HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1093 Volunteer Health Services
SPONSOR(S): Health Quality Subcommittee; Hudson
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 1690

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health Quality Subcommittee	12 Y, 0 N, As CS	McElroy	O'Callaghan
2) Appropriations Committee	26 Y, 0 N	Rodriguez	Leznoff
3) Health & Human Services Committee			

SUMMARY ANALYSIS

Pursuant to s. 766.1115, F.S., the Access to Health Care Act (Act), a governmental contractor, who contracts with a health care provider to provide volunteer and uncompensated health care services to low-income individuals, has exclusive control and oversight over patient eligibility, referral determinations, and patient care.

The bill amends the Act to authorize the health care provider to determine patient eligibility, referrals, and care. The bill specifies that the patient selection and initial referral “may” be made by the government contractor or provider.

The bill requires the Department of Health (DOH) to provide an online listing of all health care providers volunteering under this program including the duration of service (in hours) and the number of patient visits by provider.

The bill creates a continuing education credit for health care providers who provide health care services in accordance with the Act.

The bill retains DOH’s review and oversight authority over patient eligibility and referral determinations and requires DOH to adopt rules that specify the required methods for making and approving these determinations.

There is an insignificant fiscal impact on state government that may be absorbed within existing agency resources.

The bill provides an effective date of July 1, 2013.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Access to Health Care Act

Section 766.1115, F.S., is entitled the "Access to Health Care Act" (Act).[1] The Act was enacted in 1992 to encourage health care providers to provide care to low-income persons.[2] This 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:[3]

- 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 a health care professional.
- 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.

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[1] Chapter 64I-2, F.A.C., refers to the Access to Health Care Act as the "Volunteer Health Care Provider Program."

[2] 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.

[3] Section 766.1115, F.S.

A health care provider may not subcontract for the provision of services.[4]

A "governmental contractor" is defined in the Act as DOH, a county health department, a special taxing district with health care responsibilities, or a hospital owned and operated by a governmental entity.[5]

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.[6]

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.[7]

The individual accepting services through the contracted provider must not have medical or dental care coverage for the illness, injury, or condition in which medical or dental care is sought.[8] The health care provider cannot perform experimental procedures and clinically unproven procedures.[9] The governmental contractor must determine whether or not a procedure is authorized under the Act.[10]

DOH has adopted rules that specify required methods of determination and approval of patient eligibility and referral, as well as services and procedures authorized to be provided by the health care provider. These rules include, but are not limited to, the following:

- The provider must accept all patients referred by DOH. The number of patients that must be accepted may be limited in the contract.
- The provider shall comply with DOH rules regarding determination and approval of the patient eligibility and referral.
- The provider shall complete training by DOH regarding compliance with the approved methods of determination and approval of patient eligibility and referral.

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[4] Rule 64I-2.004, F.A.C.
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] Rule 64I-2.002, F.A.C.
[9] Rule 64I-2.006, F.A.C.
[10] *Id.*

- DOH shall retain review oversight authority of the patient eligibility and referral determination.[11]

As of June 30, 2012, there were 12,867 licensed, contracted volunteer providers in the state.[12]

Annually, DOH reports a summary to the Legislature of the efficacy of access and treatment outcomes from the provision of health care services for low-income persons under the Act.[13]

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 statute, 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. In addition, the law limits the recovery of any one person to $200,000 for one incident and limits all recovery related to one incident 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.[14]

The Florida Supreme Court, in *Stoll v. Noel* set forth the test to be utilized in determining whether a health care provider is entitled to sovereign immunity.[15] Specifically, whether a health care provider is entitled to sovereign immunity turns on the degree of control retained or exercised by the governmental entity.[16] The degree of control over a health care provider necessary for agency status cannot be established through contractual language but rather must be based upon the actual relationship between the parties.[17]

Effect of Proposed Changes

Under s. 766.1115, F.S., the "Access to Health Care Act" (Act), a governmental contractor, who contracts with a health care provider to provide volunteer and uncompensated health care services to low-income individuals, retains exclusive control and oversight over patient eligibility, referral determinations, and patient care. Patient selection and initial referral must be made solely by the governmental contractor and the health care provider must accept all referred patients.[18] Patient care, including any follow-up or hospital care, is subject to approval by the governmental contractor.[19]

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[11] Section 766.1115 (10), F.S.
[12] *Id*.
[13] Department of Health, Volunteer Health Services Program Annual Report 2010-2011, available at: http://doh.state.fl.us/workforce/vhs/index.html (last visited on March 23, 2013).
[14] Section 768.28(5), F.S.
[15] *Stoll v. Noel,* 694 So.2d 701 (Fla. 1997)
[16] *Id*.
[17] *Robinson v. Linzer,* 758 So.2d 1163 (Fla. 4th DCA 2000).
[18] Section 766.1115, F.S.
[19] *Id*.

