# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 2386

SPONSOR: Health, Aging, and Long-Term Care and Senator Saunders

SUBJECT: Health Care Practitioners

DATE: April 21, 2003 REVISED: _____ _____ _____ _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Munroe | Wilson | HC | Favorable/CS |
| 2. | | | CF | |
| 3. | | | CJ | |
| 4. | | | JU | |
| 5. | | | GO | |
| 6. | | | | |

## I. Summary:

The bill revises substantive rights for health care practitioners who are alleged to be impaired. The consultant for the impaired practitioner treatment program when he or she suspects that a practitioner is impaired, must give the practitioner information regarding the investigation process. The Department of Health is granted rulemaking authority to determine what information should be provided. If the consultant fails to comply with providing the required information to the practitioner, such failure constitutes harmless error. If the consultant asks a practitioner to participate in a voluntary examination to determine whether the practitioner is in fact impaired, the practitioner is given the option of locating an examiner who meets the consultant's qualifications and who will record the examination. The examiner conducting the voluntary examination may not solicit the practitioner to enroll in a treatment program from which the examiner receives benefit.

This bill amends s. 456.076, Florida Statutes.

## II. Present Situation:

### Impaired Practitioner Treatment Program

Chapter 456, F.S., provides for the regulation of health care professions. Various practice acts regulating health care professions under the regulatory jurisdiction of the Department of Health contain provisions establishing grounds for disciplinary action which may be taken against licensed health care practitioners who are unable to practice their profession with reasonable skill and safety as a result of the misuse or abuse of alcohol, drugs or due to a mental or physical condition.

Pursuant to s. 456.076, F.S., whenever the Department of Health receives a written or oral legally sufficient complaint alleging that a licensed health care practitioner is impaired as a result of the misuse or abuse of alcohol or drugs, or both, or due to a mental or physical condition and no complaint other than impairment exists, the reporting of such information does not constitute grounds for discipline within the applicable practice act if the probable cause panel of the appropriate board or the department when there is no board, finds that:

- the licensee has acknowledged the impairment;
- the licensee has voluntarily enrolled in an appropriate, approved treatment program;
- the licensee has voluntarily withdrawn from practice or limited the scope of practice as required by the consultant until the panel or board or department is satisfied that the licensee has successfully completed an approved treatment program; and
- the licensee has executed releases for medical records, authorizing the release of all records of evaluations, diagnoses, and treatment of the licensee, including records of treatment for emotional or mental conditions, to the consultant.

The impaired practitioner treatment program was created to help rehabilitate various health care practitioners regulated by the Division of Medical Quality Assurance within the Department of Health. By entering and successfully completing the impaired practitioner treatment program, the practitioner may avoid formal disciplinary action, if the only violation of the licensing statute under which the practitioner is regulated is the impairment.

Section 456.076, F.S., requires the Department of Health to retain one or more impaired practitioner consultants to administer and implement the impaired practitioner treatment program. The section requires the consultant to be a licensed practitioner or recovered practitioner under the department's jurisdiction and at least one of the consultants must be a licensed medical physician, osteopathic physician, or nurse. The consultant works closely with the approved treatment providers regarding the intervention, evaluation, and treatment of impaired practitioners participating in the program. An approved treatment provider is required, upon request, to disclose to the consultant all information in its possession regarding an impaired practitioner's impairment and participation in the program.

Section 456.076, F.S., also provides that this treatment information maintained by the Department of Health, or the consultant as the department's agent, is confidential and exempt from the Public Records Law. If in the opinion of the consultant, after consultation with the treatment provider, the impaired practitioner fails to satisfactorily progress in a treatment program, all information regarding the practitioner's impairment and participation in the treatment program must be disclosed to the department. The disclosure constitutes a disciplinary complaint, which remains confidential until probable cause is found that the licensee has violated regulations applicable to the practice of the licensee's profession.

**Health Care Practitioner Disciplinary Procedures**

Section 456.073, F.S., sets forth procedures the Department of Health must follow in order to conduct disciplinary proceedings against practitioners under its jurisdiction. The department, for the boards under its jurisdiction, must investigate all written complaints filed with it that are legally sufficient. Complaints are legally sufficient if they contain facts, which, if true, show that

a licensee has violated any applicable regulations governing the licensee's profession or occupation. Even if the original complainant withdraws or otherwise indicates a desire that the complaint not be investigated or prosecuted to its completion, the department at its discretion may continue its investigation of the complaint. The department may investigate anonymous, written complaints or complaints filed by confidential informants if the complaints are legally sufficient and the department has reason to believe after a preliminary inquiry that the alleged violations are true. If the department has reasonable cause to believe that a licensee has violated any applicable regulations governing the licensee's profession, it may initiate an investigation on its own.

