

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 7235 Vulnerable Children and Adults

SPONSOR(S): Health & Human Services Committee

TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Health & Human Services Committee		Prater	Gormley

SUMMARY ANALYSIS

The bill amends sections of Chapters 382, 393, and 916, F.S., relating to vulnerable children and adults to:

- Provide homeless children and minors who have had the disabilities of nonage removed the ability to obtain their birth certificate.
- Provide the Agency for Persons with Disabilities (APD) the final order authority for Medicaid fair hearings for Medicaid programs administered by APD.
- Require that APD monitoring regulations do not require facilities that serve APD clients to make pornographic materials available to residents at such facilities.
- Require that an individual who is subject to an involuntary admission order to an APD residential facility be released by the court to APD. APD will then make arrangements for the appropriate residential facility, rather than a court directly placing an individual in a specific facility.
- Require APD to notify the court and counsel of transfers between residential facilities.
- Require APD to ensure that there are sufficient facilities that provide community-based training for defendants charged with sex offenses.
- Create a taskforce to set guidelines and procedures for residential facilities, in relation to sexual activity.
- Cap the economic and noneconomic damages recoverable in a tort action by a claimant or claimant(s) against Department of Children and Families (DCF) child welfare lead agency or subcontractor, or against multiple entities involved in the same incident.
- Provide that DCF is not liable in tort for acts or omissions of a lead agency, or a subcontractor of the lead agency, or the officers, agents, or employees of the lead agency or subcontractor.
- Prohibit DCF from requiring a lead agency or a subcontractor to indemnify DCF against the department's own acts or omissions.
- Provide that DCF may not require a lead agency or subcontractor to include the department as an additional insured on any insurance policy, nor may a lead agency require its subcontractors to include the lead agency as an additional insured on any liability policy.

The bill has no fiscal impact on state government.

The bill provides an effective date of July 1, 2011.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Agency for Persons with Disabilities

The Agency for Persons with Disabilities (APD) is responsible for providing services to persons with developmental disabilities.¹ A developmental disability is defined in chapter 393, Florida Statutes, as “a disorder or syndrome that is attributable to retardation, cerebral palsy, autism, spina bifida, or Prader-Willi syndrome that manifests before the age of 18, and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely.”² Children who are at “high risk”³ of having a developmental disability and are between the ages of 3 and 5 are also eligible for services.

Medicaid Fair Hearings

State agencies administering the Medicaid program are required by federal and state law to grant an opportunity for a hearing to persons in the program under certain circumstances. This includes but is not limited to, applicants whose claim for services is denied or not acted upon promptly. Individuals may also request a hearing if they believe the state has taken erroneous action that affects them.⁴ When an individual requests a hearing regarding a change or reduction to their service package, their current level of service is often maintained until the hearing is conducted and a decision is rendered.

Prior to August 2006, Medicaid fair hearings for participants in the APD Medicaid waiver programs were conducted by the Department of Children and Families, Office of Fair Hearings. DCF Fair hearings for the Medicaid program are presided over by hearing officers who are impartial arbiters of the case. The fair hearing process is based on federal regulations and Chapter 120, F.S. As a result of a 1st District Court of Appeals ruling⁵ in 2007, the APD hearings were moved to the Division of Administrative Hearings (DOAH). Under this process DOAH issued recommended orders on the outcome of hearings and final orders were issued by APD. The 2010 Legislature moved the fair hearings process for APD back to DCF which in essence restored the pre-August 2006 process.⁶

Involuntary Commitment

The circuit court after a hearing and in accordance with the procedures in s. 393.11, F.S., may involuntarily admit a person with a diagnosis of mental retardation or autism to an APD residential facility for care and treatment.⁷ A petition must be filed in circuit court and allege that the person lacks sufficient capacity to give express and informed consent to a voluntary application for services and lacks the basic survival and self-care skills to provide for the person’s well-being or is likely to physically injure others if allowed to remain at liberty.⁸

After APD receives the court order for involuntary commitment, they must provide the court with the person’s family or individual support plan and copies of all examinations and evaluations, outlining the

¹ S. 20.197(3), F.S.

