

**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 Rules

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BILL: SB 826

INTRODUCER: Senators Baxley and Harrell

SUBJECT: Child Protection Teams

DATE: April 15, 2021

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Moody</u>	<u>Cox</u>	<u>CF</u>	<b>Favorable</b>
2.	<u>Ravelo</u>	<u>Cibula</u>	<u>JU</u>	<b>Favorable</b>
3.	<u>Moody</u>	<u>Phelps</u>	<u>RC</u>	<b>Favorable</b>

## 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.<sup>1</sup> Article X, section 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 article X, section 13 of the Florida Constitution. Section 768.28(1), F.S., allows for suits in tort against the state 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.<sup>2</sup> The waiver of sovereign

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<sup>1</sup> Legal Information Institute, *Sovereign immunity*, available at [https://www.law.cornell.edu/wex/sovereign\\_immunity](https://www.law.cornell.edu/wex/sovereign_immunity) (last visited March 8, 2021).

<sup>2</sup> Section 768.28(1), F.S.

immunity applies only to “injury or loss of property, personal injury, or death caused by the 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 ....”<sup>3</sup>

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.<sup>4</sup> 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.<sup>5</sup> 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 conduct that is beyond negligent.<sup>6</sup>

An “officer, employee, or agent” protected by sovereign immunity includes, but is not limited to, certain volunteer health care providers, certain nonprofit independent colleges or universities located and chartered in this state which own or operate an accredited medical school; and a public defender or her or his employee or agent, including among others, an assistant public defender and an investigator.<sup>7</sup>

Florida Appeal Courts have equated “bad faith” with the “actual malice standard.”<sup>8</sup> “Malicious purpose,” has been interpreted as meaning the conduct was committed with “ill will, hatred, spite, [or] an evil intent.”<sup>9</sup> “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.”<sup>10</sup> 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.<sup>11</sup> 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.”<sup>12</sup>

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<sup>3</sup> *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.).

<sup>4</sup> Section 768.28(9)(a), F.S.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Section 768.28(9)(b)2., F.S.

<sup>8</sup> *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)).

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

<sup>10</sup> *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)).

<sup>11</sup> *Id.*

<sup>12</sup> *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 an entity protected by sovereign immunity.<sup>13</sup> 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.<sup>14</sup> Additionally, an attorney may not charge in excess of 25 percent of any judgment or settlement.<sup>15</sup>

### ***Claim Bills***

Although an 'excess' judgment may be entered, the statutory caps make it impossible, absent a special claim bill passed by the Legislature or insurance coverage, for a claimant to collect more than the caps discussed above.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> The Legislature may pass a claim bill<sup>19</sup> and does so based on a principle of fair treatment to compensate a person who is injured or damaged without compensation.<sup>20</sup>

Once a legislative claim bill is formally introduced, a special master conducts a quasi-judicial hearing.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup>

### **Child Protection Teams**

#### ***Description***

The Florida Department of Health (DOH) currently contracts with 22 independent, community-based organizations that serve as child protection teams.<sup>24</sup> "Child Protective Team" (CPT) means a team of professionals established by the DOH to receive referrals from the protective

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

<sup>14</sup> Section 768.28(5), F.S.

<sup>15</sup> Section 768.28(8), F.S.

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

<sup>17</sup> The Florida Senate, The Florida House of Representatives Civil Justice Subcommittee, *Legislative Claim Bill Manual, Policies, Procedures, and Information Concerning Introduction and Passage*, p. 2 (August 2019), available at <https://www.flsenate.gov/PublishedContent/ADMINISTRATIVEPUBLICATIONS/leg-claim-manual.pdf> (last visited March 8, 2021).

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

<sup>19</sup> *United Servs. Auto. Ass'n v. Phillips*, 740 So. 2d 1205, 1209 (Fla. 2d DCA 1999).

<sup>20</sup> *Wagner*, 960 So. 2d at 788 (citing Kahn, Legislative Claim Bills, Fla. B. Journal (April 1988)).

<sup>21</sup> *Wagner*, 960 So. 2d at 788-789 (citing Kahn, at 26).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> The DOH, *Senate Bill 826 Agency Analysis*, p. 2 (March 2, 2021) (on file with the Senate Committee on Children, Families, and Elder Affairs) (hereinafter cited as "The DOH Analysis").

