

SUBJECT: Limiting liability of volunteer health care practitioners

COMMITTEE: Civil Practices — committee substitute recommended

VOTE: 5 ayes — Nixon, Gattis, Hartnett, Rose, Woolley

0 nays

4 absent — Capelo, Y. Davis, King, Krusee

WITNESSES: For — None

Against — Jay Harvey, Texas Trial Lawyers Association

DIGEST: CSHB 3439 would, under certain circumstances, offer liability protections to health care practitioners who conducted free physical examinations to certify the eligibility of students, at private or public schools from kindergarten to grade 12, to participate in school-sponsored extracurricular activities or sports. These health care practitioners — physicians, physician assistants, or advanced nurse practitioners — would be immune from civil liability for any act or omission that resulted in death or injury to a patient, if:

- the practitioners acted in good faith and within the scope of their duties and licenses;
- the act or omission occurred during the course of conducting the medical screening or physical examination; and
- the patient, or the patient's parent or legal guardian, signed a written statement acknowledging that the health care practitioner would be conducting a free examination and that limitations applied to the potential recovery of damages from the practitioner connected to the examination.

This immunity would apply only to a health care practitioner who had in effect liability coverage of at least \$100,000 per person and \$300,000 per single occurrence for death and bodily injury, and \$100,000 for each single occurrence of damage to property.

CSHB 3439 would not limit the liability for any intentional, wilful, or wantonly negligent act or omission, or one that was done with conscious indifference or reckless disregard for the safety of others. It would not limit the liability of a school district, governmental unit or employee, or an insurer or insurance plan.

The bill would take effect on September 1, 2003.

**SUPPORTERS
SAY:**

CSHB 3439 would enable many economically disadvantaged children to obtain physical examinations necessary for participation in school sports and other activities. Many of these children come from families that do not have insurance coverage or cannot pay for such physicals. At the same time, many health care practitioners are unwilling to take on the liability that comes with performing these services free of charge. By limiting their liability, this bill would allow more health care practitioners to perform free examinations, thereby helping more children to participate in extracurricular activities.

CSHB 3439 would give practitioners the necessary liability protection for performing a simple examination. A physical given for this purpose is general and cursory, designed to ascertain the general fitness of the patient to participate in sports or other activities. Such an examination, however, is not designed to uncover the presence of hidden health conditions that require specialized screenings to detect. Practitioners should be protected from liability for not detecting problems that a general physical examination is not designed to spot. In addition, a practitioner who spotted a health condition but chose to pass the child anyway would be considered negligent under this bill and would not be immune from liability.

This bill also would protect children from practitioners acting outside of the scope of their duties by requiring that they had insurance protection to get the liability limitation. Although the policy would not cover an act or omission immunized under this bill, it would cover, at least up to the policy limits, an injury caused by a practitioner doing something outside the scope of his or her duties.

Although the House-passed version of HB 4 by Nixon et al. includes a provision that would limit the liability of health care practitioners who volunteered in public schools, it would not protect volunteers in private

schools. This bill would protect volunteers in both private and public schools.

**OPPONENTS
SAY:**

This bill would not hold practitioners to a reasonable standard. They should be held responsible if they failed to find a problem that they should have found during an examination or did find a problem and issued the child a clean bill of health anyway. The standard of care should not be lower simply because the services were offered for free. For example, if a practitioner noticed that a star running back had an enlarged spleen but passed the child anyway, and that child later died from a ruptured spleen during a game, the practitioner should be held liable.

Although the bill would require a practitioner to carry insurance to enjoy protection from liability, the items exempted from immunity under the bill, such as willful or wantonly negligent conduct, are not covered by most insurance policies, and a child therefore would be unlikely to recover for injuries caused by such acts. It would do little good for a practitioner to carry insurance that would not pay for the majority of damages that could result from a physical exam performed under this bill.

CSHB 3439 is not necessary because the House-passed version of HB 4 by Nixon et al. would limit the liability of volunteers, including doctors, physician assistants, and registered nurses, performing free services, including physicals for school children.

NOTES:

The committee substitute differs from the bill as introduced by extending liability protection to physicians' assistants and nurse practitioners as well as physicians.

The companion bill, SB 1098 by Carona, was referred to the Senate State Affairs committee on March 17.

HB 4 by Nixon et al. passed the House on March 28, and currently is pending in the Senate State Affairs Committee.