HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1121 w/CS Health Care Providers/Sovereign Immunity
SPONSOR(S): Green
TIED BILLS: None. **IDEN./SIM. BILLS:** CS/SB 1374

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Health Care	23 Y, 1 N	Garner	Collins
2) Judiciary	17 Y, 0 N w/CS	Birtman	Havlicak
3)			
4)			
5)			

SUMMARY ANALYSIS

HB 1121 amends s. 766.1115, F.S., the Access to Health Care Act, which provides criteria under which health care providers can provide care to persons under the doctrine of sovereign immunity. Sovereign immunity would be granted to “free clinics” that provide services free of charge to all low-income persons.

The bill also revises the definition of “contract” to provide that for a health care provider to qualify as a volunteer, the provider may not receive any compensation from the patient or from third-party payers.

In addition, the bill requires the Department of Health (DOH) to adopt rules regarding procedures the department would use to determine eligibility and to refer patients to providers.

The bill provides an effective date of upon becoming a law.

The Department of Health reports that the bill has no fiscal effect on the department.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

1. Reduce government?	Yes[]	No[X]	N/A[]
2. Lower taxes?	Yes[]	No[]	N/A[X]
3. Expand individual freedom?	Yes[]	No[]	N/A[X]
4. Increase personal responsibility?	Yes[]	No[]	N/A[X]
5. Empower families?	Yes[]	No[]	N/A[X]

For any principle that received a "no" above, please explain:

1. The bill expands the rulemaking authority of the Department of Health to adopt rules regarding the referral and eligibility process for governmental contractors.

B. EFFECT OF PROPOSED CHANGES:

HB 1121 amends s. 766.1115, F.S., the Access to Health Care Act, which provides criteria under which health care providers can provide care to persons under the doctrine of sovereign immunity. Sovereign immunity would be granted to "free clinics" that provide services free of charge to all low-income persons.

The bill also revises the definition of "contract" to provide that for a health care provider to qualify as a volunteer, the provider may not receive any compensation from the patient or from third-party payers. The provider would continue to be able to receive federal grant funding to provide medical services to the indigent.[1]

In addition, the bill requires the Department of Health (DOH) to adopt rules regarding procedures the department would use to determine eligibility and to refer patients to providers.

PRESENT SITUATION

Access to Heath Care Act

Section 766.1115, F.S., is entitled "The Access to Health Care Act." The act was enacted in 1992 to encourage health care providers to provide care to low-income persons. The 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. Such 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 s. 766.1115, F.S.

A health care provider under contract with the state may not be named as a defendant in any action arising out of medical care or treatment provided under contracts entered into under s. 766.1115, F.S. The contract must provide for specified elements which include: the right of dismissal or termination of any health care provider delivering services under the contract; access to patient records of any health care provider delivering services under the contract by the governmental contractor; adverse incidents and information on treatment outcomes to be reported by the health care provider delivering services under contract to the governmental contractor; patient selection and referral must be made solely by

[1] A representative from the Salvation Army has reported that many volunteer health care providers use federal grant funding to provide nursing services to the homeless population. The bill does not prohibit such funding in its definition of 'volunteer, uncompensated services.'

the governmental contractor; patient care is subject to approval by the governmental contractor; and the provider is subject to supervision and regular inspection by the governmental contractor.

Since the Act was passed in 1992, the protection from exposure to liability it offers, in tandem with the education and oversight provided by the Department of Heath, has greatly stimulated participation in charitable care initiatives and increased access to health care for uninsured and medically indigent persons throughout the state. Specifically, providers documented over $86 million dollars in medical care to low income families and individuals as shown in the 2001-02 Florida Department of Health Statewide Volunteer Health Services Program Report.

The Use of Free Clinics in Florida

"Free clinics" provide limited medical services to low-income individuals in Florida as alternative sites to emergency rooms and other higher cost health care facilities. Many of these free clinics cooperate with the Department of Health's (DOH) Volunteer Health Care Provider Program (VHCPP). VHCPP operates in 55 of Florida's 67 counties and uses local health care providers who volunteer their services free of charge. Statewide, during FY 2002-03, the value of services donated totaled $107.8 million and the number of volunteers exceeded 17,000.

The intent of the VHCPPs is two-fold: 1) to increase access to health care for Floridians with low incomes through health care practitioner volunteers; and 2) to increase the number of health care volunteers by extending sovereign immunity protection. One of the criteria for health care professionals to receive sovereign immunity is that the health care services be free of charge to eligible patients who are referred solely by a governmental contractor.

For a health care practitioner to be covered under sovereign immunity, the practitioner must provide voluntary uncompensated services while being a provider under contract with the department. In addition, current law provides that patient selection and initial referral is limited solely to governmental contractors (DOH, special health care taxing districts and hospitals owned and operated by governmental entities).

HB 1121 changes the definitions in s. 766.1115, F.S., to extend the state's protection of sovereign immunity to the clinics that deliver only medical diagnostic or nonsurgical services free of charge to all low-income recipients and revising the criteria under which a governmental contractor (DOH or AHCA) may contract with health providers.

Sovereign Immunity

Article X, s. 13, of the State Constitution, authorizes the Florida Legislature 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. The section imposes a $100,000 limit on the government's liability to a single person for claims arising out of a single incident, with a limit of $200,000 per occurrence. The section also extends sovereign immunity to private entities under contract with the government under certain conditions. Specifically, s. 768.28(9), F.S., states that agents of the state or its subdivisions are not personally liable in tort; instead, the government entity is held liable for its agent's torts. As it pertains to health care, s. 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).

