

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 715 Child Protection Teams  
**SPONSOR(S):** Harrell  
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 670

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	9 Y, 4 N	Robinson	Bond
2) Appropriations Committee			
3) Health & Human Services Committee			

### SUMMARY ANALYSIS

A child protection team (CPT) is a medically directed, multidisciplinary team of professionals contracted by the Children's Medical Services (CMS) Program in the Department of Health (DOH). CPTs supplement the child protective investigation activities of local sheriffs' offices and the Department of Children and Families (DCF) in cases of child abuse, abandonment, and neglect. CPTs provide expertise in evaluating alleged child abuse and neglect, assessing risk and protective factors, and providing recommendations for interventions to protect children and to enhance a caregiver's capacity to provide a safer environment when possible.

The bill provides that CPT members are included within the definition of the term "officer, employee, or agent" of the state for purposes of state sovereign immunity when carrying out the member's duties as part of the CPT. As a result, CPT members may not be held personally liable for torts committed in such capacity; instead the state may be held liable up to the limits established under the state's statutory waiver of sovereign immunity.

The bill does not appear to have a fiscal impact on local government. The bill may have a minimal negative fiscal impact on state expenditures.

The bill has an effective date of July 1, 2016.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **BACKGROUND**

##### **Child Protection Teams**

###### Generally

Section 39.303, F.S., provides for the establishment and maintenance of one or more Child Protection Teams (CPT) in each of the service districts of the Department of Children and Families (DCF). A CPT is a medically directed, multidisciplinary team contracted by the Children's Medical Services (CMS) program in the Department of Health (DOH) to supplement the child protective investigation efforts of local sheriffs' offices and DCF in cases of child abuse, abandonment, and neglect.<sup>1</sup> Upon a case referral<sup>2</sup> by DCF, these independent, community-based programs provide expertise in evaluating alleged child abuse and neglect, assessing risk and protective factors, and providing recommendations for interventions to protect children and to enhance a caregiver's capacity to provide a safer environment when possible. Specifically, CPT members provide:<sup>3</sup>

- Emergency telephone consultation services.
- Medical, psychological, and psychiatric diagnosis and evaluation services, including the provision and interpretation of laboratory tests and x-rays.
- Assessments that include, as appropriate, family psychosocial interviews, specialized clinical interviews, or forensic interviews.
- Expert medical, psychological, and related professional testimony in court cases.
- Case staffings to develop treatment plans for children whose cases have been referred to the team.
- Case service coordination and assistance.
- Training for DCF and DOH employees to enable them to develop and maintain their professional skills and abilities in handling child abuse, abandonment, and neglect cases.
- Educational and community awareness campaigns on child abuse, abandonment, and neglect.

Entities under contract with CMS to provide CPT services include non-profit agencies, hospitals, universities, and county governments.<sup>4</sup>

###### CPT Teams

There are currently 23 CPTs providing services to all 67 Florida counties.<sup>5</sup> Each CPT is led by a district medical director who must be a CMS approved provider pediatrician.<sup>6</sup> A CPT may be comprised of

---

<sup>1</sup> Florida Department of Health, Children's Medical Services. *Child Protection Teams*, available at [http://www.floridahealth.gov/AlternateSites/CMS-Kids/families/child\\_protection\\_safety/child\\_protection\\_teams.html](http://www.floridahealth.gov/AlternateSites/CMS-Kids/families/child_protection_safety/child_protection_teams.html) (last visited December 30, 2015).

<sup>2</sup> Certain cases must be referred to a CPT for assessment and supportive services, including cases involving injuries to the head, bruises to the neck or head, burns, or fractures in a child of any age; bruises anywhere on a child 5 years of age or under; any report alleging sexual abuse of a child; any sexually transmitted disease in a prepubescent child; reported malnutrition of a child and failure of a child to thrive; reported medical neglect of a child; any family in which one or more children have been pronounced dead on arrival at a hospital or other health care facility, or have been injured and later died, as a result of suspected abuse, abandonment, or neglect, when any sibling or other child remains in the home; and symptoms of serious emotional problems in a child when emotional or other abuse, abandonment, or neglect is suspected. s. 39.303(4), F.S.

