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 Health Policy

BILL:	SB 1690
INTRODUCER:	Senator Bean
SUBJECT:	Volunteer Health Services
DATE:	March 18, 2013
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	McElheney	Stovall	HP	**Pre-meeting**
2.			AHS	
3.			AP	
4.				
5.				
6.				

I. Summary:

SB1690:

- Revises requirements for patient referral under the "Access to Health Care Act."
- Eliminates a requirement that a governmental contractor approve all follow up or hospital care.
- Requires the Department of Health (DOH) to post specified information online concerning volunteer providers.
- Allows volunteer providers to earn continuing education credits for participating in the program for up to eight credits per licensure period for each provider.
- Removes specific provisions requiring the DOH to adopt rules concerning determination and approving eligibility and referral of a patient.

This bill substantially amends s. 766.1115 of the Florida Statutes:

II. Present Situation:

Access to Health Care Act

Section 766.1115, F.S., is entitled "The Access to Health Care Act" (the Act). The Act was enacted in 1992 to encourage health care providers to provide care to low-income persons.[1] This

[1] Low-income persons are defined in the Act as a person who is Medicaid-eligible, a person who is without health insurance and whose family income does not exceed 200 percent of the federal poverty level, or any eligible client of the Department of Health who voluntarily chooses to participate in a program offered or approved by the department.

section extends sovereign immunity to health care providers who execute a contract with a governmental contractor and who provide volunteer, uncompensated health care services to low-income individuals as an agent of the state. These health care providers are considered agents of the state under s. 768.28(9), F.S., for purposes of extending sovereign immunity while acting within the scope of duties required under the Act.

Health care providers under the Act include:[2]

- A birth center licensed under chapter 383.
- An ambulatory surgical center licensed under chapter 395.
- A hospital licensed under chapter 395.
- A physician or physician assistant licensed under chapter 458.
- An osteopathic physician or osteopathic physician assistant licensed under chapter 459.
- A chiropractic physician licensed under chapter 460.
- A podiatric physician licensed under chapter 461.
- A registered nurse, nurse midwife, licensed practical nurse, or advanced registered nurse practitioner licensed or registered under part I of chapter 464 or any facility which employs nurses licensed or registered under part I of chapter 464 to supply all or part of the care delivered under this section.
- A dentist or dental hygienist licensed under chapter 466.
- A midwife licensed under chapter 467.
- A health maintenance organization certificated under part I of chapter 641.
- A health care professional association and its employees or a corporate medical group and its employees.
- Any other medical facility the primary purpose of which is to deliver human medical diagnostic services or which delivers nonsurgical human medical treatment, and which includes an office maintained by a provider.
- A free clinic that delivers only medical diagnostic services or nonsurgical medical treatment free of charge to all low-income recipients.
- Any other health care professional, practitioner, provider, or facility under contract with a governmental contractor, including a student enrolled in an accredited program that prepares the student for licensure as any one of the professionals listed in subparagraphs 4.-9.
- Any nonprofit corporation qualified as exempt from federal income taxation under s. 501(a) of the Internal Revenue Code, and described in s. 501(c) of the Internal Revenue Code, which delivers health care services provided by the listed licensed professionals, any federally funded community health center, and any volunteer corporation or volunteer health care provider that delivers health care services.

A governmental contractor is defined in the Act as the DOH, a county health department, a special taxing district with health care responsibilities, or a hospital owned and operated by a governmental entity.[3]

[2] s. 766.1115(3)(d), F.S.
[3] s. 766.1115(3)(c), F.S.

The definition of contract under the Act provides that the contract must be for volunteer, uncompensated services. For services to qualify as volunteer, uncompensated services the health care provider must receive no compensation from the governmental contractor for any services provided under the contract and must not bill or accept compensation from the recipient, or any public or private third-party payor, for the specific services provided to the low-income recipients covered by the contract.[4]

The Act further specifies contract requirements. The contract must provide that:

- The governmental contractor retains the right of dismissal or termination of any health care provider delivering services under the contract.
- The governmental contractor has access to the patient records of any health care provider delivering services under the contract.
- The health care provider must report adverse incidents and information on treatment outcomes.
- The governmental contractor must make patient selection and initial referrals.
- The health care provider must accept all referred patients, however the contract may specify limits on the number of patients to be referred and patients may not be transferred to the provider based on a violation of the antidumping provisions of the Omnibus Budget Reconciliation Acts.
- Patient care, including any follow-up or hospital care, is subject to approval by the governmental contractor.
- The health care provider is subject to supervision and regular inspection by the governmental contractor.

The governmental contractor must provide written notice to each patient, or the patient's legal representative, receipt of which must be acknowledged in writing, that the provider is covered under s. 768.28, F.S., for purposes of actions related to medical negligence.

The individual accepting services through this contracted provider must not have medical or dental care coverage for the illness, injury, or condition in which medical or dental care is sought.[5] The services not covered under this program include experimental procedures and clinically unproven procedures. The governmental contractor shall determine whether or not a procedure is covered.

