek an appropriation to enforce a judgment against the state or state agency. The exclusive remedy to enforce damage awards that exceed the recovery cap is by an act of the Legislature through the claim bill process. A claim bill is a bill that compensates an individual or entity for injuries or losses occasioned by the negligence or error of a public officer or agency.

Sovereign immunity is potentially available to private entities under contract with the government as set forth in s. 768.28(9), F.S. This section of law states that agents of the state or its subdivisions are not personally

<sup>2</sup> Bayfront Medical Center provides obstetrical services and All Children's Hospital provides neonatal services and both hospitals are designated as a single center. Children's Medical Services, Florida Department of Health. "Regional Perinatal Intensive Care Centers: Annual Report (Fiscal Year 2005-2006) found at:

<[http://www.doh.state.fl.us/Cms/RPICC/0506RPICC\\_AnnualReport.pdf](http://www.doh.state.fl.us/Cms/RPICC/0506RPICC_AnnualReport.pdf)> (Last visited on September 25, 2007).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> RESTATEMENT (SECOND) TORTS §. 45A.

<sup>7</sup> *Sovereign Immunity: A Survey of Florida Law*, Florida House of Representatives, Committee on Claims, 1999-2000.

liable in tort; instead, the government entity is held liable for its agents' torts. The factors required to establish an agency relationship are: (1) acknowledgment by the principal that the agent will act for him; (2) the agent's acceptance of the undertaking; and (3) control by the principal over the actions of the agent.<sup>8</sup> The existence of an agency relationship is generally a question of fact to be resolved by the fact-finder based on the facts and circumstances of a particular case. In the event, however, that the evidence of agency is susceptible to only one interpretation the court may decide the issue as a matter of law.<sup>9</sup>

Section 768.28(9), F.S., defines "officer, employee, or agent" to include, but not be limited to, any health care provider when providing services pursuant to s. 766.1115, F.S. (the Access to Health Care Act), any member of the Florida Health Services Corps, as defined in s. 381.0302, F.S., who provides uncompensated care to medically indigent persons referred by the DOH, and any public defender or her or his employee or agent, including among others, an assistant public defender and an investigator. Subsections 768.28(10), (11), and (12), F.S., declare certain other entities, under specified circumstances, to be agents of the state for purposes of sovereign immunity.

### **Extension of Sovereign Immunity through Governmental Contracts**

Section 766.1115, F.S., provides sovereign immunity to private, nongovernmental health care providers who contract as an agent of a governmental entity for the purpose of providing free health care services to low-income persons. Section 766.1115, F.S., specifies conditions that must be in a contract for the private health care provider to be considered an agent of the governmental contractor. The contract must provide that: the right of dismissal of the health care provider is retained by the governmental contractor; the governmental contractor has a right of access to patient records; the health care provider must report adverse incidents and treatment outcomes; patient selection and referral must be made solely by the governmental contractor; and the provider is subject to supervision and inspection by the governmental contractor.

Section 766.1115, F.S., requires governmental contractors to provide written notice to all clients that the health care provider is an agent of the governmental

contractor and that the exclusive remedy for any injury is under s. 768.28, F.S. The governmental contractor must establish a quality assurance program to monitor health services provided under s. 766.1115, F.S.

Under the school health services program, health care entities receive a limitation on their civil liability under the doctrine of sovereign immunity. Under s. 381.0056(10), F.S., any health care entity that provides school health services under contract with the DOH under a school health services plan developed under the act, and as part of a school nurse service public-private partnership, is deemed to be a corporation acting primarily as an instrumentality of Florida solely for the purpose of limiting liability under s. 768.28(5), F.S. The limitations on tort actions in s. 768.28(5), F.S., must apply to any action against the entity with respect to the provision of school health services, if the entity is acting within the scope of and pursuant to guidelines established in the contract or by rule of the DOH. The contract must require the entity, or the partnership on behalf of the entity, to obtain general liability insurance coverage, with any additional endorsement necessary to insure the entity for liability assumed by its contract with the DOH.

