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**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
JUDICIARY
ANALYSIS**

BILL #: HB 2093 (PCB CF 99-08)
RELATING TO: Child Welfare Privatization
SPONSOR(S): Committee on Children & Families and Representative Murman
COMPANION BILL(S): SB 660 (Compare)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) CHILDREN & FAMILIES YEAS 9 NAYS 0
 - (2) JUDICIARY
 - (3)
 - (4)
 - (5)
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I. SUMMARY:

The bill makes changes to s. 409.1671, F.S., to address the continued expansion of the privatization of child welfare services. The bill makes the following changes:

- Specifies certain insurance requirements and liability limits for community-based agencies and their subcontractors. Requires lead agencies to obtain general liability insurance and subcontractors to be covered by general liability insurance.
- Limits liability for covered agencies and their subcontractors to *net economic damages*.
- Requires the state to hold private providers harmless for *non-economic damages* over \$200,000 pursuant to s. 768.28, F.S. Provides for an increase in the limitation on noneconomic damages by 5% per year.
- The immunity provided to covered foster care providers and their subcontractors is limited by an exception for defendants who act in a culpably negligent manner or with unprovoked physical aggression when such acts result in injury or death proximately caused by such acts.
- Contains a severability clause intended to save any part of the subsection from being invalidated if another passage was declared invalid.
- Requires the department to give federal earnings generated by a community-based agency back to the community-based agency for the purpose of providing additional child welfare services.
- Provides that the bill shall become effective on becoming law.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Child Welfare

Child welfare generally refers to child abuse/neglect investigations, protective services, family reunification services, shelter care, foster care, residential group care and adoption services. The primary chapters of law that provide the framework for child welfare services include chapters 39, 63, 409, and 415, F.S.

Section 409.1671

Provisions in s. 409.1671, F.S., require the Department of Children & Family Services to privatize state child welfare services by January 1, 2003. The department is required to develop a plan that meets specific conditions to guide the conversion from state operated to a private system including alternative strategies for areas of the state where obstacles exist to meeting the time frame for this effort. Services that would be privatized include family preservation, independent living, emergency shelter, residential group care, foster care, therapeutic foster care, intensive residential treatment, foster care supervision, case management, post placement supervision, permanent foster care, and family reunification services.

The department must establish a quality assurance program for the privatization of services. The quality assurance program must include standards for each specific component of these services. Each program operated must be evaluated annually by the department or by an objective competent entity designated by the department. The department is also required to submit an annual report regarding quality performance, outcome measure attainment, and cost efficiency to the Legislature.

The privatization of the children's welfare system began in 1992 with a project in District 1 (Pensacola). Three other projects have been added. All projects are being evaluated by the independent consultant under contract with the department to determine the impact and effect of these efforts.

The following pilot projects have been established under s. 409.1671, F.S.

- Homeward Bound Project in District 1 (Escambia and Santa Rosa counties). Serves children from birth to age 18 in substitute care for the first time, and children previously in the program who have returned due to placement disruption. This program has been in effect since 1992.
- Family Services Coalition in District 4 (Nassau, Duval, Clay, St. Johns, and Baker counties). Serves children in foster care aged 12 to 17, and youth over 18 who are in independent living. The coalition is made up of the Baptist Home for Children, the Boys Home Association, the Children's Home Society and the Jacksonville Youth Sanctuary. The program was implemented in January of 1997.
- Sarasota County Coalition for Families & Children in District 8 (Sarasota County). The program serves all children in Sarasota County needing protective services, foster care, and adoption services. The Youth & Family Services arm of the local YMCA in Sarasota County serves as the administrative support/home to the coalition. The program was implemented in January of 1997.
- Bridges Program in District 13 (Lake and Sumter counties). The program serves all children entering care for the first time through the department's shelter care system. The program operates out of the Lake County Boys Ranch, and was implemented on January 1, 1997.

Sovereign Immunity

Sovereign immunity is an ancient doctrine firmly anchored in common law which insulates the state and any governmental officers, employee, or agent acting on behalf of the state, from a lawsuit. As explained by Justice Holmes, "a sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." Although the extent of immunity has been considerably eroded by both federal and state legislation, it is still retained under a social policy of protecting the state from burdensome interference with the performance of its governmental functions and excessive encroachments on the public treasury. The immunity is absolute and unqualified. However, Article X, Section 13, of the State Constitution permits the Legislature to waive sovereign immunity by general law.

