

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 277 Joint Use of Public School Facilities

**SPONSOR(S):** Civil Justice Subcommittee; Spano

**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 396

| REFERENCE                           | ACTION              | ANALYST | STAFF DIRECTOR or<br>BUDGET/POLICY CHIEF |
|-------------------------------------|---------------------|---------|--|
| 1) Choice & Innovation Subcommittee | 13 Y, 0 N           | Beagle  | Fudge                                    |
| 2) Civil Justice Subcommittee       | 12 Y, 0 N, As<br>CS | Bond    | Bond                                     |
| 3) Education Committee              |                     |         |  |

### SUMMARY ANALYSIS

While obesity flourishes due in part to inactivity, many of the state's playgrounds and athletic facilities on the grounds of public schools are closed to the public due in part to concerns over liability. The bill:

- Encourages each district school board to adopt public access policies that allow public access to outdoor recreation and sports facilities on public school property.
- Encourages each district school board to enter into joint-use agreements with local governments or private organizations regarding outdoor recreation and sports facilities.
- Requires the Florida Department of Education to create a model joint-use agreement and to post on the internet public access policies and joint-use agreements.
- Provides that a district school board that enacts a public access policy or enters into a joint-use agreement is only liable for civil damages for personal injury, property damage, or death occurring on public school property if the district school board is found to have committed gross negligence or intentional misconduct.

This bill does not appear to have a fiscal impact on state government. A district school board may have a negative fiscal impact related to maintenance expenses, but only if it elects to enact a policy or enter into an agreement.

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

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Present Situation

##### **Overweight Children and Adults**

The Centers for Disease Control and Prevention (CDC) estimates that 35.9% of American adults are obese and another 33.3% are overweight, and approximately 17% (or 12.5 million) of children and adolescents aged 2-19 are obese. The prevalence of obesity among children and adolescents has almost tripled since 1980.<sup>1</sup> The Surgeon General estimates 300,000 deaths per year may be attributed to obesity and reports that individuals who are obese have a 50-100% increased risk of premature death from all causes, when compared to individuals with a healthy weight.<sup>2</sup>

According to the CDC, youth who have access to opportunities for physical activity during non-school hours have higher overall levels of physical activity and are less likely to be overweight or obese. CDC cites increasing access to safe and appealing places to play and be active as one strategy communities can employ to combat youth obesity. CDC's research indicates that less than half of Florida's youth have access to parks and community centers in their neighborhood.<sup>3</sup>

##### **Public Access to Public School Facilities**

Florida law broadly authorizes district school boards and the boards of trustees of Florida College System institutions, state universities, and the Florida School for the Deaf and the Blind to allow the public access to educational facilities and grounds for any legal assembly, as a community use center, or a polling location.<sup>4</sup> Additionally, the law specifically requires each county and municipality located within the geographic area of a school district to enter into an interlocal agreement with the district school board to coordinate their respective growth and development plans and processes. Among other things, the interlocal agreement must include a process for determining where and how the school boards and local governments can share facilities for mutual benefit and efficiency.<sup>5</sup> Some district school boards currently authorize, through their interlocal agreements, public access to sports and recreational facilities on school campuses. The specific details related to such access, such as the hours the facility will be open and which party is liable for any damages or injuries sustained on the property, are contained in a separate "joint-use" agreement.<sup>6</sup>

According to the state Department of Education (DOE), school district facilities personnel have informally expressed support for providing public access to recreation and sports facilities. However, such personnel indicate that reaching a joint-use agreement to provide such access is highly dependent on variables related to individual facilities. Thus, agreements are typically considered on a

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<sup>1</sup> Centers for Disease Control and Prevention, *Obesity and Overweight*, <http://www.cdc.gov/nchs/fastats/overwt.htm> (last visited Jan. 2, 2014); Centers for Disease Control and Prevention, Data and Statistics, *Obesity rates among all children in the United States*, <http://www.cdc.gov/obesity/childhood/data.html> (last visited Jan. 2, 2014).