### **Constitutional Access to Public Records and Meetings**

Florida has a long history of providing public access to the records and meetings of governmental and other public entities. The state's Public Records Act, in ch. 119, F.S., and the public meetings law, in ch. 286, F.S., were first enacted in 1967.<sup>10</sup> In November, 1992, the public affirmed the tradition of government-in-the-sunshine by enacting a constitutional amendment, which guaranteed and expanded the practice. Article I, s. 24 of the State Constitution provides every person with the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, *or persons acting on their behalf*. The section specifically includes the legislative, executive and judicial branches of government and each agency or department created under them. It also includes counties, municipalities, and districts, as well as constitutional officers, boards, and commissions or entities created pursuant to law or the State Constitution. All meetings of any collegial public body must be open and noticed to the public.

The State Constitution authorizes exemptions to the open government requirements and establishes the

<sup>8</sup> *Goldschmidt v. Holman*, 571 So.2d 422 (Fla. 1990).

<sup>9</sup> *Campbell v. Osmond*, 917 F. Supp. 1574, 1583 (M.D. Fla. 1996). See also *Stoll v. Noel*, 694 So.2d 701 (Fla. 1997).

<sup>10</sup> Chapters 67-125 and 67-356, L.O.F.

means by which these exemptions are to be established. Under Art. I, s. 24(c) of the State Constitution, the Legislature may provide by general law for the exemption of records and meetings. The general law must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish its purpose.

## METHODOLOGY

Senate professional staff reviewed relevant case law and the RPICC contracts, physician handbook, and annual reports. The staff sent a questionnaire to each of the RPICCs. The staff also communicated with the DOH staff, staff of the Division of Risk Management within the Department of Financial Services, associations representing health care providers, and other interested stakeholders. Senate professional staff also made site visits to three of the RPICCs.

## FINDINGS

### RPICCs and Sovereign Immunity

The 2002 Legislature established a RPICC Study Group to study the statutory standards relating to the number of RPICCs and the cost effectiveness of expanding the number of centers.<sup>11</sup> The RPICC Study Group expanded its charge to address the issue of extending sovereign immunity to maternal-fetal physicians when they are performing services under contract for high-risk RPICC clients. The study group had received information from a source (Senate professional staff was unable to verify the source) that without specific legislative relief, Florida will be critically short of maternal-fetal medicine specialists to assist in perinatal centers or in obstetric outreach clinics.<sup>12</sup>

The report supported many of the tort reforms recommended by the Governor's Select Task Force on Healthcare Professional Liability Insurance, including a recommendation to extend sovereign immunity to emergency room physicians. The report suggested that there is merit to considering expanding the Task Force recommendation relating to emergency room physicians to include obstetric conditions. It is a requirement of federal and state law that women in labor presenting in emergency rooms must be treated.<sup>13</sup>

<sup>11</sup> Proviso language in section 3, item 590, ch. 2002-394, Laws of Florida.

<sup>12</sup> See The RPICC Study Group Report, Florida Department of Health, March 2003, Appendix M.

<sup>13</sup> See s. 395.1041, F.S., and the federal Emergency Medical Treatment and Active Labor Act at 42 USC 1395dd and 42 CFR 489.20, et. seq. Congress enacted the Emergency

Senate professional staff attempted to assess the risk exposure of the RPICCs. Some of the RPICCs were unable or unwilling to provide information on their risk exposure for this project, because the information could be released as a public record. St. Mary's Hospital reports that it paid out \$11 million in indemnity or judgments and \$500,000 in litigation costs for four cases involving RPICC mothers or infants over the last five years. The Safety Net Hospital Alliance of Florida (SNAF) is a group of 14 health care systems that includes the state's public, teaching, and children's hospitals. The SNAF hospitals that serve as RPICC clinical sites include: Jackson Memorial Hospital, Broward General Medical Center, Tampa General Hospital, Lee Memorial Hospital, Shands, Memorial Hospital, and Arnold Palmer Hospital. The SNAF provided information in the aggregate regarding their malpractice claims. The SNAF experienced an average of six claims per hospital over the last five years, with a median of \$200,000 for settled claims paid out.<sup>14</sup> The SNAF paid a total of \$1.4 million in litigation costs over the last five years in the defense of negligence claims involving RPICC Medicaid or Medicaid-eligible patients.