C. SECTION DIRECTORY:

Section 1. Amends s. 766.1115, F.S., revising definitions; providing qualifications for volunteer, uncompensated services; extends protection of sovereign immunity to free clinics; and authorizes the Department of Health to adopt certain rules necessary to implement this provision.

Section 2. Provides an effective date of upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   See fiscal comments section.

2. Expenditures:

   The Department of Health states that the bill has no fiscal effect on the department.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill will allow free health care clinics who do not charge low-income recipients for services delivered to have sovereign immunity attach to their acts or omissions, and to receive indirect compensation to cover the costs of such care as long as the recipient or third-party payors are not billed for health care services rendered to recipients.

D. FISCAL COMMENTS:

The Department of Health's Volunteer Health Care Provider Program uses local health care providers who volunteer to provide medical services free of charge. The department reports that statewide in fiscal year 2002-2003, the value of volunteer health care services donated totaled $107.8 million, and the number of volunteers exceeded 17,000. Even with these numbers, there were not enough health care professionals or clinics in the program to treat the number of patients needing health care services.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

Access to Courts - Article I, section 21 of the State Constitution provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." No similar provision exists in the federal constitution. Where citizens have enjoyed a historical right of access, the Legislature can only eliminate a judicial remedy under two circumstances: a valid public purpose coupled with a reasonable alternative,[2] or an overriding public necessity.[3] Even though this bill provides immunity to free clinics that deliver specified services free of charge to all low-income recipients, s. 766.1115, F.S., already provides legislative findings that appear to provide a valid public purpose.[4] Further, because the bill provides that specified health care providers who contract with the government are considered government agents entitled to sovereign immunity, the provisions under s. 768.28, F.S., authorizing the Legislature to award claims that exceed the statutory cap would appear to provide a reasonable alternative to court access. Thus it does not appear that the provisions of this bill violate the Access to Courts provisions of the Florida constitution.

B. RULE-MAKING AUTHORITY:

The Florida Supreme Court has held that regardless of the Legislature's statutory designation as an 'agency', that unless an entity is acting as a 'true agent' of the government, and not as an independent contractor, the entity cannot logically share in the full panorama of the government's immunity.[5] The existence of a true agency relationship depends on the degree of control exercised by the principal; the Court has found that physician consultants' employment contract with Children's Medical Services (then run by the Department of Health and Rehabilitative Services) provided extensive control over the patients' treatment, thus holding that the physician consultants were agents of the government entitled to sovereign immunity.[6] Section 766.1115(4), F.S., provides the following contract requirements for the creation of agency relationship between governmental contractors and health care practitioners:

- the right of dismissal or termination of any health care provider delivering services under the contract is retained by the department;
- the governmental contractor has access to the patient records of any health care provider delivering services under the contract;
- adverse incidents and information on treatment outcomes must be reported to the governmental contractor under specified circumstances;
- patient selection and initial referral must be made solely by the governmental contractor, with specified exceptions;
- if emergency care is required, the patient need not be referred before receiving treatment, but must be referred within 48 hours after treatment is commenced;

[2] See *Kluger v. White, 281 So.2d 1 (Fla. 1973)*.
[3] See *Rotwein v. Gersten, 36 So.2d 419 (Fla. 1948)*.
[4] Section 766.1115(2), F.S., which provides legislative findings and intent as follows: The Legislature finds that a significant proportion of the residents of this state who are uninsured or Medicaid recipients are unable to access needed health care because health care providers fear the increased risk of medical negligence liability. It is the intent of the Legislature that access to medical care for indigent residents be improved by providing governmental protection to health care providers who offer free quality medical services to underserved populations of the state. Therefore, it is the intent of the Legislature to ensure that health care professionals who contract to provide such services as agents of the state are provided sovereign immunity.
[5] See Theodore v. Graham, 733 So.2d 538 (Fla. 4th DCA 1999).
[6] See Stoll v. Noel, 694 So.2d 701 (Fla. 1997). The Court held the following facts to be dispositive in finding that the department held the requisite amount of control over the contractor: the contractors were required to abide by the terms of a manual developed by the department; all services provided had to be authorized in advance by the department's medical director; the department had responsibility to supervise and direct medical care of all patients; the department had supervisory responsibility over all employees; the department had absolute authority over payment for treatment; and the department could refuse to allow treatment for medical or budgetary reasons. Note that the plaintiff in this case is the claimant in the Noel claim bill, HB 265, which is currently pending before the Legislature.

- patient care, including any follow-up or hospital care, is subject to approval by the governmental contractor; and

- the provider is subject to supervision and regular inspection by the governmental contractor.

Many of the health care providers serve patients who may not be referred by the department, but who otherwise meet the financial eligibility criteria. Thus the bill gives the department rule-making authority to allow health care providers to serve patients notwithstanding referral by the department. It would appear that in order for health care practitioners who volunteer at such clinics to be covered by sovereign immunity, a court would look to the amount of control exercised by the department. In order to prevent a court from finding that a health care practitioner is not entitled to sovereign immunity because the practitioner is serving as an independent contractor rather than as an agent, the rules provision at s. 766.1115(10), F.S., appears to provide that the department exercises the requisite amount of control over the referral process.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On March 30, 2004, the Judiciary Committee adopted an amendment giving the department specific rule making authority and requirements regarding specific methods for the determination and approval of patient eligibility and referral. This analysis is to the bill as amended.