

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/CS/SB 660

SPONSOR: Governmental Oversight and Productivity Committee, Children and Families Committee, and Senator Brown-Waite

SUBJECT: Foster Care

DATE: March 17, 1999 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Barnes</u>	<u>Whiddon</u>	<u>CF</u>	<u>Favorable/CS</u>
2.	<u>Wilson</u>	<u>Wilson</u>	<u>GO</u>	<u>Favorable/CS</u>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

Committee Substitute for Senate Bill 660 specifies that any community-based agency providing foster care and related services pursuant to s. 409.1671, F.S., under contract with the Department of Children and Family Services (DCF) is a corporation acting primarily as an instrumentality of the state and is protected by the limitations on tort actions contained in s. 768.28, F.S., if the agency is acting within the scope of the contract with the department. The bill requires that these providers indemnify the department and the state, due to their employees or their subcontractor's intentional or negligent acts or omissions, up to the limits established under s. 768.28, F.S., including all defense costs incurred by the department or the state.

The bill directs the DCF to transfer back to the lead agency in the district where the funds were earned all documented federal funds that the department receives as a result of foster care and related services provided by a lead agency that exceeds its contracted amount. The lead agency must use these funds for providing additional child welfare services in the district in which the funds were earned.

This bill amends section 409.1671, Florida Statutes.

II. Present Situation:

Background

The Department of Children and Family Services began privatizing child welfare services in several Florida communities in the early 1990s by purchasing an extensive array of services from private sector providers such as Florida Sheriff's Youth Association and the Children's Home Society. Of Florida's \$373 million child protection budget, \$240 million, or 63 percent, are spent on services provided by the private sector.

Chapter 96-402, L.O.F, amended s. 409.1671, F. S., to include provisions for the department to contract with competent community based agencies for the provision of foster care and related services. As expressed in the legislation, the Legislature believed that privatizing child welfare services would strengthen the support and commitment of communities to the reunification of families and that privatized care of children and families would result in efficiencies and increased accountability. Privatized “related services” specified in statute include family preservation, independent living, emergency shelter, residential group care, foster care, therapeutic foster care, intensive residential treatment, foster care supervision, case management, permanent foster care, and family reunification. Pursuant to this legislation, the department established privatization model programs during FY 1996-97 in Districts 1, 4, 13, and Subdistrict 8A.

Chapter 98-180, L.O.F., provided direction to the department and the communities on the privatization of foster care and related services through contracts with eligible lead community-based providers. The term “eligible lead community-based provider” is defined in s. 409.1671(1)(b), F.S., as a single agency that contracts with the department for the provision of child protective services in a community that is no smaller than a county. The law directed the department to privatize all foster care and related services in District 5 (Pinellas and Pasco counties), beginning January 1, 1999, and continuing at least through December 31, 1999; to continue the current model programs in Districts 1, 4, and 13; and to incorporate Manatee county into the Subdistrict 8A program. The department is directed to submit a plan by July 1, 1999, to phase in privatization statewide over a 3 year period beginning January 1, 2000.

Sovereign Immunity Provisions

The department reports that certain lead community-based agencies under contract or under consideration to provide privatized foster care and related services have grave concerns about their liability risks under the current law governing the privatization initiative. The providers maintain that a level of liability protection similar to that provided the department under s. 768.28, F.S., is appropriate because they are assuming the child protection functions that were previously administered by the department. The department states that in order to attract competent and solvent agencies to provide quality child protection services, steps should be taken to provide a level of protection to these privatized providers that minimizes their risks. Community-based providers currently purchase liability insurance incurring annual premium costs as high as \$100,000 per year.

The doctrine of sovereign immunity precludes the institution of a suit against the sovereign (government) without that sovereign’s consent. In Florida, sovereign immunity is the rule and, pursuant to the Florida Constitution, may only be waived by general law. (See Art. X, s. 13, Fla. Const.) In s. 768.28(1), F.S., the Legislature has explicitly waived sovereign immunity for tort actions. This waiver is extended to the state or to any of its agencies or subdivisions, which specifically include the executive, legislative and judicial branches of government; independent establishments of the state; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, its counties or municipalities. See s. 768.28(2), F.S. The limits on the waiver are \$100,000 per claim or judgment by any one person and \$200,000 per incidence or occurrence. See s. 768.28(5), F.S.