The Tort Claims Act, s. 768.28, F.S., enacts the state's waiver of sovereign immunity. Immunity is waived only to the extent that the state or any of its agencies or subdivisions would be liable if a private person would be liable to a claimant. Further, liability does not include punitive damages, interest accrued, nor claims in excess of \$100,000 per person, or \$200,000 per incident. Employees, constitutional officers, and agents of the state and its subdivisions are immune from personal liability unless they act in bad faith, with malicious purpose, or in a grossly negligent manner. Any judgment above the cap must be sought from the Legislature through a claims bill.

The state and its agencies and subdivisions are authorized to be self-insured, enter into risk management programs, or purchase liability insurance for whatever coverage they choose. For those state executive agencies participating in risk management programs administered by the Department of Insurance, agency premiums are calculated on the basis of the agency's loss experience. For those choosing to purchase insurance, sovereign immunity may be waived to the extent of the insurance coverage. Although all claims against state agencies or subdivisions in excess of the sovereign immunity cap must be approved by the Legislature in the municipalities, hospital districts, or other political subdivisions of the state they are almost always directed toward the local governmental entity rather than state general revenue.

Agents of the state are generally covered by the state's sovereign immunity, and may include persons or entities, not permanently employed by the state, who enter into contracts with the state. To be considered an agent, rather than an independent contractor, a certain degree of control or supervision must be exerted by the governmental entity over the activities the agent undertakes on the entity's behalf. The resolution of whether an individual is an agent of the government is a mixed question of law and fact. To invoke sovereign immunity, the agency relationship must not only be expressed contractually, but must be established factually in the actual execution of the contract.

Entities acting as instrumentalities of the state also come within the purview of s. 768.28, F.S. Like in the case of agents, the state must exercise sufficient control over the instrumentality in order for the instrumentality to receive the protection of the statute.

Currently, s. 768.28, F.S., applies to many different private providers under contract with state agencies. *For example, under s. 768.28(10)(a), F.S., health care vendors under contract with the Department of Corrections to provide health care services to inmates of the state correctional system are considered agents of the state. Section 768.28(11)(a), F.S., specifies that providers under contract with the Department of Juvenile Justice providing services to children in need of services, families in need of services, or juvenile offenders are also agents of the state.*

In the area of foster care, section 409.175(14)(a), F.S., directs the Division of Risk Management of the Department of Insurance to provide coverage through the department to any person who owns or operates a licensed family foster home for the department in her or his place of residence. The coverage is provided from the general liability account of the Florida Casualty Insurance Risk Management Trust Fund and is limited to general liability claims arising from the provision of family foster home care pursuant to an agreement with the department and pursuant to guidelines established through policy, rule, or statute.

With the exception of family foster homes as defined in s. 409.175(14), F.S., licensed providers of child foster care services who contract with the department are considered independent contractors by the Division of Risk Management, and thus ineligible to invoke the protection of the limitation on tort actions contained in s. 768.28, F.S. This exposure can result in civil damage awards against the provider exceeding the \$100,000/\$200,000 limits applicable to the state.

Federal Earnings

Federal support for child welfare, foster care and adoption assistance programs is authorized under titles IV-B and IV-E of the Social Security Act. Title IV-B authorizes funds to states for a broad range of child welfare services, including family preservation and family support services. Title IV-E provides funding for the Foster Care, Independent Living, and Adoption Assistance Programs. The IV-B and IV-E programs are intended to operate in consort to help prevent the need for out-of-home placement of children, and in cases where such placement is necessary, to provide protections and permanent placement for the children involved. Funding is provided under the Foster Care Program to assist states with the maintenance costs of low-income children in foster care. The Independent Living Program is intended to help states facilitate the transition of older children from foster care to independent living. The Adoption Assistance Program helps states support the adoption of low income or SSI-eligible children with "special needs," such as minority status, age, membership in a sibling group, or a mental or physical handicap.