<sup>2</sup> Office of the Surgeon General, *Overweight and Obesity: Health Consequences*, [http://www.surgeongeneral.gov/library/calls/obesity/fact\\_consequences.html](http://www.surgeongeneral.gov/library/calls/obesity/fact_consequences.html) (last visited Jan. 2, 2014).

<sup>3</sup> Centers for Disease Control and Prevention, *Overweight and Obesity: A Growing Problem*, <http://www.cdc.gov/obesity/childhood/problem.html> (last visited Jan. 2, 2014); Centers for Disease Control and Prevention, *State Indicator Report on Physical Activity, 2010*, at 3 and 13, available at [http://www.cdc.gov/physicalactivity/downloads/PA\\_State\\_Indicator\\_Report\\_2010.pdf](http://www.cdc.gov/physicalactivity/downloads/PA_State_Indicator_Report_2010.pdf) (last visited Feb. 6, 2014).

<sup>4</sup> Section 1013.10, F.S.; see also s. 1013.01(3), F.S. (defines "Board").

<sup>5</sup> Sections 163.31777(1) and (2)(g) and 1013.33(2) F.S.

<sup>6</sup> See, e.g., *Interlocal Agreement between Pinellas County, Florida, et al. and the School Board of Pinellas County, Florida*, at 4 (2012), available at [www.pinellascounty.org/Plan/pdf\\_files/1906\\_IA.pdf](http://www.pinellascounty.org/Plan/pdf_files/1906_IA.pdf) [hereinafter *Pinellas County Agreement*] (last visited Feb. 6, 2014).

facility-by-facility basis. Such personnel indicate that one barrier to expanding joint-use of, and public access to, school facilities is premises liability concerns.<sup>7</sup>

District school boards are not limited to partnering with governmental entities in joint-use agreements. If authorized by the school board's interlocal agreements, boards may establish joint-use agreements with private entities. For example, in 2003, a Best Financial Management Practices Review of the Duval County School District indicated that the school district had established 47 joint-use agreements with the City of Jacksonville, the YMCA, and various community groups for the use of school facilities.<sup>8</sup>

## School District Liability

### *Landowner Liability*

A plaintiff who is injured on another person's land may sue the landowner in tort if the landowner breached a duty of care owed to the plaintiff and the plaintiff suffered damages as a result of the landowner's breach.<sup>9</sup> A landowner's duty to persons on his or her land is governed by the status of the injured person. A person who is lawfully on school grounds, including persons there pursuant to permission of the school board under some form of public access agreement or joint-use agreement is an invitee.

An invitee is a person who was invited to enter the land.<sup>10</sup> Florida law defines "invitation" to mean "that the visitor entering the premises has an objectively reasonable belief that he or she has been invited or is otherwise welcome on that portion of the real property where injury occurs."<sup>11</sup> The duties owed to most invitees are the duty to keep property in reasonably safe condition; the duty to warn of concealed dangers which are known or should be known to the property holder, and which the invitee cannot discover through the exercise of due care; and the duty to refrain from wanton negligence or willful misconduct.<sup>12</sup>

### *Sovereign Immunity Limit*

When a government may be liable in tort, such as for landowner liability, current law limits such liability. Article X, s. 13 of the Florida Constitution recognizes the concept of sovereign immunity and gives the Legislature the right to waive the state's immunity in part or in full by general law. The Legislature has established a limited waiver of sovereign immunity for tort liability for state agencies or subdivisions.<sup>13</sup> School districts are a state agency or subdivision for purposes of sovereign immunity.<sup>14</sup> The statutory waiver of sovereign immunity limits the recovery in a tort action against the state or subdivision to

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<sup>7</sup> Florida Department of Education, *Legislative Bill Analysis for HB 431* (2012). For example, the Pinellas County interlocal agreement with the School Board of Pinellas County, among others, authorizes the parties to establish an agreement "for each instance of collocation and shared use to address legal liability, operating and maintenance costs, scheduling of use, and facility supervision or any other issues that may arise from collocation or shared use." *Pinellas County Agreement*, *supra* note 6, at 4.