² S. 393.063(9), F.S.

³ S. 393.063(19), F.S., defines “high-risk child” as a child from 3 to 5 years of age with one or more of the following characteristics: a developmental delay in cognition, language, or physical development; a child surviving a catastrophic infectious or traumatic illness known to be associated with developmental delay, when funds are specifically appropriated; a child with a parent or guardian with developmental disabilities who requires assistance in meeting the child’s developmental needs; or a child who has a physical or genetic anomaly associated with developmental disability.

⁴ 42 CFR 431.220, s. 409.285, F.S.

⁵ J.M. v. Florida Agency for Persons with Disabilities, Case No. 1D06-0183.

⁶ 2010-157, LOF

⁷ S. 393.11, (8)(b)1. F.S.

⁸ S.393.11(2), F.S.

treatment and rehabilitative programs.⁹ In addition, APD must document that the person has been placed in the most appropriate, least restrictive and cost-beneficial residential setting.¹⁰ The court which issues the initial order for involuntary admission to residential services has continuing jurisdiction to ensure that the person is receiving adequate care. Upon request, the court may transfer the jurisdiction to the court where a client resides if it is different from where the original involuntary admission order was issued.¹¹

A defendant who is charged with a felony and been found incompetent to proceed due to mental retardation or autism may be involuntarily committed for training upon a finding by the court.¹² The court may order the individual into a forensic facility operated by APD. If the felony charges are dropped for the defendant, the court must consider a petition for involuntary admission to residential services provided by APD which may include a secure placement.¹³

Monitoring of Licensed Facilities

Through its licensing authority and by rule, APD is required to provide the following regulations for foster care facilities, group home facilities, residential habilitation centers, and comprehensive transitional education programs that serve agency clients:

- license application procedures;
- provider qualifications;
- facility and client care standards;
- requirements for client records;
- requirements for staff qualifications and training; and
- requirements for monitoring.¹⁴

In addition, the Agency for Health Care Administration contracts with the Delmarva Foundation, a nonprofit organization, to conduct quality assurance monitoring activities that includes licensed residential facilities who receive Medicaid waiver funding.¹⁵

There are approximately 1,600 APD licensed residential facilities in the state, covering a broad range of needs. There is no provision in APD procedures for residential providers that regulates sexual activity among residents of its facilities.¹⁶

In December 2010, the St. Petersburg Times reported that the Human Development Center (HDC) in Seffner, FL, a facility that provides services to APD clients, promoted the use of pornography and sexual activity among male residents as a part of their treatment plan.¹⁷ The parent of an involuntarily committed resident to HDC alleged that this policy was included in his treatment plan over their objections.¹⁸ Because the individual was accused of committing a sexual offense prior to commitment, transfer to an alternative facility was difficult to achieve.¹⁹

⁹ S. 393.11(8)(e), F.S.

¹⁰ *Id.*

¹¹ S. 393.11(11), F.S.

¹² S.916.302, F.S.

¹³ S.916.3025(3), F.S.

¹⁴ S. 393.067(1), F.S.

¹⁵ See: <http://www.dfmc-florida.org/> (last viewed April 2, 2011).

¹⁶ APD Bill Analysis SB 2062, on file with Health and Human Services Access Subcommittee Staff, March 31, 2011.

¹⁷ See: *Group Home's Unorthodox Sex Policy Disquiets Mother*, St. Petersburg Times, December 27, 2010.

