

**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.)

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Prepared By: The Professional Staff of the Committee on Judiciary

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BILL: SB 160

INTRODUCER: Senator Bullard

SUBJECT: Canned or Perishable Food Distributed Free of Charge

DATE: March 10, 2014

REVISED: \_\_\_\_\_

|    | ANALYST           | STAFF DIRECTOR  | REFERENCE | ACTION             |
|----|-------------------|-----------------|-----------|--------------------|
| 1. | <u>McLaughlin</u> | <u>Klebacha</u> | <u>ED</u> | <u>Favorable</u>   |
| 2. | <u>Crosier</u>    | <u>Hendon</u>   | <u>CF</u> | <u>Favorable</u>   |
| 3. | <u>Brown</u>      | <u>Cibula</u>   | <u>JU</u> | <u>Pre-meeting</u> |

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## I. Summary:

SB 160 makes public schools exempt from civil and criminal liability for damages caused by food donated to local food banks and other charitable organizations. This bill adds public schools to the list of donors protected from civil and criminal liability if they donate food to charitable organizations and injury results from consumption of the food.

As is the case for other donors, immunity from liability does not apply under this bill if the injury resulting from the consumption of donated food is due to gross negligence, recklessness, or intentional misconduct.

## II. Present Situation:

### Federal School Lunch Program Act

Public schools in Florida participate in school lunch and breakfast programs subsidized by the federal government. Congress amended the School Lunch Program Act in 2011 to provide that each “school and local educational agency participating in the school lunch program under this chapter may donate any food not consumed under such program to eligible local food banks or charitable organizations.”<sup>1</sup> The federal School Lunch Program Act also provides immunity from criminal and civil liability to schools participating in the food donation program.<sup>2</sup>

### Immunity from Liability for Food Donors

Section 768.136, F.S., provides that a donor or gleaner of canned or perishable food apparently fit for human consumption may donate the food to charity and be immune from civil and criminal liability.<sup>3</sup> The term “donor” includes grocery stores and any place where food is

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<sup>1</sup> 42 U.S.C. §1758(l)(1).

<sup>2</sup> 42 U.S.C. §1758(l)(3).

<sup>3</sup> Section 768.136, F.S.

regularly prepared for sale, take-out, or delivery, including to factories, construction sites, airlines, and locations where events are catered.<sup>4</sup> A “gleaner” is a person who harvests for free distribution an agricultural crop that has been donated by the owner.<sup>5</sup> If the food is fit for human consumption and donated for free distribution to a bona fide charitable or nonprofit organization, the donor is not liable for an injury caused by the food unless the injury is caused by the gross negligence, recklessness, or intentional misconduct of the donor or gleaner.<sup>6</sup> Likewise, a nonprofit or charitable organization which distributes donated food for free is protected from criminal and civil penalties under the same conditions. Public schools are not specifically included in the list of donors protected from liability under state law.

### **Standards of Fault in Negligence Cases**

In any negligence case, the plaintiff needs to prove each of the elements of the cause of action which are duty, breach, causation, and damage. A plaintiff must establish that the defendant breached the duty of care required towards that particular plaintiff. On the continuum of fault, the courts generally place gross negligence in between ordinary, simple, or mere negligence, and recklessness.<sup>7</sup> Gross negligence, however, does not rise to the level of an “intent to cause harm or evil motive or actual malice.”<sup>8</sup> Proving that a defendant acted with a wanton or willful disregard or a malicious purpose are typically higher standards of care than gross negligence.<sup>9</sup>

### **III. Effect of Proposed Changes:**

The bill adds public schools to the list of donors protected from civil and criminal liability for food they donate to charitable organizations. Absent the immunity provided by federal law and pursuant to the state’s waiver of sovereign immunity, public schools may be liable for damages of \$200,000 per person and \$300,000 per occurrence for damages caused by food donations. This bill appears to provide absolute immunity to public schools.

As is the case for other donors, immunity from liability does not apply under this bill if the injury resulting from the consumption of donated food is due to gross negligence, recklessness, or intentional misconduct. The federal School Lunch Program Act provides an exception to the immunity if an injury results from an act or omission of the person which constitutes either gross negligence or intentional misconduct.<sup>10</sup> In contrast, under s. 768.28, F.S., sovereign immunity is not available to a governmental entity or agent acting in bad faith, with a malicious purpose, or when acting in wanton and willful disregard of human rights, safety, or property.

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

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<sup>4</sup> Section 768.136(1)(a), F.S.

<sup>5</sup> Section 768.136(1)(b), F.S.

<sup>6</sup> Section 768.136(2), F.S.

<sup>7</sup> STEIN TREATISE §4:11 (2013).

<sup>8</sup> *Id.*

<sup>9</sup> Jens Dammann, Matthias Schundeln, *Where Are Limited Liability Companies Formed? An Empirical Analysis*, 55 J.L. & ECON. 741, 785 (Nov. 2012).

<sup>10</sup> 42 U.S.C. §1791(3)

**IV. Constitutional Issues:****A. Municipality/County Mandates Restrictions:**

None.

**B. Public Records/Open Meetings Issues:**

None.

**C. Trust Funds Restrictions:**

None.

**D. Constitutional Issues:****Sovereign Immunity**

The term “sovereign immunity” refers 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 immunity is expressly waived.

Article X, s. 13, of the Florida Constitution recognizes the concept of sovereign immunity and gives the Legislature the power to waive immunity in part or in full by general law.

Section 768.28, F.S., contains a broad, limited waiver of sovereign immunity applicable to the state. Under this law, officers, employees, and agents of the state are not personally liable in tort for any injury or damage suffered as a result of any act, event, or omission of action committed in the scope of employment.<sup>11</sup> However, personal liability may result from actions committed in bad faith, with a malicious purpose, or when in wanton and willful disregard of human rights, safety, or property.

The waiver of immunity places caps on recovery at \$200,000 for any one person or \$300,000 for all recovery related to one incident. A plaintiff may receive a judgment exceeding the caps, but only at the prerogative of the Legislature through the claims bill process.<sup>12</sup>

This bill provides an exception to the broad waiver of sovereign immunity. Therefore, the bill appears to grant absolute immunity from suit to public schools that comply with the provisions of this bill.

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<sup>11</sup> Section 768.28(9)(a), F.S.

<sup>12</sup> Section 768.28(5), F.S.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

To the extent that public schools will increase donations of food to charitable organizations due to the immunity provided in the bill, charitable groups and organizations may have greater revenue to devote to purposes other than food provision.

**C. Government Sector Impact:**

This bill may encourage food donations by public schools to charitable organizations by eliminating the potential for lawsuits resulting from the donations.

The Department of Education (DOE) indicates that the DOE will incur no impact from the provisions of this bill

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill amends section 768.136 of the Florida Statutes.

**IX. Additional Information:****A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.