The state appropriates trust funds to the department based on projected earnings. The department bills Title IV-E for eligible services defined and in a state plan approved by the federal department of Health & Human Services. Federal dollars received by the department are deposited in a general unrestricted cash account. The department through a budget amendment process uses these funds for program needs based on the decisions of the Secretary. Obtaining federal dollars is a process which involves many people in different areas of the department. The ability to claim federal reimbursement begins when the child's eligibility is determined. How the payment is processed through the Child Welfare Vouchering System determines how the payment will be coded in the state's accounting system. Eventually, the total expenditures, for the maintenance cost of children in out-of-home care, are entered into a data system that allocates costs against federal grants. With each report submitted, the department must certify that for the expenditures reported, the accurate amount of match (or general revenue) was available.

The Legislature appropriates to the department anticipated IV-E earnings through a trust fund. The department uses the federal earnings and General Revenue to reimburse providers for services provided to the child. IV-E earning in excess of contract cost may be used for other child welfare services. Presently, community-based providers only receive a projected amount of federal earnings as stated in their contract with the department. The Legislature and department used excess earnings to provide funds for other statewide child welfare projects. The child welfare information system [SACWIS], revenue maximization positions, and child welfare training have received these dollars.

Section 215.425, F.S.

Section 215.425, F.S., prohibits additional compensation to any officer, agent, employee, or contractor after the service has been rendered or the contract made.

Liability insurance coverage

Section 409.175, F.S., requires that the Division of Risk Management of the Department of Insurance to provide liability insurance coverage for family foster home providing services to the Department of Children & Family Services. The coverage is limited to general liability claims arising from the provision of family foster home care pursuant to an agreement with the department and pursuant to guidelines established through policy, rule, or statute.

B. EFFECT OF PROPOSED CHANGES:

The bill makes changes to s. 4091671, F.S., to address the continued expansion of the privatization of child welfare services.

Insurance Requirements

The bill will specify certain insurance requirements and liability limits for community-based agencies and their subcontractors. In particular, these provisions require lead agencies to obtain general liability insurance and subcontractors to be covered by general liability insurance. This provision of the bill is ambiguous as it does not state a minimum coverage amount, nor does it clarify whether such coverage must be on a per claim or per incident basis.

Limitation on Damages

The bill limits liability for covered agencies and their subcontractors to *net economic damages*.

The bill also requires the state to hold private providers harmless for *non-economic damages* over \$200,000 pursuant to s. 768.28, F.S. The bill does not make clear whether this indemnification will be effectuated through the claims process or otherwise. The bill also provides for an increase in the limitation on noneconomic damages by 5% per year.

The Legislature may abolish a right of action or set a floor or ceiling on damages if it meets one of the following exceptions: (1) By providing a reasonable alternative remedy or commensurate benefit for claimants; or (2) showing an overpowering public necessity for the abolishment of the right and no alternative method of meeting such public necessity. *Smith v. Dep't of Ins.*, 507 So. 2d 1080, 1088 (Fla. 1987)(citing *Kluger v. White*, 281 So. 2d 1 (Fla. 1973)). If the Legislature fails to make the requisite showing, the limitation will be deemed to fail the access to courts provisions of Article 1, Section 21 of the Florida Constitution.

By its terms, the bill implicitly prohibits claims for *punitive damages*. If it is the intent of the bill's sponsor, such a prohibition should be made express in order to avoid ambiguities in application that may generate needless litigation. The Legislature has the authority to prohibit punitive damages claims. *Gordon v. State*, 608 So. 2d 800 (Fla. 1992).

Exception to Limitations

The immunity provided to covered foster care providers and their subcontractors is limited by an exception for defendants who act in a culpably negligent manner or with unprovoked physical aggression when such acts result in injury or death proximately caused by such acts. Again, the bill does not expressly except punitive damages from the limitations provided. This ambiguity may result in needless litigation on the issue, and could be clarified by amendment.

Federal Funds

The bill will require the Department of Children and Families to give federal earnings generated by a community-based agency back to the community-based agency for the purpose of providing additional child welfare services.

Severability

The bill contains a standard severability clause.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

N/A

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

Yes. The bill will obligate the state to indemnify covered providers for that portion of noneconomic damages that exceeds \$200,000.

(3) any entitlement to a government service or benefit?

Yes. The bill will entitle covered providers to indemnification of that portion of noneconomic damages that exceeds \$200,000.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

The bill does not eliminate or reduce any agency or program.

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

The bill may encourage foster care providers to enter into the market and take on contracted foster care responsibilities. This may have the result of improving foster care services in this state.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?
The bill may limit an injured party's ability to recover full compensation for his or her injuries.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

- (1) Who evaluates the family's needs?