¹⁸ *Id.*

¹⁹ *Id.*

Homeless Children and Youths

The term, “homeless children and youths,” as defined in federal law means:

- (a) individuals who lack a fixed, regular, and adequate nighttime residence (within the meaning of section 11302 (a)(1) of this title); and
- (b) includes—
 - (i) children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason; are living in motels, hotels, trailer parks, or camping grounds due to the lack of alternative adequate accommodations; are living in emergency or transitional shelters; are abandoned in hospitals; or are awaiting foster care placement;
 - (ii) children and youths who have a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings (within the meaning of section 11302 (a)(1) of this title);
 - (iii) children and youths who are living in cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations, or similar settings; and
 - (iv) migratory children (as such term is defined in section 6399 of title 20) who qualify as homeless for the purposes of this part because the children are living in circumstances described in clauses (1) through (iii).²⁰

The term, “unaccompanied youth,” as defined in federal law means youth not in the physical custody of a parent or guardian.²¹

Although the prevalence of youth homelessness is difficult to measure, researchers estimate that about 5 to 7.7 percent of youth experience homelessness. With at least one million youth on the streets and in shelter, and thousands more leaving juvenile justice, mental health facilities, and leaving foster care systems, the problem of youth homelessness continues to increase.²² While the reasons for youth homelessness vary by individual, the primary causes appear to be either family breakdown or systems failure of mainstream programs like child welfare, juvenile corrections, and mental health programs. Between 20,000 and 25,000 youth ages 16 and older transition from foster care to legal emancipation, or “age out” of the system annually with few resources and multiple challenges.²³ As a result, former foster care children and youth are disproportionately represented in the homeless population. Twenty-five percent of former foster youth nationwide reported that they had been homeless at least one night within two-and-a-half to four years after exiting foster care.²⁴

Under current law, minors who meet certain conditions can be granted the same rights as an adult. This process is known in current law as “having the disabilities of nonage removed” and is provided for if:

- The minor is married or has been married or subsequently becomes married, including one whose marriage is dissolved, or who is widowed, or widowed;²⁵ or
- A circuit court remove the disabilities of nonage of a minor age 16 or older residing in this state upon a petition filed by the minor’s natural or legal guardian or, if there is none, by a guardian ad litem.²⁶

²⁰ 42 U.S.C. §11434a.

²¹ *Id.*

²² Fundamental Issues to Prevent and End Youth Homelessness. Youth Homelessness Series, Brief No. 1. National Alliance to End Homelessness. May 2006.

²³ According to DCF, in Florida, approximately 800 young adults leave the foster care system annually upon reaching their 18th birthday.

²⁴ Fundamental Issues to Prevent and End Youth Homelessness. Youth Homelessness Series, Brief No. 1. National Alliance to End Homelessness. May, 2006.

²⁵ S. 743.01, F.S.

²⁶ S. 743.015, F.S.

Under current law, homeless children are not specifically given the ability to obtain their birth certificate. Current law provides that a person must be of legal age to obtain their birth certificate, and if they are not of legal age, the birth certificate can be obtained by parent, guardian, or other legal representative.²⁷ Therefore, homeless children not of legal age and without a parent, guardian or other legal representative would not be able to obtain their birth certificate.

Department of Children and Families/Community Based Care Providers

The Department of Children and Families (DCF) is one of the state agencies responsible for providing assistance and services to abused and neglected children. Prior to 1996, DCF accomplished its mission by directly delivering child protection services to recipients. In 1996, DCF began to privatize child protection services through a CBC pilot program.²⁸ Through the CBC program, private companies, known as “lead agencies”, enter into a contract with DCF to provide foster care services, child abuse services, mental health services, and other types of assistance.

Upon evaluating the program, DCF found that the lead agencies were able to have more frequent in-person contact with children in the program, to achieve lower ratios of children per home, to maintain smaller caseloads per case worker, and to have a lower average number of per child placement changes.²⁹ Due to the success of the pilot program, the Legislature significantly amended s. 409.1671, F.S., to create the CBC program privatizing foster care services, which remains largely unchanged today.³⁰ There are currently 20 lead agencies providing these and other services across the state.³¹ Lead agencies use subcontractors to deliver services directly to recipients.