<sup>3</sup> s. 39.303(3), F.S.

<sup>4</sup> Florida Department of Health, Children's Medical Services, *Child Protection Team Program Handbook*, at 4, available at [www.floridahealth.gov/alternatesites/cms-kids/providers/prevention/documents/handbook\\_cpt.pdf](http://www.floridahealth.gov/alternatesites/cms-kids/providers/prevention/documents/handbook_cpt.pdf) (last visited January 6, 2016).

<sup>5</sup> Florida Department of Health, Children's Medical Services, *Child Protection Teams: CPT Statewide Directory*, available at <http://www.floridahealth.gov/alternatesites/cms-kids/home/contact/cpt.pdf> (last visited December 30, 2015).

<sup>6</sup> Rule 64C-8.002, F.A.C.

representatives of school districts, healthcare providers, mental health providers, legal services, social service agencies, and law enforcement agencies,<sup>7</sup> but, at a minimum, includes:<sup>8</sup>

- An on-site team coordinator.
- One or more case coordinators.
- A Florida licensed psychologist with training and experience in evaluation and treatment of child abuse and neglect.
- An attorney who is a member of the Florida Bar.
- Professional consultants (including physicians, advanced registered nurse practitioners, psychiatrists, psychologists, or attorneys) as needed who respond to requests for medical consultation and evaluation of children suspected of being abused or neglected.

The total number of all CPT members statewide is approximately 388.<sup>9</sup> These 388 positions do not include the 20 CPT Medical Directors and the two interim CPT Statewide Medical Directors. Of the 388 positions, 92 are employed by the University of Florida (Gainesville and Jacksonville) and the University of South Florida.

#### CPT Oversight and Control

CMS has oversight and contract management responsibility for the CPT Program and employs a Statewide Medical Director to provide medical oversight for the teams throughout the state. While working functionally under the statewide Medical Director, individual CPT Medical Directors are employed by DOH, and are under the overall direction of the CMS Deputy Secretary of Health.<sup>10</sup> The State Surgeon General and the DOH Deputy Secretary for Children's Medical Services, in consultation with the DCF Secretary, have responsibility for the screening, employment, and any necessary termination of child protection team medical directors, both at the state and district level.<sup>11</sup>

All other CPT providers are governed by the terms of their contracts with DOH and the *CPT Program Policy and Procedure Handbook* which specifies program objectives, roles and responsibilities, service delivery and practice and quality standards.<sup>12</sup>

#### **Sovereign Immunity and Child Protection Teams**

The CPT Program Handbook provides that "CPT medical providers appear to act under the color of law and are agents of the state when they examine children allegedly abused or neglected under ch. 39, F.S."<sup>13</sup> An agent of the state is immune from personal tort liability for acts or omissions within the scope of his or her function under the state's sovereign immunity provisions.

#### Sovereign Immunity

Adopted by the Legislative Council of the Territory of Florida in 1829,<sup>14</sup> the common law<sup>15</sup> doctrine of "sovereign immunity" prohibits lawsuits in state court against the state, its agencies, and political subdivisions without the state's consent.<sup>16</sup> Historically, this absolute doctrinal position held state and local governments immune from liability arising from the activities of its officers, employees, and agents.

---

<sup>7</sup> s. 39.303(1), F.S.

<sup>8</sup> Rule 64C-8.002, F.A.C.

<sup>9</sup> Florida Department of Health, Agency Analysis of 2016 Senate Bill 670, p. 3(November 3, 2015).

<sup>10</sup> Florida Department of Health, Children's Medical Services, *Provider Handbook: Physicians & Dentists* (2013), at 14, available at [http://www.floridahealth.gov/alternatesites/cms-kids/providers/documents/handbook\\_physician.pdf](http://www.floridahealth.gov/alternatesites/cms-kids/providers/documents/handbook_physician.pdf) (last visited January 6, 2016).

