HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 595 Community Behavioral Health Agencies
SPONSOR(S): Cannon
TIED BILLS: **IDEN./SIM. BILLS:** SB 280

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Judiciary Committee		Thomas	Hogge
2) Health Care Appropriations Committee			
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

The bill limits liability in tort actions involving crisis services provided by detoxification programs, addictions receiving facilities, or designated public receiving facilities. The bill requires that net economic damages be limited to $1 million per liability claim, including, but not limited to, past and future medical expenses, wage loss, and loss of earning capacity. Additionally, any noneconomic damages are limited to $200,000 per claim. The bill allows for any claim to be settled up to the policy limits without action by the Legislature. However, claims for any amount exceeding the limits may be brought to the Legislature as a claims bill in accordance with s. 768.28, F.S.

The bill specifies that the immunities enjoyed by a provider under the provisions of this act extend to an employer of the provider when the employee is acting in furtherance of the provider's responsibilities under its contract with the Department of Children and Families. However, these immunities are not applicable to a provider or employee who acts in a culpably negligent manner or with willful and wanton disregard or unprovoked physical aggression when such acts result in injury or death.

The bill requires each provider obtain and maintain general liability insurance coverage in the amount of $1 million per claim and $3 million per incident.

Conditional limitations on damages specified by the act are increased at the rate of 5 percent each year, to be prorated from its effective date to the date at which damages subject to such limitations are awarded by final judgment or settlement.

The effective date of this bill is July 1, 2006.

The bill does not appear to have a fiscal impact on state or local government.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government—The bill mandates that each provider obtain and maintain general liability insurance coverage in the amount of $1 million per claim and $3 million per incident.

Promote personal responsibility—The bill limits the liability of a provider in certain civil actions. Recovery for amounts above the limits specified in the bill, if approved by the Legislature in a claims bill, will originate from the state budget.

Empower families—To the extent that providers reduce their costs for liability insurance and from legal immunity, the offering of services, with the attendant emotional and financial benefits, may increase for families.

B. EFFECT OF PROPOSED CHANGES:

PRESENT SITUATION

Background on the Provision of Mental Health Services Prevention of Substance Abuse

Part I of ch. 394, F.S., is the Florida Mental Health Act, also known as "the Baker Act." The Baker Act describes the criteria and process for the involuntary examination of a person who is believed to have a mental illness and, because of that illness, has refused voluntary examination or is unable to determine that an examination is necessary and is a danger to self or others or likely to suffer from self-neglect to the degree that it endangers his or her well-being. The statute authorizes law enforcement, certain mental health clinical professionals, or the court to require that an individual be involuntarily detained for evaluation for a period up to 72 hours.

In addition to procedural requirements for involuntary examination and voluntary and involuntary treatment, the Baker Act provides a framework for the public mental health service delivery system. The "front door" to that system is the public receiving facility. Receiving facilities admit persons for involuntary examination and are defined in the statute as "any public or private facility designated by the Department of Children and Families (DCF) to receive and hold involuntary patients under emergency conditions or for psychiatric evaluation and to provide short-term treatment."[1] Public receiving facilities are those facilities that receive public funds specifically for Baker Act examinations. Under s. 394.459(2), F.S., receiving facilities are required to examine and provide treatment to everyone, regardless of their diagnosis or ability to pay. Public receiving facilities are usually co-located with a community mental health provider agency or a public hospital.

A crisis stabilization unit is defined as "a program that provides an alternative to inpatient hospitalization and that provides brief, intensive services 24 hours a day, seven days a week, for mentally ill individuals who are in an acutely disturbed state."[2] The definition of "crisis stabilization unit" and licensure requirements for these programs are found in pt. IV of ch. 394, F.S., the Community Substance Abuse and Mental Health Services Act.

Part V of ch. 397, F.S., provides criteria and procedures for the involuntary admission of an individual in an acute substance abuse crisis. A person meets the criteria for involuntary admission if he or she is substance abuse impaired and because of such impairment has lost the power of self-control with respect to substance use and either is likely to harm himself or herself or others or is in need of substance abuse services and his or her judgment has been so impaired that the person is unable to

[1] Section 394.455(26), F.S.
[2] Section 394.67(5), F.S.

appreciate the need for treatment or services.[3] An individual may be compelled to emergency admission for detoxification, assessment, or stabilization through one of several pathways including law enforcement, physician certification, parent or guardian consent, or court order.