Liability Insurance for Community Based Care Providers

Among many other facets of the CBC program, current law requires mandatory liability insurance limits to be maintained by lead agencies and their subcontractors.³² In addition to the mandatory insurance limits, current law allows for a yearly increase of 5 percent in the conditional limitation on damages available to claimants to account for the annual increase in the cost of goods and services.³³ Lead agencies and subcontractors must maintain a minimum level of general liability insurance of \$1 million per claimant and \$3 million per liability incident.³⁴ Economic damages³⁵ per claimant are capped at \$1,550,000.³⁶ Noneconomic damages³⁷ per claimant are capped at \$310,000.³⁸ In addition, lead agencies and subcontractors must maintain minimum bodily injury liability insurance coverage of \$100,000 per claim and \$300,000 per incident.³⁹ Also, providers must maintain \$1,000,000 in non-owned automobile insurance coverage.⁴⁰ This coverage is secondary to the primary insurance coverage of \$100,000 per claim and \$300,000 per incident that must be maintained by employees of

²⁷ S. 382.025 (1)(a) 1., F.S.

²⁸ State of Florida, Department of Children and Families, *Community-Based Care Implementation Plan*, July 1999, pg. 2.

²⁹ *Id.*

³⁰ See s. 2, Ch. 2009-206, L.O.F.

³¹ Lead Agency Map, State of Florida, Department of Children and Families, at http://www.dcf.state.fl.us/programs/cbc/docs/lead_agency_map.pdf (last visited March 21, 2011).

³² Section 409.1671(1)(h) and (j), F.S.

³³ Section 409.1671(1)(l), F.S.

³⁴ Section 409.1671(1)(h) and (j), F.S.

³⁵ See, e.g., s. 766.202(3), F.S., defining “economic damages” as financial losses that would not have occurred but for the injury giving rise to the cause of action in tort, including, but not limited to, past and future medical expenses, wage loss, loss of future earnings capacity, funeral expenses, and loss of prospective net accumulations of an estate.

³⁶ The original limit on economic damages was set at \$1,000,000 in Chapter 2009-206, L.O.F. The current limit on economic damages includes the annual 5 percent increase allowed by law.

³⁷ See, e.g., s. 766.202(8), F.S., defining “noneconomic damages” as non-financial losses that would not have occurred but for the injury giving rise to the cause of action in tort, including, but not limited to, pain and suffering, loss of support and services, loss of companionship or consortium, inconvenience, physical impairment, mental anguish, disfigurement, and loss of capacity for enjoyment of life.

³⁸ The original limit on noneconomic damages was set at \$200,000 in Chapter 2009-206, L.O.F. The current limit on noneconomic damages includes the annual 5 percent increase allowed by law.

³⁹ Section 409.1671(h) and (j), F.S.

⁴⁰ Section 409.1671(h), F.S.

lead agencies or subcontractors who use their personal vehicles to transport children and families in the course of providing services.⁴¹

The limits on liability provided for lead agencies and their subcontractors are not applicable if the lead agency or the subcontractor “acts in a culpably negligent manner or with willful and wanton disregard or unprovoked physical aggression when such acts result in injury or death or such acts proximately cause such injury or death...”⁴² Culpable negligence is defined as “reckless indifference or grossly careless disregard of human life.”⁴³ Further, the statute authorizes “a claim bill may be brought on behalf of a claimant pursuant to s. 768.28 for any amount exceeding the limits” provided to lead agencies and their subcontractors.⁴⁴

According to industry advocates, lead agencies collectively paid approximately \$2,750,000 in insurance premiums in 2010.⁴⁵ While each lead agency contracts with many subcontractors to directly provide services and each subcontractor must maintain the same insurance coverage levels as the lead agency, it is unknown how much the subcontractors are paying in insurance premiums.

It has been reported that tort claims against lead community-based providers, and subcontractors of the providers, are increasing.⁴⁶ One possible reason for the increase in claims is the high liability insurance requirement, which guarantees a significant source of recovery for a plaintiff in a tort case, assuming the plaintiff can obtain a favorable verdict. Also, the statute of limitations for intentional torts based on abuse can be lengthy, leaving a lead community-based provider, or subcontractor of the provider, liable for potentially significant damages over an extended period of time.⁴⁷

Effects of Proposed Changes

Section 1-

The bill adds the definition of “certified homeless youth” to chapter 382, F.S., relating to vital statistics. Certified homeless youth is defined as a minor who is a homeless child or youth, or unaccompanied youth, as defined in federal law and has been certified as homeless or unaccompanied by:

- A school district homeless liaison;
- The director of an emergency shelter program funded by the United States Department of Housing and Urban Development, or the director’s designee; or
- The director of a runaway or homeless youth basic center or transitional living program funded by the United States Department of Health and Human Services, or the director’s designee.

