

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 Children, Families, and Elder Affairs

BILL: SB 826

INTRODUCER: Senator Baxley

SUBJECT: Child Protection Teams

DATE: March 8, 2021

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|--------------|----------------|-----------|------------------|
| 1. | <u>Moody</u> | <u>Cox</u> | <u>CF</u> | <u>Favorable</u> |
| 2. | _____ | _____ | <u>JU</u> | _____ |
| 3. | _____ | _____ | <u>RC</u> | _____ |

I. Summary:

SB 826 extends sovereign immunity protections to any member of a child protection team when the team member is carrying out her or his duties under the control, direction, and supervision of the state or any of its agencies or subdivisions. A child protection team is a group of professionals who receive referrals, primarily from child protective investigators and sheriff's offices, when child abuse, abandonment, or neglect is alleged. The team, directed by a physician, evaluates the allegations, assesses risks, and provides recommendations for child safety and support services.

The bill may have an indeterminate effect on state revenues and expenditures. See section V. Fiscal Impact Statement.

This bill is effective July 1, 2021.

II. Present Situation:

Waiver of Sovereign Immunity

Sovereign immunity is a principle under which a government cannot be sued without its consent.¹ Article X, s. 13 of the Florida Constitution allows the Legislature to waive this immunity. Section 768.28(1), F.S., is a limited statutory waiver of the immunity conferred under art. X, s. 13, of the Florida Constitution. Section 768.28(1), F.S., allows for suits in tort against Florida and its agencies and subdivisions for damages resulting from the negligence of a government officer, employee, or agent acting in the scope of employment. This liability exists only where a private person would be liable for the same conduct.² The waiver of sovereign immunity applies only to "injury or loss of property, personal injury, or death caused by the

¹ *Sovereign immunity*, Legal Information Institute, available at https://www.law.cornell.edu/wex/sovereign_immunity (last visited March 8, 2021).

² Section 768.28(1), F.S.

negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee's office or employment"³

Individual government employees, officers, or agents are immune from suit or liability for damages caused by any action taken in the scope of employment unless the damages result from the employee's acting in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard from human rights, safety, or property.⁴ A government entity is not liable for any damages resulting for actions by an employee outside the scope of his or her employment or for damages resulting from actions committed by the employee in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard for human rights, safety, or property.⁵ A tortious claim that arises under the waiver of sovereign immunity must be brought against the relevant government entity or official in his or her capacity, unless it arises from such conduct.⁶

An "officer, employee, or agent" includes, but is not limited to, any health care provider when providing services pursuant to s. 766.1115, F.S., any nonprofit independent college or university located and chartered in this state which owns or operates an accredited medical school, and its employees or agents, when providing patient services pursuant to paragraph (10)(f); and any public defender or her or his employee or agent, including among others, an assistant public defender and an investigator.⁷

Florida Appeal Courts have equated "bad faith" with the "actual malice standard."⁸ "Malicious purpose," has been interpreted as meaning the conduct was committed with "ill will, hatred, spite, [or] an evil intent."⁹ "Wanton and willful disregard of human rights [or] safety," has been described as "conduct much more reprehensible and unacceptable than mere intentional conduct," and "conduct that is worse than gross negligence."¹⁰ These cases have not interpreted what "wanton and willful disregard of human rights [or] safety" *actually means* as used in s. 768.28(9)(a), F.S.¹¹ However, according to the Florida Standard Jury Instructions, "wanton" means "with a conscious and intentional indifference to consequences and with the knowledge that damage is likely to be done to persons or property" and "willful" means "intentionally, knowingly and purposely."¹²

³ *City of Pembroke Pines v. Corrections Corp. of America, Inc.*, 274 So. 3d 1105, 1112 (Fla. 4th DCA 2019) (quoting s. 768.28(1), F.S.).

⁴ Section 768.28(9)(a), F.S.

⁵ *Id.*

⁶ *Id.*

⁷ Section 768.28(9)(b)2., F.S.

⁸ *Peterson v. Pollack*, 290 So.3d 102, 109(Fla. 4th DCA 2020) (quoting *Parker v. State of Fla. Bd. of Regents ex rel. Fla. State Univ.*, 724 So. 2d 163, 167 (Fla. 1st DCA 1998) (citation omitted)).

⁹ *Id.* (quoting *Eiras v. Florida*, 239 F. Supp. 3d 1331, 1343 (M.D. Fla. 2017)).

¹⁰ *Id.* (quoting *Richardson v. City of Pompano Beach*, 511 So. 2d 1121, 1123 (Fla. 4th DCA 1987); *Sierra v. Associated Marine Insts., Inc.*, 850 So. 2d 582, 593 (Fla. 2d DCA 2003)).