Section 409.175(14)(a), F.S., directs the Division of Risk Management of the Department of Insurance to provide coverage through the department to any person who owns or operates a licensed family foster home for the department in his or her place of residence. The coverage is provided from the general liability account of the Florida Casualty Insurance Risk Management Trust Fund and is limited to general liability claims arising from the provision of family foster home care pursuant to an agreement with the department and pursuant to guidelines established through policy, rule, or statute.

The limitations on tort actions pursuant to s. 768.28, F.S., are provided to certain private providers under contract with state agencies as well. For example, under s. 768.28(10)(a), F.S., health care vendors under contract with the Department of Corrections to provide health care services to inmates of the state correctional system are considered agents of the state. The corporation created under Part II of ch. 946, F.S., also receives sovereign immunity protection for the production and training activities it undertakes in the state correctional system. Section 768.28(11)(a), F.S., specifies that providers under contract with the Department of Juvenile Justice providing services to children in need of services, families in need of services, or juvenile offenders are also agents of the state.

With the exception of the above mentioned family foster homes, foster care providers under the auspices of private agencies are considered independent contractors and according to the department's General Counsel, there is uncertainty as to whether these providers of foster care would be considered as agents of the state.

Earning Federal Funds

The contract between a community-based agency and the department specifies the amount of federal funds that the agency expects to earn and expend during the fiscal year. There is no current statutory provision in s. 409.1671, F.S., directing the department to allocate federal earnings that exceed the specified contract amount to the community-based agency that earned those funds. Even though neither of the two existing lead agencies has earned federal funds in excess of their contracted amount, the department believes that providing this statutory assurance will be an incentive to providers to increase federal earnings as privatization of foster care and related services is further implemented.

III. Effect of Proposed Changes:

Sovereign Immunity Provisions

Committee Substitute for Senate Bill 660 amends s. 409.1671, F.S., stating that any community-based agency that provides foster care and related services to children and families under contract with the DCF pursuant to s. 409.1671, F.S., is a corporation acting primarily as an instrumentality of the state. The bill specifies that the limitations on tort actions contained in s. 768.28, F.S., apply to any action brought against the agency with respect to those contracted foster care and related services if the agency is acting within the scope of and consistent with guidelines and provisions of the department's contract. The bill requires that the agency carry general liability insurance in its contract with the department which indemnifies the state agency for any liabilities incurred due to negligence of the service providers' employees or

subcontractors. The indemnification does not preclude the Legislature from the filing or payment of claims bills.

Earning Federal Funds

Committee Substitute for Senate Bill 660 amends s. 409.1671, F.S., by directing the DCF to transfer back to that lead agency in the district where the funds were earned all documented federal funds that the department receives as a result of foster care and related services provided by a lead agency that exceeds their contracted amount. The lead agency must use these funds for providing additional child welfare services in the district in which the funds were earned. To achieve this objective the bill exempts these additional amounts from the definition of extra compensation contained in s. 215.425, F.S., after a contract has been executed.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This bill should lower the insurance premiums for the community-based providers based on the limitations in s. 768.28, F.S., resulting in additional dollars for foster care and related services. The department believes that there should be no new premium costs for the providers as most agencies currently have the liability insurance coverage consistent with the limits specified in s. 768.28, F.S.

The bill would allow private providers under contract with the department pursuant to s. 409.1671, F.S., to retain the federal funds which they earn that exceed their contracted amount. The department reports that these amounts would still be governed by the budget consultation provisions contained in s. 216.212, F.S., to avoid annualized commitments of federal funds by the agency in excess of appropriated amounts.

C. Government Sector Impact:

The department states that this bill should have a positive economic impact on the state because the reduced or contained costs associated with the provider's limited liability should enhance the department's ability to attract and negotiate contracts with private providers. The Division of Risk Management in the Department of Insurance foresees no additional cost to the DCF that would be imposed by the bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