Section 2-

The bill provides language allowing certified homeless youth or a minor who has had the disabilities of nonage removed⁴⁸ to obtain their birth certificate.

Section 3-

The bill provides that monitoring requirements for foster care facilities, group home facilities, residential habilitation centers, and comprehensive transitional education programs, which are licensed by APD, may not mandate the availability of pornography in residential facilities licensed by APD.

⁴¹ Section 409.1671(j), F.S.

⁴² Section 409.1671(1)(i) and (k), F.S.

⁴³ *Id.*

⁴⁴ Section 409.1671(1)(h) and (j), F.S.

⁴⁵ See A Premium on Care: The Importance of Providing Affordable Insurance Coverage to Florida’s Community-Based Care Agencies, Cynthia S. Tunnicliff, et al., at pg. 6, citing data provided by the Florida Coalition for Children.

⁴⁶ *Id.*

⁴⁷ Section 95.11, F.S., which, in part, provides for limitations on actions in tort, ranging from four years for actions founded on negligence or statutory liability [s. 95.11(3)(a) and (f), F.S.] to at least seven years, with a possibility of many years beyond, for intentional torts based on abuse [s. 95.11(7), F.S.].

⁴⁸ As provided under s. 743.01, or 743.015, F.S.

Section 4-

The bill provides that an individual who is subject to an involuntary admission to an APD residential facility be released to the agency, and then placed in an appropriate facility. The bill prevents the court from ordering a person directly to a facility. APD may transfer an involuntarily committed individual under civil commitment from one facility to another, and must notify the court and counsel within 30 days after the transfer is completed.

Section 5-

The bill requires DCF to submit a recommended order after the conclusion of a Medicaid administrative hearing to APD. APD must issue a final order after the recommendation is made. This clarifies that final order authority rests with APD for the hearings conducted by DCF.

Section 6-

The bill reduces the mandatory general liability insurance coverage requirement for DCF child welfare lead agencies and subcontractors to \$500,000 per occurrence and a policy limit aggregate of \$2,000,000. The limit on economic damages available to a claimant is reduced to \$500,000 per occurrence and capped at \$1,000,000 in the aggregate. The total amount of economic damages recoverable by all claimants is limited to \$2,000,000 against DCF, lead agencies and subcontractors involved in the same incident or occurrence, when totaled together.

The bill also limits noneconomic damages available to a claimant to \$200,000 per occurrence and \$500,000 in the aggregate. The total amount of noneconomic damages recoverable by all claimants is limited to \$1,000,000 against the department, lead agencies and subcontractors involved in the same incident or occurrence, when totaled together.

The bill requires lead agencies and subcontractors to require their employees who transport children and families in personal vehicles to obtain bodily injury liability insurance in the amount of \$100,000 per person and \$300,000 per accident. In addition, the bill requires lead agencies or providers and subcontractors to maintain nonowned automobile insurance coverage at a minimum of \$1,000,000 per occurrence and \$2,000,000 in the aggregate.

The bill repeals s. 409.1671(1)(l), F.S., eliminating the 5 percent annual increase in the conditional limitations on damages.

The bill adds language to s. 409.1671(2)(a), F.S., to state that DCF is not liable in tort for the acts or omissions of a lead agency, or a subcontractor of a lead agency, or the officers, agents, or employees of a lead agency, or subcontractor of a lead agency. The department may not require a lead agency or subcontractor of a lead agency to indemnify the department for its own acts or omissions. The department may not require a lead agency or subcontractor to include the department as an additional insured on any insurance policy. Lastly, a lead agency or provider may not require its subcontractors to add the agency or provider as an additional insured on any liability policy.