<sup>11</sup> s. 39.303(1), F.S.

<sup>12</sup> *Supra* note 4, at 1.

<sup>13</sup> *Supra* note 4, at 73.

<sup>14</sup> s. 2.01, F.S.

<sup>15</sup> At common law, the doctrine's foundation was premised on the maxim, "the king can do no wrong." As sovereign, the king was considered to be beyond the jurisdiction of any court. RESTATEMENT (SECOND) OF TORTS. Ch. 45A (1979).

<sup>16</sup> *Cauley v. City of Jacksonville*, 403 So.2d 379,381 (Fla. 1981).

Since 1868, the Florida Constitution has authorized the Legislature to waive sovereign immunity, in part or in full, by general law.<sup>17</sup> Pursuant to such constitutional authority, the Legislature enacted s. 768.28, F.S., a limited waiver of the sovereign immunity of the state, its agencies, and subdivisions<sup>18</sup> in tort.<sup>19</sup> Under s. 768.28, F.S., a governmental entity may be sued for the negligent or wrongful act or omission of an employee acting within the scope<sup>20</sup> of his or her employment or office, but there is a \$200,000 per person and \$300,000 per incident cap on the involuntary collectability of any judgment.<sup>21</sup> Damages in excess of the established caps may be paid in part or in whole only by further act of the Legislature through the passage of a claim bill.<sup>22</sup>

Pre-suit notice of tort claims must be provided to the Division of Risk Management in the Department of Financial Services (Risk Management).<sup>23</sup> All liability claims received by Risk Management are reviewed by an Administrator, and assigned to a claims adjuster to determine a settlement offer, if the state is liable. If a claim is not settled and a lawsuit is filed, Risk Management will retain a defense attorney for the state and the adjuster will continue to monitor and supervise the litigation to conclusion.<sup>24</sup> Damages pursuant to any judgment and court ordered attorney fees are paid from the Insurance Risk Management Trust Fund.<sup>25</sup>

### Immunity of Officers, Employees, or Agents of the State

The officer, employee, or agent is not personally liable in tort for acts or omissions within the scope of her or his employment or function unless such acts are committed in bad faith, with malicious purpose, or in wanton and willful disregard of human rights, safety, or property.<sup>26</sup> In general, the only remedy for tortious injury by officers, employees, or agents of the state or its subdivisions lies against the government employer or entity that acts as the agent's principal.<sup>27</sup>

The immunity from personal liability under s. 768.28(9)(a), F.S., may extend to certain private parties who are involved in contractual relationships with the state, provided that such parties are deemed "agents" of the state. However, the Legislature has not defined or provided an exhaustive list of private contractors that are "agents" of the state for purposes of sovereign immunity.<sup>28</sup> If a private contractor

---

<sup>17</sup> FLA. CONST. art. X, s. 3.

<sup>18</sup> "State agencies or subdivisions" include the executive departments, the Legislature, the judicial branch (including public defenders), 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, including the Florida Space Authority.

<sup>19</sup> s. 768.28, F.S.

<sup>20</sup> Conduct is considered to be within the scope of employment when: (1) it is the type of conduct which the employee is hired to perform; (2) it occurs substantially within the time and space limits authorized or required by the work to be performed and (3) the conduct is activated at least in part by a purpose to serve the employer. *Craft v. John Sirounis and Sons, Inc.*, 575 So. 2d 795, 796 (Fla. 4th DCA 1991).

<sup>21</sup> s. 768.28(5), F.S.

<sup>22</sup> *Id.*; A claim bill, also known as a relief bill, is a legislative measure that directs the Chief Financial Officer of Florida, or, if applicable, a unit of local government, to pay a specific sum of money to a claimant to satisfy an excess judgment or equitable claim.

<sup>23</sup> s. 768.28(6), F.S.

<sup>24</sup> Florida Department of Financial Services, *Claims Process*, <http://www.myfloridacfo.com/Division/Risk/Liability/ClaimsProcess.htm> (last visited January 12, 2016).

