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 142
INTRODUCER:	Senator Hays
SUBJECT:	Sovereign Immunity for Dentists and Dental Hygienists
DATE:	October 2, 2013 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stovall	Stovall	HP	**Favorable**
2.			JU	
3.			AHS	
4.			AP	
5.				
6.				

I. Summary:

SB 142 allows a volunteer dentist to accept a voluntary contribution toward the cost of dental laboratory work from the patient or parent or guardian of the patient without forfeiting sovereign immunity under the Access to Health Care Act.

This bill substantially amends section 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 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]

[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.

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

- A birth center licensed under ch. 383, F.S.
- An ambulatory surgical center licensed under ch. 395, F.S.
- A hospital licensed under ch. 395, F.S.
- A physician or physician assistant licensed under ch. 458, F.S.
- An osteopathic physician or osteopathic physician assistant licensed under ch. 459, F.S.
- A chiropractic physician licensed under ch. 460, F.S.
- A podiatric physician licensed under ch. 461, F.S.
- A registered nurse, nurse midwife, licensed practical nurse, or advanced registered nurse practitioner licensed or registered under part I of ch. 464, F.S., or any facility which employs nurses licensed or registered under part I of ch. 464, F.S., to supply all or part of the care delivered under this section.
- A dentist or dental hygienist licensed under ch. 466, F.S.
- A midwife licensed under ch. 467, F.S.
- A health maintenance organization certificated under part I of ch. 641, F.S.
- 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 766.1115(3)(d)4-9, F.S.
- 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 Department of Health (DOH or department), a county health department, a special taxing district with health care responsibilities, or a hospital owned and operated by a governmental entity.[3]

The contract executed under the Act 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:

[3] Section 766.1115(3)(c), F.S.
[4] Section 766.1115(3)(a), F.S.

- 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 or the provider must make patient selection and initial referrals. However, the patient need not be referred prior to receiving emergency treatment or care but must be referred within 48 hours after treatment commences or the patient has the mental capacity to consent to treatment.
- 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.[5]

An individual accepting services through this contracted provider may not have medical or dental care coverage for the illness, injury, or condition in which medical or dental care is sought.[6]

The health care provider may not subcontract for the provision of services under this Act.[7]

The Department of Health reported that from July 1, 2011 – June 30, 2012, 12,867 licensed healthcare volunteers (plus an additional 9,949 clinic staff volunteers) provided 433,191 health care patient visits with a total value of $231,530,324 under the Act.[8] The Florida Department of Financial Services, Division of Risk Management reported on March 26, 2012, that 9 claims had been filed against the Volunteer Health Care Provider Program under s. 766.1115, F.S., since February 15, 2000.[9]

Currently, s. 766.1115, F.S., is interpreted differently across the state. In certain parts of the state one medical director interprets this law to mean that as long as there is transparency and clear proof that the volunteer provider is providing services, without receiving personal compensation, then the patient can pay a nominal amount per visit to assist in covering laboratory fees. In other parts of the state, a medical director suggests that if any monetary amount is accepted then sovereign immunity is lost. Patients sometimes offer to pay a nominal contribution to cover some of the cost of laboratory fees that the provider incurs to pay outside providers for items such as dentures for the patient. In many areas, the dentist is paying the cost of these fees from his or her own resources.[10]

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[5] Section 766.1115(5), F.S.
[6] Rule 64I-2.002, F.A.C.
[7] *Id.*
[8] Department of Health Volunteer Health Services 2011-2012 Annual Report, available at: http://www.doh.state.fl.us/workforce/VHS/20112012VolAnnualReport.pdf, (last visited October 2, 2013).
[9] *Id., See* Appendix B.
[10] Staff of Committee on Health Policy's discussion with representatives from the Florida Dental Association on March 8, 2013.

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 her or his 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.[11]

Whether sovereign immunity applies turns on the degree of control of the agent of the state retained by the state.[12] 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.[13]

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.[14] The court explained:

> Whether the [Children's Medical Services (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[15] Manual and CMS Consultants Guide which contain CMS

[11] Section 768.28(5), F.S.
[12] *Stoll v. Noel*, 694 So. 2d 701, 703(Fla. 1997).
[13] *Id.* (quoting The Restatement of Agency).
[14] *Stoll v. Noel*, 694 So. 2d 701 at 703.
[15] Florida Department of Health and Rehabilitative Services.

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.[16]

III. Effect of Proposed Changes:

The bill authorizes a dentist,[17] who is a government contracted health care provider under the Access to Health Care Act, to allow a patient, or a parent or guardian of a patient, to voluntarily contribute a fee to cover costs of dental laboratory work. The contribution may not exceed the actual cost of the laboratory fee. Acceptance of the voluntary contribution from the patient for dental laboratory fees is not considered compensation for services so that sovereign immunity protection is not lost.

The bill provides an effective date of July 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

[16] *Stoll v. Noel*, 694 So. 2d 701, 703(Fla. 1997).
[17] The bill refers to a health care provider licensed under chapter 466, F.S., which includes dentists and dental hygienists under the Act.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The fiscal impact of allowing receipt of a patient's voluntary contribution to cover costs of dental laboratory work is expected to be minimal since many areas in the state already allow voluntary contributions for this purpose.[18] However, to the extent that this authorization favorably affects participation of dentists, it furthers the goals of the Act.

C. Government Sector Impact:

Additional documentation may be required to avoid the appearance that voluntary contributions are compensation to the practitioner. It could be unclear whether the activities of the dentist's staff to coordinate lab services may be characterized as paid work to the extent a fee or partial fee was provided for these services. This can be problematic if the dentist is volunteering through a professional association. Mistakes could result in litigation on the issue of compensation to the health care provider.[19]

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

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.

[18] *See* Department of Health Bill Analysis for SB 1016 (2013) (dated March 11, 2013) on file with the Senate Health Policy Committee. SB 1016 (2013) contained similar provisions to SB 142 (2014).
[19] *Id.*