Four of the RPICC hospitals already have sovereign immunity as a public hospital or a special taxing district (Broward General Medical Center, Memorial Hospital, Lee Memorial Hospital, and Jackson Memorial Hospital). Broward General Medical Center and Memorial Hospital have private physicians that do not have sovereign immunity. Lee Memorial Hospital has a mix of physicians who are employees of the hospital and who have sovereign immunity and private physicians under contract who do not have sovereign immunity. Jackson Memorial Hospital has private physicians who do not have sovereign immunity and resident physicians who are employed by the hospital and have sovereign immunity.

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Medical Treatment & Labor Act to ensure public access to emergency services. Section 1867 of the Social Security Act imposes specific obligations on Medicare-participating hospitals that offer emergency services to provide a medical screening examination when a request is made for examination or treatment for an emergency medical condition (EMC), including active labor, regardless of an individual's ability to pay. Hospitals are then required to provide stabilizing treatment for patients with EMCs. If a hospital is unable to stabilize a patient within its capability, or if the patient requests, an appropriate transfer should be implemented.

<sup>14</sup> Source: Safety Net Hospital Alliance of Florida. Over the last 5 years, the highest claim paid was \$2.3 million and the lowest was \$10,000, which includes two claim bills.

Four of the RPICC hospitals (Sacred Heart Hospital, Shands Teaching Hospital, Shands Jacksonville, and Tampa General Hospital) are private hospitals that have some physicians with sovereign immunity. In these hospitals, attending physicians and resident physicians affiliated with state universities have sovereign immunity.

The remaining four RPICC hospitals (Arnold Palmer Hospital, All Children's Hospital, Bayfront Medical Center, and St. Mary's Hospital) have no sovereign immunity for the hospital or the physicians. Arnold Palmer Hospital uses an employed physician model, but subcontracts with some private physicians. All Children's Hospital employs physicians. Bayfront Medical Center and St. Mary's Hospital have private physicians.

Some stakeholders argue that the extension of sovereign immunity is a necessary component to recruitment and retention of maternal-fetal medicine physician specialists and subspecialists, such as pediatric hematologists, who provide medical care to high-risk RPICC clients. In response to the questionnaire sent to the RPICCs by Senate professional staff, the RPICCs responded to the issue of recruitment and retention of physicians as follows:

- Shands Jacksonville, Shands Teaching Hospital South Broward Hospital and Lee Memorial Hospital reported that they do not have any barriers in the recruitment or retention of licensed health care providers to treat RPICC patients.
- Jackson Memorial Hospital, All Children's Hospital, Sacred Heart Hospital, Arnold Palmer Medical Center, and Tampa General Hospital reported difficulties in recruiting certain specialties and cited a variety of reasons for the difficulties they are experiencing.
- St. Mary's Hospital reported that it had difficulty in retaining and recruiting specialists at its RPICC, in part, due to the high volume of patients. The hospital contracts with a large private group of obstetricians and perinatologists to provide services to the RPICC. The hospital spends \$2.5 million for obstetric/gynecologic services and \$10 million annually for consulting physicians in various subspecialties to provide services to RPICC patients.

Although recruiting and retaining specialists and subspecialists may be difficult in some cases, the RPICCs have been able, through a variety of means, to

maintain appropriate staffing to meet the needs of the RPICC clients.

### Law Relating to Agency Status

The question of whether to statutorily extend sovereign immunity to RPICCs raises the issue of whether a private person or entity under contract with the government may assert sovereign immunity. The Florida Supreme Court has held that a person may obtain sovereign immunity when performing activities within the scope of an agency relationship with the government.

When evaluating the factors required to establish an agency relationship the courts have held the following principles should be followed: (1) party labels, e.g., contractual provisions or other evidence evincing the parties intent to create an agency relationship, may be considered, but are not dispositive of the issue of agency;<sup>15</sup> (2) a principal must control the means used to achieve the outcome, not merely the outcome of the relationship;<sup>16</sup> and (3) the principal's right to control the agent, not whether the principal actually exercises that right, is the relevant consideration.<sup>17</sup>