Substance abuse providers may be licensed by the DCF for one or several separate service components.[4] Included in these licensed service components are detoxification programs and addictions receiving facilities. Detoxification services may be provided within a facility that is licensed as a substance abuse treatment program or in a hospital licensed under ch. 395, F.S. Addictions receiving facilities (ARFs) are state-owned, state-operated, or state-contracted programs licensed by the DCF and designated as secure facilities to provide an intensive level of care. All persons admitted to ARFs are considered clients of the DCF and their admission cannot be denied solely on the basis of their inability to contribute to the cost of their care.[5] However, admission may be denied due to failure to meet admission criteria, medical or behavioral conditions beyond management capabilities of the program, or lack of space, services, or financial resources to pay for care.[6] Detoxification services may be provided on a residential or outpatient basis to assist an individual with the physiological and psychological withdrawal from the effects of substance abuse. While most of these programs are funded by the DCF, some of them are private, for-profit organizations that receive no funding from the DCF.

As of FY 2004-05, the DCF maintained contracts with 168 substance abuse providers and 249 community mental health provider agencies. There are currently 75 public receiving facilities and 53 private receiving facilities designated by the DCF. Among the public facilities, 47 are licensed by the Agency for Health Care Administration and designated as Crisis Stabilization Units. The agency may not issue a license to a crisis stabilization unit unless the unit receives state funds. Of the substance abuse providers, 32 provide substance abuse detoxification services and 10 are licensed as ARFs. In FY 2004-05, services were provided to 69,059 individuals through mental health or substance abuse crisis services agencies under contract with the DCF.

Current DCF contracts specify that a provider is an independent contractor and not an agent of the department and that the provider agrees to indemnify, defend and hold the department, its agencies, officers, and employees harmless from all claims, suits, judgments, or damages including attorneys' fees arising out of any act, actions, neglect or omission by the provider, its agents or employees. According to the Florida Council for Community Health (the "Council"), approximately 98% of persons served by these facilities are low income, uninsured individuals, or Medicaid eligible and virtually all funding for receiving facilities comes from local, state and federal government sources.

According to the Council, the cost of medical malpractice liability insurance is limiting the ability of publicly supported community mental health and substance abuse agencies to provide critical treatment and intervention services that are relied upon by law enforcement, local communities and state agencies. The Council states that medical malpractice insurance rates for community mental health and substance abuse agencies have increased 105% over the past three years, approximately 35% per year. In some cases, 5% or more of a facility's operating budget is used to pay for liability insurance.

The average cost of liability insurance for a community behavioral health provider was $238,847 in FY 2002-03. The average yearly cost in FY 2003-04 was $355,715, and increase of 49%. As an example of the impact on treatment capacity, a community mental health provider could have provided an additional 1,457 bed days of crisis stabilization care in lieu of paying for liability insurance during FY 2003-04. The following chart provided by the Council shows examples of the escalation of liability insurance premiums (which includes medical malpractice, officers and directors insurance and other liability insurance) for a sample of behavioral health care providers:

[3] Section 397.675, F.S.
[4] Section 397.311(18), F.S.
[5] Section 397.431(5), F.S.
[6] Section 397.6751, F.S.

Sample of Community Providers' Annual Insurance Premium Increases
FY 2002-03 through FY 2005-06

Facility	FY 2002-03 Premiums	FY 2003-04 Premiums	FY 2004-05 Premiums	FY 2005-06 Premiums	% Increase from '02-03 to '05-06
Act Corporation	$391,000	$425,000	$582,061	$619,603	58.5%
Lakeview Center	$555,301	$793,063	$1,063,966	$1,236,461	122.7%
Personal Enrichment	$72,315	$225,662	$187,556	$159,454	120.5%
Meridian Behavioral Health	$306,364	$420,174	$520,896	$543,201	77.3%
Apalachee Center	$95,630	$247,239	$186,031	$272,355	184.8%
Bayview Center	$59,280	$88,952	$119,629	$137,646	132.2%
Manatee Glens	$99,744	$125,379	$137,404	$162,473	62.9%
LifeStream	$137,843	$167,463	$221,535	$257,879	87.1%
Bridgeway	$160,250	$281,539	$219,817	$238,270	48.7%
Average Cost / % Change	$208,636	$308,275	$359,877	$403,038	93.18%

Source: Florida Council for Behavioral Healthcare, Helping Florida Families in Crisis: Liability Limits for State Funded Detoxification and Public Receiving Facilities, January 1, 2006

Report by the Department of Children and Families on the Experience of Public Receiving Facilities in Securing and Maintaining Medical Malpractice Insurance

In 2004, the Florida Legislature, in proviso language in the General Appropriations Act, mandated that the DCF develop a report that reviewed the experience of public receiving facilities in securing and maintaining medical malpractice insurance. The review was to include the current cost of insurance and the rate of increase or decrease in these costs over the past three years and the experience of these facilities with lawsuits and associated awards. The department was directed to investigate whether these facilities were experiencing problems with malpractice insurance and the impact such problems have on service delivery. The department delivered the report to the Governor and the Senate and House Appropriations committees by December 31, 2004.

The report states that the median cost of insurance for public receiving facilities rose by 72.5 percent during the four years 2001 to 2004, from $15,210 in FY 2001-02 to $26,239 in FY 2003-04. During this same period, the reporting agencies' acute care budgets increased by 23.01 percent.