The health care provider may not subcontract for the provision of services under this chapter.[6]

Annually, the DOH reports a summary to the Legislature containing the efficacy of access and treatment outcomes while providing health care for low-income persons. The DOH adopts rules to administer this section. The rules include services to be provided and authorized procedures.

The DOH adopts rules that specify required methods of determination and approval of patient eligibility and referral. This also includes the contractual conditions under which the health care

[4] s. 766.1115(3)(a), F.S.
[5] Rule 64I-2.001, F.A.C.
[6] Supra, fn 5

provider may perform the patient eligibility and referral process. These rules include, but are not limited to the following:

- Provider must accept all patients referred by the DOH. The number of patients that must be accepted may be limited in the contract.
- Provider shall comply with departmental rules regarding determination and approval of the patient eligibility and referral.
- Provider shall complete training by the DOH regarding compliance with the approved methods of determination and approval of patient eligibility and referral.
- The DOH shall retain review oversight authority of the patient eligibility and referral determination.[7]

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 such governments unless the 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.

Under this statue, officers, employees, and agents of the state will 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 his or her employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

Instead, the state steps in as the party litigant and defends against the claim. Subsection (5) limits the recovery of any one person to $200,000 for one incidence and limits all recovery related to one incidence to a total of $300,000. The sovereign immunity recovery caps do not prevent a plaintiff from obtaining a judgment in excess of the caps but the plaintiff cannot recover the excess damages without action by the Legislature.[8]

Whether sovereign immunity applies turns on the degree of control of the agent of the state retained by the state.[9] In *Stoll v. Noel*, the Florida Supreme Court explained that 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.[10]

[7] Section 766.1115 (10), F.S.
[8] Section 768.28(5), F.S.
[9] Stoll v. Noel, 694 So. 2d 701, 703(Fla. 1997)
[10] Stoll v. Noel, 694 So. 2d 701, 703(Fla. 1997) (quoting The Restatement of Agency)

The court examined the employment contract between the 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.[11] The court explained:

> Whether the CMS physician consultants are agents of the state turns on the degree of control retained or exercised by CMS. This Court has held that the right to control depends upon the terms of the employment contract. *National Sur. Corp. v. Windham*, 74 So. 2d 549, 550 (Fla. 1954) ("The [principal's] right to control depends upon the terms of the contract of employment…") The CMS requires each consultant, as a condition of participating in the CMS program, to agree to abide by the terms published in its HRS[12] Manual and CMS Consultants Guide which contain CMS policies and rules governing its relationship with the consultants. The Consultant's Guide states that all services provided to CMS patients must be authorized in advance by the clinic medical director. The language of the HRS Manual ascribes to CMS responsibility to supervise and direct the medical care of all CMS patients and supervisory authority over all personnel. The manual also grants to the CMS medical director absolute authority over payment for treatments proposed by consultants. The HRS Manual and the Consultant's Guide demonstrate that CMS has final authority over all care and treatment provided to CMS patients, and it can refuse to allow a physician consultant's recommended course of treatment of any CMS patient for either medical or budgetary reasons.
>
> Our conclusion is buttressed by HRS's acknowledgement that the manual creates an agency relationship between CMS and its physician consultants, and despite its potential liability in this case, HRS has acknowledged full financial responsibility for the physicians' actions. HRS's interpretation of its manual is entitled to judicial deference and great weight.[13]

III. Effect of Proposed Changes:

Section 766.1115, F.S., is amended to revise requirements for patient referral under the "Access to Health Care Act." The bill eliminates a requirement that a governmental contractor approve all follow up or hospital care. It requires the DOH to post specified information online concerning volunteer providers.

This bill also allows volunteer providers to earn continuing education credits for participating in the program for up to eight credits per licensure period for each provider. Provisions requiring the DOH to adopt rules concerning determination and approving eligibility and referral of a patient are removed.

The effective date of the bill is July 1, 2013.

[11] Stoll v. Noel, 694 So. 2d 701, 703(Fla. 1997)
[12] Florida Department of Health and Rehabilitative Services
[13] Stoll v. Noel, 694 So. 2d 701, 703(Fla. 1997)

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Additional health care providers may be incentivized to volunteer under the Act due to the continuing education credits authorized in the bill.

C. Government Sector Impact:

SB 1690 requires the DOH to post specified information online concerning volunteer providers. This may require additional staffing.

This bill allows each hour of volunteer services to count as a continuing education hour for up to eight hours. To monitor and record each hour will require current continuing education procedures to be updated within the DOH.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Whether sovereign immunity is extended to a contracted health care provider depends on the degree of control retained or exercised by the governmental entity. The bill removes the specific requirement that patient care is subject to approval by the governmental contractor. Although the DOH retains responsibility to adopt rules to administer the Act, the extent to which oversight and control of the provider is diminished, if any, might affect a court's determination of whether sovereign immunity applies.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.