Section 7-

The bill requires APD to ensure that there are sufficient facilities that provide community-based training for defendants charged with sex offenses so that alternative placements are available. Where there are two or fewer, APD must immediately procure additional facilities.

Section 8-

The bill provides that defendants that have had their criminal charges dismissed and are involuntary admitted to an APD residential facility shall be released to the agency, and then placed in an appropriate facility. The bill prevents the court from ordering a person directly to a facility.

Section 9-

The bill provides that the Legislature recognizes the rights of individuals with developmental disabilities and the obligation of the state to protect vulnerable individuals from sexual abuse. In order to protect these individuals, the bill establishes a task force to provide input to APD to set guidelines and procedures for residential facilities, in relation to sexual activity.

The task force is composed of the following members:

- The director of the Agency for Persons with Disabilities or his or her designee.
- The director of Adult Protective Services in the Department of Children and Family Services.
- The executive director of The Arc of Florida.
- An Arc of Florida family board member appointed by the executive director of The Arc of Florida.
- The chair of the Family Care Council Florida.
- A parent representative from the Family Care Council Florida appointed by the chair of the Family Care Council Florida.
- A representative from the Developmental Disabilities Council, Inc.
- A representative from Disability Rights Florida.
- A representative from the Florida courts.
- A representative from the Florida Prosecuting Attorneys Association.
- A representative from the Florida Public Defender Association.
- A staff member of the University Center for Excellence in Developmental Disabilities at the University of South Florida/Center for Inclusive Communities.
- A self-advocate.
- A representative from an intensive behavior residential habilitation provider.

The members of the task force must hear from self-advocates, family members, experts at universities and colleges, and other entities with expertise pertinent to this issue. Members of the task force serve without compensation. APD is to provide administrative support for the task force, and the task force must report its findings to the President of the Senate and the Speaker of the House of Representatives by November 1, 2011.

B. SECTION DIRECTORY:

- Section 1:** Amends s. 382.002, F.S., relating to definitions.
- Section 2:** Amends s. 382.025, F.S., relating to certified copies of vital records; confidentiality; research.
- Section 3:** Amends s. 393.067, F.S., relating to facility licensure.
- Section 4:** Amends s. 393.11, F.S., relating to involuntary admission to residential services.
- Section 5:** Amends s. 393.125, F.S., relating to hearing rights.
- Section 6:** Amends s. 409.1671, F.S., relating to foster care and related services; outsourcing.
- Section 7:** Amends s. 916.1093, F.S., operation and administration; rules.
- Section 8:** Amends s. 916.3025, F.S., relating to jurisdiction of committing court.
- Section 9:** Creates an unnumbered section of law creating a taskforce.
- Section 10:** Provides an effective date of July 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Lower liability limits could encourage insurers to enter, or re-enter, the market in Florida, creating competition for business and allowing lead agencies and subcontractors to maximize their premium dollars. Lead agencies and subcontractors should realize savings on insurance premiums.

D. FISCAL COMMENTS:

Currently, s. 409.1671(1)(h) and (j), F.S authorizes that “a claim bill may be brought on behalf of a claimant pursuant to s. 768.28 for any amount exceeding the limits” provided to lead agencies and their subcontractors. As this legislation reduces the limits, the legislature may see an increase in requests to file a “claim bill” and an increase in the amounts of the claims bill.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

Damages Caps

This bill caps the economic and noneconomic damages recoverable in certain tort actions. The Florida Constitution places limits on the Legislature’s ability to cap damages in tort cases or otherwise restrict a litigant’s access to courts. The “access to courts provision” of the declaration of rights in the Florida Constitution requires that the courts “be open to every person for redress of any injury.”⁴⁹ As the Legislature has enacted damage caps, the Florida Supreme Court developed a test to determine whether or not caps on damages are sufficient to overcome the prohibition in the state constitution against restricting access to courts through statutory caps on damages.