¹¹ *Id.*

¹² *Id.* (citing Fla. Std. Jury Instr. (Crim.) 7.9 (Vehicular or Vessel Homicide); Fla. Std. Jury Instr. (Crim.) 28.5 (Reckless Driving); Fla. Std. Jury Instr. (Crim.) 28.19 (Reckless Operation of a Vessel)).

Damages

Section 768.28(5), F.S., caps tort recovery from a governmental entity at \$200,000 per person and \$300,000 per accident. The caps in s. 768.28(5), F.S., apply to all of the elements of the monetary award to a plaintiff against a sovereignly immune entity.¹³ In other words, a plaintiff's entire recovery, including damages, back pay, attorney fees, and any other costs, are limited by the caps in s. 768.28, F.S. The limited waiver of immunity does not apply to punitive damages or interest for the period before judgment.¹⁴ Additionally, an attorney may not charge in excess of 25 percent of any judgment or settlement.¹⁵

Claim Bills

Although an 'excess' judgment may be entered, the statutory caps make it impossible, absent a special claim bill passed by the Legislature, for a claimant to collect more than the caps discussed above.¹⁶ A claim bill, also known as a relief act, is a bill that compensates a particular individual or entity for injuries or losses occasioned by the negligence or error of a public officer or agency.¹⁷ It is not an action at law, but rather is a legislative measure that directs a relevant government entity or officer to pay a specific sum of money to a claimant to satisfy an obligation.¹⁸ A claim bill may be obtained solely from the Legislature or after obtaining a judgment from a Florida court.¹⁹ The Legislature may pass a claim bill²⁰ and does so based on a principle of fair treatment to compensate a person who is injured or damaged without compensation.²¹

Once a legislative claim bill is formally introduced, a special master conducts a quasi-judicial hearing.²² This hearing may be conducted in a manner similar to a trial during which the claimant may offer testimony or other evidence relevant to establish the claim.²³ A responding agency may present a defense to contest the claim, and the special master must then prepare a report with an advisory recommendation to the Legislature.²⁴

A government entity may, without a claim bill, settle a claim against it for an amount above the caps in s. 768.28, F.S., if that amount is within the limits of insurance coverage.²⁵

¹³ *Gallagher v. Manatee Cty.* 927 So. 2d 914, 918 (Fla. 2d DCA 2006).

¹⁴ Section 768.28(5), F.S.

¹⁵ Section 768.28(8), F.S.

¹⁶ Section 768.28(5), F.S. *Breaux v. City of Miami Beach*, 899 So. 2d 1059 (Fla. 2005).

¹⁷ The Florida Senate, The Florida House of Representatives Civil Justice Subcommittee, *Legislative Claim Bill Manual, Policies, Procedures, and Information Concerning Introduction and Passage*, p. , August 2019, available at <https://www.flsenate.gov/PublishedContent/ADMINISTRATIVEPUBLICATIONS/leg-claim-manual.pdf> (last visited March 8, 2021).

¹⁸ *Wagner v. Orange Cty.*, 960 So. 2d 785, 788 (Fla. 5th DCA 2007)

¹⁹ *City of Miami v. Valdez*, 847 So. 2d 1005, 1006-1007 (Fla. 3d DCA 2003).

²⁰ *United Servs. Auto. Ass'n v. Phillips*, 740 So. 2d 1205, 1209 (Fla. 2d DCA 1999).

²¹ *Wagner*, 960 So. 2d at 788 (citing Kahn, Legislative Claim Bills, Fla. B. Journal (April 1988)).

²² *Wagner*, 960 So. 2d at 788-789 (citing Kahn, at 26).

²³ *Id.*

²⁴ *Id.*

²⁵ Section 768.28(5), F.S.

Child Protection Teams

Description

The Florida Department of Health (DOH) currently contracts with 22 independent, community-based organizations that serve as child protection teams.²⁶ “Child Protective Team” (CPT) means a team of professionals established by the DOH to receive referrals from the protective investigators and protective supervision staff of the Department of Children and Families (DCF) and to provide specialized and supportive services to the program in processing child abuse,²⁷ abandonment,²⁸ or neglect case.^{29, 30} The teams perform medical evaluations, assess risks, and provide recommendations for child safety and support services.³¹

Composition and Responsibilities

The CPT is one of six programs that make up the Division of Children’s Medical Services (CMS) of the DOH. The CPTs, within the CMS, have 22 district offices.³² Each office must be available 24 hours per day, every day, to provide immediate medical diagnosis and evaluation, for consultations by phone, or for other assessment services.³³

Services

When a CPT accepts a referral from the DCF or law enforcement, the team must be able to provide, in part, the following services:

- Medical diagnosis and evaluation services;
- Nursing assessments;
- Child and family social assessments;

²⁶ The DOH, *Agency Analysis for SB 826*, p. 2, March 2, 2021 (on file with the Senate Committee on Children, Families, and Elder Affairs) (hereinafter cited as “The DOH Analysis”).