In *Stoll v. Noel*, the Florida Supreme Court found that physician consultants with the CMS program were acting as agents of the state and were immune from liability.<sup>18</sup> The court examined the relationship between the CMS program and the consultant physicians and found that the issue of agency turned on the *degree of control* retained or exercised by the CMS program. The Supreme Court determined the following factors provided evidence of an agency relationship between the CMS program and the physicians: the CMS program required the physicians to abide by policies and rules in the Department of Health and Rehabilitative Services (HRS) and CMS manuals; all physician services rendered and paid for by the CMS program had to first be authorized by the CMS medical director; and HRS policy required the CMS program to be responsible for supervising all personnel and medical care for CMS patients. The Court found that the contract demonstrated that the CMS program had final authority over all care and treatment provided to CMS patients, and could refuse to allow a physician

<sup>15</sup> *Cantor v. Cochran*, 184 So.2d 173, 174 (Fla.1966); *Shands Teaching Hospital and Clinics, Inc. v. Pendley*, 577 So.2d 632, 634 (Fla.1<sup>st</sup> DCA 1991).

<sup>16</sup> *Dorse v. Armstrong World Industries, Inc.*, 513 So.2d 1265, 1268.

<sup>17</sup> *Id.* Also see *Nazworth v. Swire Florida, Inc.*, 486 So.2d 637, 638 (Fla.1<sup>st</sup> DCA 1986).

<sup>18</sup> *Stoll v. Noel*, 694 So.2d 701 (Fla. 1997).

consultant's recommended course of treatment of any CMS patient for either medical or budgetary reasons.

In *Theodore v. Graham*, the physician/director of the RPICC at St. Mary's Hospital, was sued for medical malpractice.<sup>19</sup> The physician moved for summary judgment based on an affirmative defense of sovereign immunity. The trial court granted the physician's motion ruling that the case was controlled by *Stoll* and found both the physician and the hospital were agents and as a matter of law that the plaintiffs were not entitled to relief. Upon appeal, the Fourth District Court of Appeal reversed and remanded after carefully examining the relationship between the state agency and the director of the RPICC clinical site. The Fourth District Court found that a question of fact existed as to whether the RPICC director was "controlled or subject to control" by HRS in the treatment of patients.<sup>20</sup> The court found that:

- The determination of medical eligibility and the final medical decision for admission of a patient was made by the physician; and
- The contract between HRS and the RPICC director showed that the director was more an "independent contractor," because the physician assumed liability for negligence and indemnified HRS for damages arising from her negligence while acting under the contract.

Key to the court's decision to reverse was the court's finding that the government did not retain actual control or the right to control the physician's professional judgment over patient treatment decisions. The Florida Supreme Court dismissed review of the *Theodore* decision.

Even though the RPICCs are a creature of statute, the courts have failed to extend sovereign immunity to RPICC clinical sites or providers when sovereign immunity is asserted as a defense to medical malpractice claims. In part, the courts have focused on case-by-case review of the factual circumstances and have applied the applicable law regarding agency status as announced in *Noel*. The facts of subsequent cases involving governmental contractors have been distinguished from *Noel*, in part, because the contractors have, under the factual analysis, been shown to be more "independent contractors" than

agents under the actual control of the government for purposes of extending sovereign immunity.

The RPICC contract states that RPICC clinical sites and their agents in the performance of this contract shall act in the capacity of independent contractors.<sup>21</sup> The RPICC contract states that "the provider shall be liable for and shall indemnify, defend, and hold harmless the department and all of its officers, agents, and employees, from all claims, suits, judgments, or damages, consequential or otherwise and including attorney's fees and costs, arising out of any act, actions, neglect, or omissions by the provider, its agents, or employees during the performance of this contract or any subsequent modifications thereof, ..." <sup>22</sup>

In response to the Senate professional staff questionnaire, the RPICC clinical site representatives note that the DOH contractual policies do not restrict or limit the professional judgment of licensed health care providers for the treatment of high-risk pregnant women and infants who are Medicaid recipients or Medicaid-eligible patients treated at the RPICC. The contract is between the DOH and the hospital designated as a RPICC, not with individual health care providers who may be independent contractors with the RPICC.