<sup>8</sup> Office of Program Policy Analysis and Government Accountability, *Best Financial Management Practices Review of the Duval County School District*, Report No. 03-41, ch. 7 Facilities Construction, at 18-19 (Aug. 2003), available at <http://www.oppaga.state.fl.us/Summary.aspx?reportNum=03-41> (last visited Feb. 6, 2014).

<sup>9</sup> 74 Am.Jur 2d Torts s. 7 (2013).

<sup>10</sup> *Post*, 261 So.2d at 147-48.

<sup>11</sup> Section 768.075(3)(a)1., F.S.

<sup>12</sup> See, e.g., *Dampier v. Morgan Tire & Auto, LLC*, 82 So.3d 204, 205 (Fla. 5th DCA 2012).

<sup>13</sup> Sections 768.28(1) and (2), F.S.; see Op. Att'y Gen. Fla. 78-145 (1978); see also *Wallace v. Dean*, 3 So.3d 1035, 1045 (Fla. 2009), citing *Hutchins v. Mills*, 363 So.2d 818, 821 (Fla. 1st DCA 1978). "Prior to the effective date of s. 768.28(6), F.S., courts did not have subject matter jurisdiction of tort suits against the State and its agencies because they enjoyed sovereign immunity pursuant to Article X, section 13, Florida Constitution. However, by enacting s. 768.28 the Legislature provided for waiver of sovereign immunity in tort actions. Therefore, pursuant to that statute, courts now have subject matter jurisdiction to consider suits that fall within the parameters of the statute."

<sup>14</sup> The term "state agencies or subdivisions" includes the executive departments, the Legislature, the judicial branch, and the independent establishments of the state, including state university boards of trustees; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities. Section 768.28(2), F.S.

\$200,000 for any one person or one incident and limits all recovery related to one incident to a total of \$300,000.<sup>15</sup> When the state's sovereign immunity applies, the officers, employees, and agents of the state that were involved in the commission of the tort are not personally liable to an injured party.<sup>16</sup>

### *Standards of Liability*

In general, a landowner liability suit is judged based on the ordinary negligence standard. A plaintiff seeking damages for ordinary negligence need only show that the defendant failed to exercise reasonable care to protect persons on his or her land.<sup>17</sup>

Where the law applies a gross negligence standard, that standard requires a plaintiff to show that the defendant acted or failed to act with conscious indifference to the potential harm that may befall others. It is a course of conduct that a reasonable, prudent person would know is very likely to result in injury to another.<sup>18</sup>

## **Effect of Proposed Changes**

### **Public Use Policies and Joint-Use Agreements**

The bill creates s. 1013.105, F.S., to provide legislative findings that greater public access to recreation and sports facilities is necessary to reduce the impact of obesity on personal health and health care expenditures and that tax-payer funded public school playgrounds, fields, tracks, courts, and other outdoor recreation and sports facilities should be used to provide the public with accessible opportunities for physical activity.

The bill encourages each district school board to adopt written policies to promote public access to outdoor recreation and sports facilities on public school property during non-school hours when a school-sponsored or school-related activity is not occurring. The bill also encourages joint-use agreements between district school boards and local governments or private organizations for the same purpose. A school board must submit a copy of a public access policy or joint-use agreement to the DOE within 30 days of adopting such policy or agreement.

The bill requires the DOE to develop a model joint-use agreement to be posted on its website. The bill also requires the DOE to post on its website either links to, or copies of, all public access policies and joint-use agreements submitted to DOE by district school boards.

### **School Board Liability**

The bill creates s. 768.072, F.S., to limit the liability of a district school board that has enacted a public use policy or entered into joint-use agreement. Where such policy or agreement is in place, the school board will only be liable for gross negligence or intentional misconduct.

The bill also specifies that this section does not affect liability of a school board for injuries that occur during school hours or during school-related or school-sponsored activities, nor does this section otherwise waive sovereign immunity.

## **B. SECTION DIRECTORY:**

Section 1 creates s. 1013.105, F.S., relating to joint use of public school facilities.

Section 2 creates s. 768.072, F.S., relating to limitation on public school premises liability.

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<sup>15</sup> Section 768.28(5), F.S.