Similar Statutory Provisions

Liability limits and immunity provisions similar to those proposed in this bill are extended to health care[7] and other providers serving inmates of the state correctional system,[8] providers under contract with the Department of Juvenile Justice,[9] and eligible child welfare lead agencies.[10] These immunities are not applicable to a provider or employee who acts in a culpably negligent manner or with willful and wanton disregard or unproved physical aggression when such acts result in injury or death.

EFFECT OF PROPOSED CHANGES

The bill creates s. 394.9085, F.S., to provide that certain facilities or programs [a detoxification program defined in s. 397.311(18)(b), F.S, an addictions receiving facility defined in s. 397.311(18)(a), F.S., or a designated public receiving facility defined in s. 394.455(26), F.S.] shall have liability limits in tort actions based on services for crisis stabilization. The bill requires that net economic damages be limited to $1 million per liability claim, including, but not limited to, past and future medical expenses, wage loss, and loss of earning capacity. The bill also specifies that damages be offset by any collateral source payment that is paid in accordance with s. 768.76, F.S. Additionally, any noneconomic

[7] Section 456.048, F.S.
[8] Section 946.5026, F.S.
[9] Section 985.31(5)(d), F.S.
[10] Section 409.1671(1)(h), F.S.

damages specified against the entities specified by this bill are limited to $200,000 per claim. The bill allows any claim to be settled up to the policy limits without action by the Legislature. However, claims for any amount exceeding the limits specified by this bill may be brought to the Legislature as a claims bill in accordance with s. 768.28, F.S. The provider or its insurer must assume any costs for defending actions brought under this section.

The bill specifies that the immunities enjoyed by a provider under the provisions of this act extend to an employee of the provider when the employee is acting in furtherance of the provider's responsibilities under its contract with the DCF. However, these immunities are not applicable to a provider or employee who acts in a culpably negligent manner or with willful and wanton disregard or unprovoked physical aggression when such acts result in injury or death.

The bill specifies that a person who provides contractual services to the DCF is not an employee or agent of the state for the purposes of ch. 440, F.S. (Worker's Compensation). The bill requires each provider obtain and maintain general liability coverage in the amount of $1 million per claim and $3 million per incident.

The bill additionally specifies that the conditional limitations on damages specified by this act shall be increased at the rate of five percent each year, to be prorated from its effective date to the date at which damages subject to such limitations are awarded by final judgment or settlement.

C. SECTION DIRECTORY:

Section 1. Creates 768.0755, F.S., relating to behavioral provider liability.

Section 2. Provides that the bill takes effect on July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   This bill does not appear to have a fiscal impact on state revenues.

2. Expenditures:

   This bill does not appear to have a fiscal impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   This bill does not appear to have a fiscal impact on local government revenues.

2. Expenditures:

   This bill does not appear to have a fiscal impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The provisions of this bill limit the economic damages recoverable by certain individuals who have been damaged in tort and require that certain substance abuse and mental health providers purchase general liability coverage.

The Department of Children and Family Services reports that limiting the damages awarded to an individual may have a direct positive impact on certain mental health and substance abuse providers by containing the cost of their insurance premiums, thereby reducing their administrative costs.

To the extent that providers reduce their costs for insurance and legal fees, there may be increased funding available for services. Conversely, to the extent that injured persons are not able to recover fully for their injuries, more families may be dependent on government-funded assistance programs.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this joint resolution does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

2. Other:

Access to Courts

Article I, section 21 of the Florida 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."[11] The Legislature must not unduly or unreasonably burden or restrict access. The Florida Constitution protects "only rights that existed at common law or by statute prior to the enactment of the Declaration of Rights of the Florida Constitution."[12] In order to make a colorable claim of denial of access to courts, an aggrieved party must demonstrate that the Legislature has abolished a common-law right previously enjoyed by the people of Florida and, if so, that it has not provided a reasonable alternative for redress and that there is not an "overpowering public necessity" for eliminating the right.[13]

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

There appears to be a technical drafting error in s. 394.9085(2) of the bill. The first sentence appears to be missing the phrase "as described in this section," which should be inserted after the first two words of the first sentence.

There also appears to be a technical error in the second sentence of s. 394.9085(2) of the bill concerning the reference to "immunities from liability enjoyed by such providers extend as well to each employee of the provider …." The bill does not provide for immunity from liability, but rather, for limitations on liability. Finally, a similar technical error appears to occur in the last sentence of s. 394.9085(2) of the bill, where it again refers to "immunities."

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

N/A

[11] *See generally* 10A FLA. JUR. 2D CONSTITUTIONAL LAW §§ 360-69.
[12] Fla. Jur. 2d., s. 360.
[13] Kluger v. White, 281 So.2d 1, 4 (Fla. 1973).