The key issue is whether every health care provider who enters into a contract with the DOH is a state agent entitled to sovereign immunity as a matter of law, regardless of whether the health care provider's contract gives DOH the control necessary to create an agency relationship. No Florida case appears to have resolved a challenge to the status of a statutorily designated agent. As a result, it is unknown whether the courts would accept a legislative determination of agency for the RPICCs solely as a matter of law. The courts are likely to continue to view the determination of agency status as a mixed question of fact and law and examine the facts and circumstances of each case.

### Right of Access to Courts

If immunity from liability is legislatively accorded to a private entity, the likely constitutional challenge would be that the law violates the right of access to the courts. Section 21, Art. I of the State Constitution provides that the courts shall be open to all for redress for an injury. To impose a barrier or limitation on litigant's right to file certain actions, extension of the immunity from liability would have to meet the test announced by

<sup>19</sup> *Theodore ex rel. Theodore v. Graham*, 733 So.2d 538 (Fla 4th DCA), *rev. denied*, 737 So.2d 551 (Fla.1999).

<sup>20</sup> *Id.* at 541, citing *King v. Young*, 107 So.2d 751, 753.

<sup>21</sup> Florida Department of Health, RPICC Contract.

<sup>22</sup> *Id.*

the Florida Supreme Court in *Kluger v. White*<sup>23</sup>. Under this test, the Legislature would have to: (1) provide a reasonable alternative remedy or commensurate benefit, or (2) make a legislative showing of overpowering public necessity for the abolishment of the right and no alternative method of meeting such public necessity.

Some of the stakeholders argue that extension of sovereign immunity would give private specialists and subspecialists an incentive to provide their services to high-risk RPICC patients. Although reasonable individuals may disagree, an alternative remedy appears to currently provide an incentive for some of the specialists to work with RPICC patients. It may be expensive, but hospitals designated as RPICCs appear to be able to attract specialists and subspecialists who are in great demand nationally through a variety of financial incentives. Some of the RPICCs acknowledge that they are not concerned with recruitment or retention of health care practitioners because they employ the practitioners or provide other monetary and nonmonetary incentives for private specialists and subspecialists to provide services to patients for their RPICC.

Despite the difficulties in the recruitment and retention of maternal-fetal physicians and other health care practitioners, RPICCs have managed to provide appropriate staffing to give quality services to the RPICC patients. It does not appear that the Legislature could show an overpowering necessity for the abolishment of the right.

### **Constitutional Access to Public Records and Meetings**

Under ch. 119, F.S., “agency” is defined to include any public or private agency, person, partnership, corporation, or business entity *acting on behalf of* any public agency. If sovereign immunity is conferred on health care providers who contract with the DOH or are acting as agents of the DOH to provide RPICC services then, arguably, the records that they hold which relate to the RPICC program would be subject to disclosure and the meetings that they hold would be subject to the open government requirements under ch. 286, F.S.

Five of the entities that operate as RPICC program clinical sites are already subject to Florida’s public records and meetings laws. They include Jackson Memorial Hospital, Broward General Medical Center, Memorial Hospital, Tampa General Hospital, and Lee

Memorial Hospital. Sacred Heart Hospital, St. Mary’s Hospital, Arnold Palmer Hospital, All Children’s Hospital, Bayfront Medical Center, and Shands are not subject to the public records law, since they are private hospitals.

The RPICC contract currently requires each RPICC contractor to:

- Maintain patient records in accordance with the RPICC Program Handbook or longer, as required by statute, rule, or applicable professional standards;
- Make available safety reports, utilization reports, and infection control reports for the monitoring team to review during the annual RPICC on-site visit;
- Make available documentation of all contractual requirements for CMS Central Office to review when requested;
- Document accurate patient data in the RPICC Data System for all RPICC patients.<sup>24</sup>

The RPICC contract also gives DOH access to the provider’s contract and related records and documents, including reviews or audits by state or federal officials.<sup>25</sup>

The RPICC contract is currently executed between the DOH and the hospital that is designated as a RPICC by the DOH. The contract does not go into detail regarding the recordkeeping requirements for *agents of the RPICC*, such as individual health care providers who may be independent contractors with a RPICC to provide specialty or subspecialty care to the hospital’s patients, including the RPICC clients.<sup>26</sup>