<sup>16</sup> Section 768.28(9), F.S.

<sup>17</sup> 38 Fla.Jur.2d Negligence s. 4 (2013).

<sup>18</sup> 38 Fla.Jur.2d Negligence s. 35 (2013).

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

The bill does not appear to have any impact on state revenues.

#### 2. Expenditures:

The bill does not appear to have any impact on state expenditures.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

The bill does not appear to have any impact on local government revenues.

#### 2. Expenditures:

The bill may have a minimal indeterminate fiscal impact on local government expenditures, but only where a school district elects to utilize the provisions created by this bill. See Fiscal Comments.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Damages received by an injured party may be limited due to a school district's immunity from liability created by this bill. A plaintiff will only receive damages from the school board if the injury, damage, or death was caused by gross negligence or intentional misconduct, and those damages would be limited by the sovereign immunity limits.

### D. FISCAL COMMENTS:

The bill encourages, but does not require, district school boards to adopt public access policies and enter into joint-use agreements to increase public access to outdoor recreation and sports facilities on public school property. Opening more school recreational facilities to the public may enable cities and counties to reduce spending on the development and maintenance of public parks and recreation areas; however, increased public use may increase "wear and tear" on school recreational facilities, thereby increasing a board's oversight, repair, and maintenance costs.<sup>19</sup>

The bill limits a district school board's liability for civil damages for personal injury, property damage, or death occurring on public school property it opens to the public through a public access policy or joint-use agreement. A plaintiff will only receive damages if the injury, damage, or death was caused by gross negligence or intentional misconduct on the part of the school board. Therefore, an injured party will not be able to recover damages for an injury sustained due to ordinary negligence. The bill does not change the cap on damages for recovery in a tort action against the state or a subdivision, which is \$200,000 for any one person or one incident and with all recovery related to one incident limited to a total of \$300,000.

While the bill provides school boards immunity from liability except in the case of gross negligence or intentional misconduct, the existence of gross negligence or intentional misconduct is usually a determination made by the jury in a particular case. If a suit is filed a school board may still incur litigation costs.

The bill requires DOE to develop a model joint-use agreement and criteria for the acceptance of grants for implementing joint-use agreements submitted to DOE by district school boards and post on its

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<sup>19</sup> Memorandum, Florida School Boards Association, Inc. (Jan. 18, 2012).  
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website the model agreement, links to or copies of all public access policies and joint-use agreements, and the grant criteria. These requirements are anticipated to be accomplished within departmental resources. Accordingly, no impact on state expenditures is expected.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

##### 2. Other:

Many bills affecting recovery in tort cases must be considered in light of the constitutional right of access to courts at art. I, s. 21, Fla. Const. The courts have found that this provision limits the ability of the Legislature to amend tort law in certain circumstances. However, these limits do not appear to apply to this bill under three separate theories:

- The Legislature may limit the liability of any owner of real property who provides the public with a park area for outdoor recreational purposes.<sup>20</sup>
- In general, sovereign immunity provides that the state government and its instrumentalities (including a school board) may not be sued for negligence. That the legislature has provided a limited waiver of sovereign immunity is a matter of legislative grace that the legislature may, at any time, take back.
- The right of access to courts only protects rights which existed at common law or by statute prior to the enactment of the Declaration of Rights in 1968.<sup>21</sup> The state's waiver of sovereign immunity was first passed in 1973.<sup>22</sup>

#### B. RULE-MAKING AUTHORITY:

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

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 5, 2014, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment removed a provision that would have provided for an appeal of a decision to not enter into a joint-use agreement, and removed a provision requiring that local school boards pursue grants related to joint-use agreements. This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.

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<sup>20</sup> *Abdin v. Fischer*, 374 So.2d 1379 (Fla. 1979).

<sup>21</sup> *Kluger v. White*, 281 So.2d 1, 4–5 (Fla.1973)(Article I, s. 21 “protects only rights at common law or by statute prior to the enactment of the Declaration of Rights of the Florida Constitution.”).

<sup>22</sup> Chapter 73-313, L.O.F.