²⁷ Section 39.01(2), F.S., defines “abuse” as any willful act or threatened act that results in any physical, mental, or sexual abuse, injury, or harm that causes or is likely to cause the child’s physical, mental, or emotional health to be significantly impaired.

²⁸ Section 39.01(1), F.S., defines “abandoned” or “abandonment” as a situation in which the parent or legal custodian of a child or, in the absence of a parent or legal custodian, the caregiver, while being able, has made no significant contribution to the child’s care and maintenance or has made no significant contribution to the child’s care and maintenance or has failed to establish or maintain a substantial and positive relationship with the child, or both. “Establish or maintain a substantial and positive relationship” means, in part, frequent and regular contact with the child, and the exercise of parental rights and responsibilities.

²⁹ Section 39.01(50), F.S., states “neglect” occurs when a child is deprived of, or is allowed to be deprived of, necessary food, clothing, shelter, or medical treatment or a child is permitted to live in an environment when such deprivation or environment causes the child’s physical, mental, or emotional health to be significantly impaired or to be in danger of being significantly impaired, except when such circumstances are caused primarily by financial inability unless services have been offered and rejected by such person.

³⁰ Section 39.01(13), F.S.

³¹ The DCF, *CFOP 170-5*, Chapter 9, p. 1, available at

<https://www.myflfamilies.com/admin/publications/cfops/CFOP%20170-xx%20Child%20Welfare/CFOP%20170-05%20%20Child%20Protective%20Investigations/CFOP%20170-05.%20%20Chapter%2009.%20Coordination%20with%20Child%20Protection%20Team.pdf> (last visited March 8, 2021).

³² The DOH, *Children’s Medical Services Child Protection Teams*, 2020, available at <http://www.cms-kids.com/home/contact/cpt.pdf> (last visited March 8, 2021) (hereinafter cited as “CMS CPT”).

³³ The DOH, Children’s Medical Services, *Child Protection Team Program Handbook*, p. 4 (June 28, 2019), available at http://www.cms-kids.com/providers/prevention/documents/handbook_cpt.pdf (last visited March 8, 2021) (hereinafter cited as “CPT Handbook”).

- Multidisciplinary case staffings;
- Psychological and psychiatric diagnosis and evaluations;
- Specialized and forensic interviews; and
- Expert medical, psychological, and related professional testimony in court cases.³⁴

Cases that must be referred to a Child Protection Team

The following cases involving child abuse, abandonment, or neglect that are reported to the Central Abuse Hotline must be referred to a child protection team:

- Head injuries, bruises to the head or neck, burns, or fractures in a child, regardless of age.
- Bruises that appear anywhere on a child who is five years old or younger.
- Alleged child sexual abuse.
- A sexually transmitted disease that occurs in a prepubescent child.
- Reported malnutrition or failure to thrive.
- Medical neglect.
- Instances of a child or sibling remaining in a home where a child has been pronounced dead on arrival at a hospital or a child has been injured and then died due to suspected abuse, abandonment, or neglect.
- Symptoms of serious emotional issues occurring in a child.³⁵

Employees and Sovereign Immunity

The teams operate under the oversight of a medical director who is a board-certified pediatrician with special training in child abuse and neglect.³⁶ According to the DOH, Florida's CPTs have approximately 364 team members, excluding medical directors, who are employed by private, non-profit entities.³⁷ Each team includes a medical director, other physicians, advanced practice registered nurses, physician assistants, registered nurses, team coordinators, case coordinators, and support staff.³⁸ State universities and county governmental entities employ approximately 126 of the team members.³⁹ The remaining members, approximately 238 members, are independent contractors who are not employees or agents of the DOH, and are therefore personally liable for their actions.⁴⁰

Lawsuits Filed Against Child Protection Teams

The DOH Legal Counsel in collaboration with the Department of Financial Services, Division of Risk Management (DRM) represent state employees in tortious actions.⁴¹ The DRM within the Chief Financial Officer's office queried its files for recent lawsuits involving CPTs. For FYs 2016-17, 2017-18, and data from 2018-February 2019, the Division of Risk Management was

³⁴ Section 39.303(3), F.S. Further, a CPT that is evaluating a report of medical neglect and assessing the health care needs of a medically complex child is required to consult with a physician who has experience in treating children with the same condition.