Whether health care providers are agents of the state turns on the degree of control retained or exercised by governmental contractors, including DOH.[20] Currently, exclusive control for patient eligibility, referrals, and patient care rests with the governmental contractors. As long as the health care providers are working within the scope of their duties under the contract, they are agents of the state and are entitled to sovereign immunity.[21]

The bill amends the Act to authorize health care providers to make patient eligibility, referral, and care determinations and thereby diminishes government control. The bill specifies that the patient selection and initial referral "may" be made by the government contractor or provider. Removing the decision-making process for the government may result in a court determining that there was not sufficient government control to create an agency relationship.[22]

The bill requires DOH to provide an online listing of all health care providers volunteering under this program including the duration of service (in hours) and the number of patient visits by provider. There is currently no reporting requirement for this information either online or in the annual report required under the Act.

The bill creates a continuing education credit for health care providers who provide services under the Act. Specifically, health care providers can earn one credit hour for every one hour volunteered up to a maximum of 8 credit hours.

The bill retains DOH's review and oversight authority over patient eligibility and referral determinations, and requires DOH to adopt rules that specify the required methods under which these determinations must be made and approved. The bill requires such rules to give providers the greatest flexibility possible in order to serve eligible patients.

The bill also deletes the requirement that DOH adopt a rule requiring a provider to complete training conducted by DOH regarding compliance with the approved methods for determination and approval of patient eligibility and referral.

B. SECTION DIRECTORY:

Section 1. Amends s. 766.1115, F.S., relating to health care providers; creation of relationship with governmental contractors.
Section 2. Provides an effective date of July 1, 2013.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   The bill has an insignificant fiscal impact that may be absorbed within existing agency resources.

   The bill requires DOH to provide an online listing of all health care providers volunteering under this program including the duration of service (in hours) and the number of patient visits by provider. According to DOH, reporting data by volunteer physicians can be done within existing resources by

[20] *Supra* fn 16.
[21] Section 766.1115, F.S.
[22] Correspondence from DOH, 2013 Florida Legislative Session, Review of Proposed Amendments to s. 766.115, F.S., HB 1093 (on file with the Florida House of Rep. Health Care Appropriations Subcommittee).

using the existing Medical Quality Assurance licensure and enforcement database, COMPAS.[23] The use of this existing system will eliminate the need to create a new online database.[24]

The bill retains DOH's review and oversight authority over patient eligibility and referral determinations, and requires DOH to adopt rules that specify the required methods under which these determinations must be made and approved. The fiscal impact associated with rule promulgation may be absorbed within existing agency resources.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill eliminates the exclusive control for eligibility determinations and patient care previously held by the governmental contractors. The bill specifies that the patient selection and initial referral "may" be made by the government contractor or provider. Removing the decision-making process for the government may result in a court determining that there was not sufficient government control to create an agency relationship. Although the state still retains some review and oversight authority over the providers, there may be an increase in the number and duration of lawsuits filed against the health care providers who deliver services under the Act.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

DOH has appropriate rule-making authority to implement the provisions of the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill creates a continuing education credit for health care providers who provide services under the Act. Specifically, health care providers can earn one credit hour for every one hour volunteered up to a maximum of 8 credit hours. The bill however fails to cross-reference s. 766.1116 or s. 456.013(9), F.S., which allow the DOH to waive up to 25% of the continuing education hours required for licensure

[23] Correspondence from DOH, 2013 Legislative Session, Review of Proposed Amendments to s. 766.1115, F.S., Data Reporting Requirement Fiscal Impact (on file with the Florida House of Rep. Health Care Appropriations Subcommittee).
[24] *Id.*

renewal if the health care practitioner provides health care services to low-income or indigent individuals, or underserved populations, for at least 160 hours during the renewal cycle. This omission may confuse health care providers as to their eligibility for these credit hours, and whether the newly established continuing education credit is in addition to the existing credit.

The bill creates a requirement for DOH to provide an online listing of all providers volunteering under this program along with the number of hours and patient visits each provided. It is unclear as to what "hours" refers to in this section. The bill does not specify how, or the frequency of which, this information is to be reported to DOH. Additionally, the bill does not provide an enforcement mechanism for DOH to collect this information from non-responsive providers.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 27, 2013, the Health Quality Subcommittee adopted two amendments to HB 1093 and reported the bill favorably as a committee substitute. The amendments:

- Reinstate the DOH's authority to adopt rules that specify methods for the determination and approval of patient eligibility and referral.
- Require the rules adopted by the DOH to provide health care providers flexibility in order to serve eligible patients.
- Reinstate the DOH's review and oversight authority of patient eligibility and referral determinations.
- Reinstate language relating to anti-dumping prohibitions.

The analysis is drafted to the committee substitute as passed by the Health Quality Subcommittee.