### **Indemnification**

The standard contract executed between the DOH and hospitals designated as RPICCs requires the RPICCs that are not covered by sovereign immunity to be liable for and indemnify, defend, and hold harmless the DOH and all of its officers, agents, and employees from all claims, suits, judgments, or damages, consequential or otherwise and including attorneys’ fees and costs, arising out of any act, actions, neglect, or omissions by the provider, its agents, or employees during the performance or operation of the contract or any subsequent modifications thereof, whether direct or

<sup>24</sup>State of Florida Department of Health Standard Contract and Attachment I, RPICC Contract.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>23</sup> See *Kluger v. White*, 281 So.2d 1 (Fla. 1973).

indirect, and whether to any person or tangible or intangible property.

Under s. 768.28(10), F.S., health care providers or vendors, or any of their employees or agents, that have contractually agreed to act as agents of the Department of Corrections (DOC) to provide health care services to inmates of the state correctional system must be considered agents of the State of Florida, Department of Corrections, for the purposes of this section, while acting within the scope of and pursuant to guidelines established in contract between the DOC or by rule. The law requires the contracts between the DOC and health care providers to provide for the indemnification of the state by the agent for any liabilities incurred up to the sovereign immunity limits of \$100,000 for a single claim and \$200,000 for multiple claims arising from the same incident.

A variation of the indemnification requirement is imposed on certain entities that provide school health services in a public-private partnership under s. 381.0056, F.S. The limitations on tort actions in s. 768.28(5), F.S., must apply to any action against the entity with respect to the provision of school health services, if the entity is acting within the scope of and pursuant to guidelines established in the contract or by rule of the DOH. The contract must require the entity, or the partnership on behalf of the entity, to obtain general liability insurance coverage, with any additional endorsement necessary to insure the entity for liability assumed by its contract with the DOH.

### **Policy Issues for the Legislature to Consider**

If the Legislature were to statutorily designate the RPICCs as agents of the state, extending sovereign immunity to RPICC clinical sites and maternal-fetal physicians, the Legislature should consider the following issues.

#### *Recruitment and Retention*

The extension of sovereign immunity to maternal-fetal physicians for the RPICC patients only, may not create a sufficient financial incentive to ensure that these specialists will enter into contracts with the RPICCs. The physicians would still have exposure for their patients who are not RPICC clients and would have to carry liability insurance for those patients.

If sovereign immunity is extended to all RPICCs, it may be easier for the RPICCs that currently do not have sovereign immunity to recruit and retain maternal-fetal physicians and practitioners who are working in office-based practices to treat RPICC patients. Existing

RPICC clinical sites that have sovereign immunity, however, may have a diminished ability to recruit and retain maternal-fetal physicians if they are competing with a larger number of hospitals that have sovereign immunity for a limited number of specialists.

#### *Requests by Additional Health Care Providers*

Other physician specialists and their affiliated businesses may also seek sovereign immunity for the provision of their services to high-risk or indigent populations. For example, emergency room physicians have sought sovereign immunity protection in the past.

#### *Public Records and Meetings Laws*

The Legislature might need to address the extent to which the public records and meetings laws should apply to the RPICC program clinical sites, individual health care providers and their businesses (professional associations) that are not already subject to the public records and meetings requirements.

#### *Indemnification*

If the Legislature were to decide to extend sovereign immunity to the RPICCs and individual contract health care providers who are not otherwise already immune and who provide services to the RPICC clients, the Legislature should consider whether to impose any requirements for the RPICCs and individual contract health care providers to partially indemnify the state for any claims arising from the provision of services to the RPICC clients under the contract. Any negligence claims generated by the RPICCs or individual health care providers must be defended by the Division of Risk Management within the Department of Financial Services, and the aggregate claim amount, including litigation costs and fees, will be borne by the DOH.

#### *Claim Bills*

Any claim amounts in excess of the sovereign immunity limits could result in additional claim bills being filed with the Legislature.

## **RECOMMENDATIONS**

Senate professional staff does not recommend that the Legislature statutorily designate RPICC contract providers as agents of the state for purposes of sovereign immunity as it is unclear whether the courts would accept the statutory designation of agency, and because alternative remedies exist to ensure the retention and recruitment of private specialists and subspecialists who provide their services to high-risk RPICC patients.