In *Kluger v. White*,⁵⁰ the Florida Supreme Court considered a statute that abolished causes of action to recover for property damage caused by an automobile accident unless the damage exceeded \$550.⁵¹ The court held that the statute violated the access to courts provision of the state constitution. In *Kluger*, the court held that where a right to access to the courts for redress for a particular injury predates the adoption of the declaration of rights in the 1968 state constitution, the Legislature cannot abolish the right without providing a reasonable alternative unless the Legislature can show (1) an overpowering public necessity to abolish the right and (2) no alternative method of meeting such public necessity.⁵²

The court applied the *Kluger* test in *Smith v. Department of Insurance*.⁵³ In 1986, the Legislature passed comprehensive tort reform legislation that included a cap of \$450,000 on noneconomic

⁴⁹ Article I, s. 21, FLA. CONST.

⁵⁰ 281 So.2d 1 (Fla. 1973).

⁵¹ See *Kluger*, 281 So.2d at 2-3.

⁵² See *Kluger*, 281 So.2d at 4.

⁵³ 507 So.2d 1080 (Fla. 1987).

damages. The Florida Supreme Court held that the right to sue for unlimited economic damages existed at the time the constitution was adopted.⁵⁴ The court said that a cap on noneconomic damages must meet the *Kluger* test in order to pass constitutional muster.⁵⁵ The *Smith* court held that the Legislature did not provide an alternative remedy or commensurate benefit in exchange for limiting the right to recover damages and found that the cap on noneconomic damages violated the access to courts provision of the Florida Constitution.⁵⁶

The issue of caps on noneconomic damages arose again in *University of Miami v. Echarte*.⁵⁷ In 1988, the Legislature instituted a voluntary binding arbitration process in medical malpractice cases. The Florida Supreme Court applied the *Kluger* test and found that arbitration statute provided a commensurate benefit for the loss of the right to recover full noneconomic damages.⁵⁸ In addition, the *Echarte* court found that the Legislature had shown an overpowering public necessity for instituting the caps and that there was no reasonable alternative.⁵⁹

The arbitration statute at issue in *Smith* states that damages are capped at \$250,000 “per incident.” In *St. Mary’s Hospital, Inc. v. Phillipe*,⁶⁰ the Florida Supreme Court considered whether the “per incident” language meant that each claimant could recover the full \$250,000 or whether all claimants in a single incident must divide \$250,000. The court held that the statute meant that each claimant was entitled to recover up to \$250,000 per incident.⁶¹ To hold otherwise, the court said, would raise equal protection concerns because a claimant’s recovery would be limited simply because there were multiple claimants in a given case.⁶²

Most recently, a federal district court upheld the caps on noneconomic damages in medical malpractice lawsuits put in place in 2003 (against an access to courts challenge and an equal protection challenge).⁶³ The court deferred to the Florida Legislature’s findings of fact based upon the recommendations of the Governor’s Select Task Force on Healthcare Professional Liability Insurance and held that these findings “presented an overpowering public necessity requiring the adoption of the liability caps.”⁶⁴ The findings were extensive and convinced the court that a medical malpractice crisis did exist and the caps were the only means available to address this crisis.⁶⁵

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

⁵⁴ See *Smith*, 507 So.2d at 1087

⁵⁵ See *Smith*, 507 So.2d at 1087-1088.

⁵⁶ See *Smith*, 507 So.2d at 1089.

⁵⁷ 618 So.2d 189 (Fla. 1993).

⁵⁸ See *Echarte*, 618 So.2d at 194.

⁵⁹ See *Echarte*, 618 So.2d at 195-97.

⁶⁰ 769 So.2d 961 (Fla. 2000).

⁶¹ See *St. Mary’s*, 769 So.2d at 967-971.

⁶² See *St. Mary’s*, 769 So.2d at 971-973.

⁶³ *M.D., a Minor, v. United States*, Case No. 8:09-cv-438-EAK-MAP, Sept. 30, 2010; United States District Court, M.D. Florida.

⁶⁴ *Id.* at 2.

⁶⁵ *Id.*