³⁵ Section 39.303(4), F.S.

³⁶ CMS CPT and s. 39.303(2)(a), F.S.

³⁷ The DOH Analysis at p. 2.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ The DOH Analysis at p. 3.

⁴¹ The DOH Analysis at p. 2.

not able to identify a lawsuit filed against a government employed CPT.⁴² The DRM conducted an updated review of approximately 42 claims against the DCF and the DOH related to child abuse, failure to protect wrongful death, etc., which have been filed since February 2019. No new claims which contain allegations of any wrongdoing against a CPT member have been identified.⁴³

Sovereign Immunity and Child Protection Team Physicians

It is not definitively settled whether all CPT *physicians* are covered under sovereign immunity. Whether sovereign immunity applies depends on the degree of control that the state maintains over the agent. In *Stoll v. Noel*,⁴⁴ the Florida Supreme Court explained that, under the appropriate circumstances, 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.⁴⁵

The *Stoll* Court examined the employment contract between the CMS 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. The manuals and guides given to physician consultants demonstrated that CMS had final authority over all care and treatment provided to CMS patients, and that CMS could refuse to allow a physician consultant's recommended course of treatment of any CMS patient for either medical or budgetary reasons. Furthermore, the Court's conclusion was supported by the state's acknowledgement that the manual creates an agency relationship between CMS and its physician consultants, and the state acknowledged full financial responsibility for the physicians' actions. The Court noted that the state's interpretation of its manual is entitled to judicial deference and great weight.⁴⁶

III. Effect of Proposed Changes:

The bill amends s. 768.28(9)(b), F.S., expanding the definition of "officer, employee, or agent" to include "any member of a child protection team, as defined in s. 39.01, when carrying out her or his duties as a team member under the control, direction, and supervision of the state or any of its agencies or subdivisions". As a result, a member of a CPT will receive sovereign immunity

⁴² Email prepared by Meredith Brock Stanfield, Director of Legislative and Cabinet Affairs, and forwarded by Chase Mitchell, Office of Legislative Affairs, Office of the Chief Financial Officer, Feb. 21, 2019, (on file with the Senate Committee on Children, Families, and Elder Affairs). Risk Management noted that it did not have a specific code in its system that identified CPTs that were involved in lawsuits. In updating a 2016 report, the workers queried all cases against DCF since July 1, 2012, and used cause codes such as child abuse, failure to protect, wrongful death by a foster parent, or similar category. The liability adjusters found no reported cases related to child protection teams in fiscal years 2016-2017. In fiscal years 2013-2014 through 2015-2016 notices were filed that litigation might ensue, but no lawsuits have been filed based upon those notices. The email shows that earlier lawsuits were filed dating back to fiscal year 2013-2014 and 2015-2016, but it is not readily apparent the extent to which CPTs were named in the litigation.

⁴³ Email prepared by Chase Mitchell, Office of Legislative Affairs, Office of the Chief Financial Officer, March 5, 2021, (on file with the Senate Committee on Children, Families, and Elder Affairs).

⁴⁴ *Stoll v. Noel*, 694 So. 2d 701 (Fla. 1997).

⁴⁵ *Id.* at 703, quoting from the *Restatement (Second) of Agency* s. 14N (1957).

⁴⁶ *Id.*

protection in a tort action only when the team member is determined to have acted under the control, direction, and supervision of the state or one of its entities. If the CPT member is found to be acting outside of that control, then sovereign immunity will not protect the team member in a tort lawsuit.

This amendatory language appears to focus on the agency role of the team member in a manner similar to the Supreme Court's *Stoll* decision discussed above. To receive sovereign immunity, the team member cannot be acting independently and separate from the supervision of the state or one of its entities. In the *Stoll* decision, the Court held that physician consultants were agents of the state and entitled to sovereign immunity because the state had to authorize the physician's services in advance and maintained supervisory authority over the physician. Additionally, final authority for the treatment of the patients did not reside with the physician consultants, but with the employing state entity.

The bill takes effect July 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may reduce the need for child protection teams to purchase liability insurance.

C. Government Sector Impact:

The DOH estimates that the fiscal impact of extending sovereign immunity coverage to approximately 238 additional CPT members cannot be determined but might be significant. Potential costs to the Department could include legal representation, the cost to settle a suit, and related litigation expenses.⁴⁷

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 768.28 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.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

⁴⁷The DOH Analysis at p. 4.