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,<sup>25</sup> abandonment,<sup>26</sup> or neglect case.<sup>27, 28</sup> The teams perform medical evaluations, assess risks, and provide recommendations for child safety and support services.<sup>29</sup>

### ***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.<sup>30</sup> 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.<sup>31</sup>

### ***Services***

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

- Medical diagnosis and evaluation services;
- Nursing assessments;
- Child and family social assessments;
- Multidisciplinary case staffings;
- Psychological and psychiatric diagnosis and evaluations;
- Specialized and forensic interviews; and
- Expert medical, psychological, and related professional testimony in court cases.<sup>32</sup>

<sup>25</sup> 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.

<sup>26</sup> 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.

<sup>27</sup> 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.

<sup>28</sup> Section 39.01(13), F.S.

<sup>29</sup> 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%20Child%20Protective%20Investigations/CFOP%20170-05,%20Chapter%202009,%20Coordination%20with%20Child%20Protection%20Team.pdf> (last visited March 8, 2021).

<sup>30</sup> 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”).

<sup>31</sup> 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](http://www.cms-kids.com/providers/prevention/documents/handbook_cpt.pdf) (last visited March 8, 2021) (hereinafter cited as “CPT Handbook”).

<sup>32</sup> 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.

### ***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 5 years of age 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.<sup>33</sup>

### ***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.<sup>34</sup> According to the DOH, Florida's CPTs have approximately 364 team members, excluding medical directors, who are employed by private, non-profit entities.<sup>35</sup> Each team includes a medical director, other physicians, advanced practice registered nurses, physician assistants, registered nurses, team coordinators, case coordinators, and support staff.<sup>36</sup> State universities and county governmental entities employ approximately 126 of the team members.<sup>37</sup> 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.<sup>38</sup>

### ***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.<sup>39</sup> The DRM within the Chief Financial Officer's office queried its files for recent lawsuits involving CPTs. For Fiscal Years 2016-17, 2017-18, and data from 2018-February 2019, the DRM was not able to identify a lawsuit filed against a government employed CPT.<sup>40</sup> The DRM conducted an updated review of

<sup>33</sup> Section 39.303(4), F.S.

<sup>34</sup> CMS CPT and s. 39.303(2)(a), F.S.

<sup>35</sup> The DOH Analysis at p. 2.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> The DOH Analysis at p. 3.

<sup>39</sup> The DOH Analysis at p. 2.

<sup>40</sup> E-mail 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 (February 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 e-mail shows that earlier lawsuits were filed dating back to Fiscal Years 2013-2014 and 2015-2016, but it is not readily apparent the extent to which CPTs were named in the litigation.

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.<sup>41</sup>

### **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*,<sup>42</sup> 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.<sup>43</sup>

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.<sup>44</sup>

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

The bill amends s. 768.28(9)(b), F.S., expanding the definition of "officer, employee, or agent" for the purpose of the purpose sovereign immunity to include:

"[A]ny 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 protection in a tort action 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.

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<sup>41</sup> E-mail 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).

<sup>42</sup> *Stoll v. Noel*, 694 So. 2d 701 (Fla. 1997).

<sup>43</sup> *Id.* at 703, quoting from the *Restatement (Second) of Agency* s. 14N (1957).

<sup>44</sup> *Id.*

The bill applies sovereign immunity to a member of the CPT using a standard similar to current Supreme Court precedent. In *Stoll*,<sup>45</sup> the Supreme Court found that state-contracted physician consultants were agents of the state and entitled to sovereign immunity when the state authorized the physician's services in advance and maintained supervisory authority over the physician. A member of the CPT acting *outside* of his or her duties or without authority from the state or its agencies, or subdivisions, would not be eligible for sovereign immunity under either the current *Stoll* standard or the bill.

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:

SB 826 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

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<sup>45</sup> See *supra* note 42, and accompanying text.

significant. Potential costs to the department could include legal representation, the cost to settle a suit, and other litigation related expenses.<sup>46</sup>

**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.

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

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<sup>46</sup> The DOH Analysis at p. 4.