<sup>25</sup> The State Risk Management Trust Fund provides the self-insurance pool for payment of workers' compensation claims, general liability claims, automotive liability claims, federal civil rights claims and court awarded attorney's fees. The revenues for this fund are premiums paid by state agencies from the agency's special appropriation category for risk management insurance.

<sup>26</sup> s. 768.28 (9)(a), F.S.

<sup>27</sup> *Id.*

<sup>28</sup> Private contractors that have been designated as agents under s. 768.28(9), F.S. by the Legislature include health care providers of medical care to indigent state residents; health care providers under contract with the Department of Corrections to provide care to inmates; physicians retained by the Florida State Boxing Commission; Health care practitioners contracted by a state university board of trustees to provide medical services to college student athletes; and vendors under contract with the Department of Juvenile Justice to provide services to children and families in need or services for juvenile offenders. See ss. 768.28(9)(b)2., F.S.; 768.28(10)(a), F.S.; 548.046(1), F.S.; 768.28(12), F.S.; and 768.28(11), F.S.

has not been statutorily designated as an “agent” for purposes of s. 768.28(9), F.S., courts must consider the following factors which establish an agency relationship:<sup>29</sup>

- Acknowledgment by the principal that the agent will act for him;
- The agent’s acceptance of the undertaking; and
- Control by the principal over the actions of the agent.

### *CMS Contract Physicians*

Applying these principles in a 1997 case, *Stoll v. Noel*,<sup>30</sup> the Florida Supreme Court found that in appropriate factual circumstances, contract physician consultants for CMS may be deemed agents of the state for purposes of liability protection under s. 768.28, F.S. The court explained that whether CMS physician consultants are agents of the state turns on the degree of control retained or exercised by CMS.<sup>31</sup> The court pointed to the terms of the employment contract, the consultant’s agreement to abide by CMS policies and rules, CMS’s authority to authorize recommended services, and CMS’s supervisory authority over all personnel in finding the *Stoll* contract physicians were agents of the state.<sup>32</sup>

DOH has taken a cautious approach regarding the applicability of *Stoll* to all CMS contract physicians, including CPT members. In a 2013 memorandum, the Deputy State Health Officer for CMS declined to make any definitive statement of when CMS contract physicians, individually or collectively, may be deemed an agent of the state for purposes of liability protection. The memorandum explained that the *Stoll* decision “does not establish a bright line legal test to determine when a CMS contracted physician will be deemed to be an agent of the state as a matter of law” and that DOH would continue to evaluate each case on its own merits.<sup>33</sup> However, a 2014 internal DOH memorandum to the Interim CMS Division Director unequivocally stated:

Although they furnish services to children within the CMS Network, CMS providers are independent contractors and consequently are not employees or agents of the Department of Health and are personally responsible for their negligent acts.<sup>34</sup>

In the last 5-10 years, the uncertain status of CPT members as “agents” of the state for purposes of liability protection under s. 768.28(9), F.S., has resulted in the loss of one CPT medical director and complicated agency efforts to recruit at least three others.<sup>35</sup>

---

<sup>29</sup> RESTATEMENT (SECOND) OF AGENCY § 1 (1957).

<sup>30</sup> *Stoll v. Noel*, 694 So. 2d 701 (Fla. 1997).

<sup>31</sup> *Id.* at 703.

<sup>32</sup> Specifically, the court found that “CMS requires each consultant, as a condition of participating in the CMS program, to agree to abide by the terms published in its HRS Manual and CMS Consultant’s Guide which contain CMS 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 acknowledgment 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.” *Stoll v. Noel*, 694 So. 2d 701, 703(Fla. 1997).

<sup>33</sup> Memorandum from Dennis V. Cookro, MD, MPH, Interim Deputy Secretary of Health, Deputy State Health Officer for CMS, to All CMS Physicians, *RE: Liability Update* (February 6, 2013)(on file with the Civil Justice Subcommittee).