The foster care services contractor, in conjunction with the Department of Children and Families.

- (2) Who makes the decisions?

The bill does not establish any decision making framework.

- (3) Are private alternatives permitted?

The bill provides for a private foster care system.

- (4) Are families required to participate in a program?

No.

- (5) Are families penalized for not participating in a program?

No.

- b. Does the bill directly affect the legal rights and obligations between family members?

The bill may limit an injured party's ability to recover full compensation for his or her injuries.

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

- (1) parents and guardians?

No.

- (2) service providers?

Yes, in conjunction with the Department of Children and Families.

- (3) government employees/agencies?

Yes. The Department of Children and Families will ostensibly work with the contract providers to control the private programs.

D. STATUTE(S) AFFECTED:

Section 409.1671, F.S.

E. SECTION-BY-SECTION ANALYSIS:

Section 1. Amends s. 409.1671, F.S.

Specifies certain insurance requirements and liability limits for community-based agencies and their subcontractors. Requires lead agencies to obtain general liability insurance and subcontractors to be covered by general liability insurance.

Limits liability for covered agencies and their subcontractors to *net economic damages*.

Requires the state to hold private providers harmless for *non-economic damages* over \$200,000 pursuant to s. 768.28, F.S. Provides for an increase in the limitation on noneconomic damages by 5% per year.

The immunity provided to covered foster care providers and their subcontractors is limited by an exception for defendants who act in a culpably negligent manner or with unprovoked physical aggression when such acts result in injury or death proximately caused by such acts.

Contains a severability clause intended to save any part of the subsection from being invalidated if another passage was declared invalid.

Requires the department to give federal earnings generated by a community-based agency back to the community-based agency for the purpose of providing additional child welfare services.

Section 2. Provides that the act takes effect upon becoming law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

N/A

2. Direct Private Sector Benefits:

The bill limits the exposure to liability by a community-based agency under contract with the Department of Children & Family Services.

The bill requires the department to give federal earnings generated by a community-based agency back to the agency for the purpose of providing additional child welfare services.

3. Effects on Competition, Private Enterprise and Employment Markets:

To the extent the bill caps liability for private community-based agencies it reduces the need to purchase liability insurance from the private sector for amounts above the caps.

D. FISCAL COMMENTS:

N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to expend funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce revenue raising authority.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

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

V. COMMENTS:

Section 1 of the bill adds paragraphs (c) and (e) to subsection (1) of section 409.1671, Florida Statutes. These paragraphs provide for the state to hold harmless private providers for non-economic damages over \$200,000 pursuant to s. 768.28, Florida Statutes. It is recommended that this provision be clarified. Is the intent for the state to hold harmless and pay for any amount automatically or is a claims bill contemplated? Also, paragraphs (d) and (f) of this same subsection refer to culpable negligence. According to the Department of Children and Family Services who proposed paragraphs (c)-(h), their intent is to define culpable negligence to mean "reckless indifference or grossly careless disregard of human life which, whether or not a violation was ever charged, would be a first-degree misdemeanor under s. 784.05, Florida Statutes."

The overall effect of these provisions is unclear. One interpretation is that the state would be obligated regardless of the merits or costs for all non-economic damages above \$200,000. Another interpretation is that the reference to s. 768.28 contemplates a claims bill process for aggrieved parties. This would create a claims bill remedy for a party who was injured by someone who was not an employee or agent of the state.

Judiciary Committee Comments:

The bill contains ambiguous language regarding the seeming prohibition on punitive damages, the amount and nature of required liability coverage, and the process for indemnifying covered providers for noneconomic damages over \$200,000. Clarifying amendments could resolve any unintended ambiguities. An additional solution to these potential problems would be to immunize covered agencies and their contractors under s.

768.28, F.S., in the same way as contractors providing health and juvenile justice services are currently immunized.

Section 2 currently permits documented federal funds earned in a year in excess of appropriation to be distributed based on a schedule and methodology developed by the Department and approved by the Governor. This provision may be found unconstitutional as a violation of Article VII Section 1(c), Florida Constitution.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON CHILDREN & FAMILIES:

Prepared by:

Bob Barrios

Staff Director:

Bob Barrios

AS REVISED BY THE COMMITTEE ON JUDICIARY:

Prepared by:

Michael W. Carlson

Staff Director:

Don Rubottom