<sup>34</sup> Memorandum from Kimberly A. Tendrich, Senior Attorney, Children’s Medical Services, to Charlotte Curtis, Interim CMS Division Director, *RE: Applicability of section 768.28, Florida Statutes, to CMS Contractors* (February 14, 2014)(on file with the Civil Justice Subcommittee).

<sup>35</sup> Email from Douglas S. Bell, Attorney at Law, Pennington, P.A., *RE: CPT Related Questions* (Feb. 3, 2015)(on file with the Civil Justice Subcommittee).

## EFFECT OF BILL

The bill statutorily designates members of child protection teams<sup>36</sup> as “officers, employees, or agents” of the state for purposes of sovereign immunity protection when acting within the scope of his or her duties as a team member. As a result, CPT members may not be held personally liable for torts committed in such capacity; instead the state may be held liable for such torts up to the limits established under the state’s statutory waiver of sovereign immunity.

### B. SECTION DIRECTORY:

Section 1 amends s. 768.28, F.S., relating to sovereign immunity in tort actions.

Section 2 provides an effective date of July 1, 2016.

## 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 Department of Financial Services (DFS) provided a rough estimate of the general liability premium with the inclusion of the Child Protection Team staff. The estimate is based upon the data for the FY15-16 general liability premium allocation, but revised to include the additional 388 FTEs identified by DOH. The result is an overall increase of \$1,683 in the general liability premium based on this year’s costs. DFS indicated they cannot guarantee the estimate will not materially differ. Because the total revenue generated each fiscal year by casualty premiums is established by the Legislature, premiums are the result of an allocation process and are not developed independently from other covered agencies and universities.<sup>37</sup> However, 92 of the 388 CPT employees are already covered by sovereign immunity so the number of employees needing protection may only be 296.

Over the last 10 years, there have been a total of 31 tort claims involving Child Protection Team members filed with the Division of Risk Management.<sup>38</sup> As illustrated by **Figure 1**, approximately 70% of such claims proceeded to litigation thereby requiring the expenditure of state funds.

**Figure 1: Division of Risk Management Claims Involving Child Protection Team Members<sup>39</sup>**

<i>Fiscal Year</i>	<i>Claims Proceeding to Litigation</i>	<i>Notice of Claim Only<sup>40</sup></i>	<i>Total Claims</i>	<i>Current Status</i>
2006-2007	9	2	11	All Closed
2007-2008	4	1	5	All Closed
2008-2009	4	1	5	All Closed
2009-2010	0	1	1	All Closed
2010-2011	0	1	1	All Closed
2011-2012	0	1	1	All Closed

<sup>36</sup> “Child protection team” means a team of professionals established by the Department of Health to receive referrals from the protective investigators and protective supervision staff of the department and to provide specialized and supportive services to the program in processing child abuse, abandonment, or neglect cases. s. 39.01(13), F.S.

<sup>37</sup> Florida Department of Health, Agency Analysis of 2016 Senate Bill 670, p. 4(November 3, 2015).

<sup>38</sup> Email from BG Murphy, Deputy Legislative Affairs Director, Office of Chief Financial Officer Jeff Atwater, RE: Information request related to HB 715 (2016) (January 12, 2016)(on file with the Civil Justice Subcommittee).

<sup>39</sup> *Id.*

<sup>40</sup> Notice filed with the Division of Risk Management pursuant to s. 768.28(6), F.S., but as of the current date, formal litigation has not been instituted.

2012-2013	3	0	3	1 Closed, 2 Open
2013-2014	1	1	2	1 Closed, 1 Open
2014-2015	0	1	1	Open
2015-2016	1	0	1	Open
<b>10 YEAR TOTAL</b>	<b>22</b>	<b>9</b>	<b>31</b>	<b>26 Closed, 5 Open</b>

**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 does not appear to have any impact on local government expenditures.

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

The bill does not appear to have any direct economic impact on the private sector.

**D. FISCAL COMMENTS:**

None.

**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:

None.

**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**

None.