When investigations of licensees within the department's jurisdiction are determined to be complete and legally sufficient, the department is required to prepare, and submit to a probable cause panel of the appropriate board, if there is a board, an investigative report along with a recommendation of the department regarding the existence of probable cause. A board has discretion over whether to delegate the responsibility of determining probable cause to the department or to retain the responsibility to do so by appointing a probable cause panel for the board. The determination as to whether probable cause exists must be made by majority vote of a probable cause panel of the appropriate board, or by the department if there is no board or if the board has delegated the probable cause determination to the department.

The subject of the complaint must be notified regarding the department's investigation of alleged violations that may subject the licensee to disciplinary action. When the department investigates a complaint, it must provide the subject of the complaint or her or his attorney a copy of the complaint or document that resulted in the initiation of the investigation. Except for cases involving physicians, within 20 days after the service of the complaint, the subject of the complaint may submit a written response to the information contained in the complaint. The department may conduct an investigation without notification to the subject if the act under investigation is a criminal offense. If the department's secretary or her or his designee and the chair of its probable cause panel agree, in writing, that notification to the subject of the investigation would be detrimental to the investigation, then the department may withhold notification of the subject.

If the subject of the complaint makes a written request and agrees to maintain the confidentiality of the information, the subject may review the department's complete investigative file. The licensee may respond within 20 days of the licensee's review of the investigative file to information in the file before it is considered by the probable cause panel. Complaints and information obtained by the department during its investigations are exempt from the public records law until 10 days after probable cause has been found to exist by the probable cause panel or the department, or until the subject of the investigation waives confidentiality. If no probable cause is found to exist, the complaints and information remain confidential in perpetuity.

When the department presents its recommendations regarding the existence of probable cause to the probable cause panel of the appropriate board, the panel may find that probable cause exists or does not exist, or it may find that additional investigative information is necessary in order to make its findings regarding probable cause. Probable cause proceedings are exempt from the noticing requirements of ch. 120, F.S. After the panel convenes and receives the department's

final investigative report, the panel may make additional requests for investigative information. Section 456.073(4), F.S., specifies time limits within which the probable cause panel may request additional investigative information from the department and within which the probable cause panel must make a determination regarding the existence of probable cause. Within 30 days of receiving the final investigative report, the department or the appropriate probable cause panel must make a determination regarding the existence of probable cause. The secretary of the department may grant an extension of the 15-day and 30-day time limits outlined in s. 456.073(4), F.S. If the panel does not issue a letter of guidance or find probable cause within the 30-day time limit as extended, the department must make a determination regarding the existence of probable cause within 10 days after the time limit has elapsed.

Instead of making a finding of probable cause, the probable cause panel may issue a letter of guidance to the subject of a disciplinary complaint. Letters of guidance do not constitute discipline. If the panel finds that probable cause exists, it must direct the department to file a formal administrative complaint against the licensee under the provisions of ch. 120, F.S. The department has the option of not prosecuting the complaint if it finds that probable cause has been improvidently found by the probable cause panel. In the event the department does not prosecute the complaint on the grounds that probable cause was improvidently found, it must refer the complaint back to the board that then may independently prosecute the complaint. The department must report to the appropriate board any investigation or disciplinary proceeding not before the Division of Administrative Hearings under ch. 120, F.S., or otherwise not completed within 1 year of the filing of the complaint. The appropriate probable cause panel then has the option to retain independent legal counsel, employ investigators, and continue the investigation, as it deems necessary.

When an administrative complaint is filed against a subject based on an alleged disciplinary violation, the subject of the complaint is informed of her or his right to request an informal hearing if there are no disputed issues of material fact, or a formal hearing if there are disputed issues of material fact or the subject disputes the allegations of the complaint. The subject may waive her or his rights to object to the allegations of the complaint, which allows the department to proceed with the prosecution of the case without the licensee's involvement. Once the administrative complaint has been filed, the licensee has 21 days to respond to the department. If the subject of the complaint and the department do not agree in writing that there are no disputed issues of material fact, s. 456.073(5), F.S., requires a formal hearing before a hearing officer of the Division of Administrative Hearings under ch. 120, F.S. The hearing provides a forum for the licensee to dispute the allegations of the administrative complaint. At any point before an administrative hearing is held, the licensee and the department may reach a settlement. The settlement is prepared by the prosecuting attorney and sent to the appropriate board. The board may accept, reject, or modify the settlement offer. If accepted, the board may issue a final order to dispose of the complaint. If rejected or modified by the board, the licensee and department may renegotiate a settlement or the licensee may request a formal hearing. If a hearing is held, the hearing officer makes findings of fact and conclusions of law that are placed in a recommended order. The licensee and the department's prosecuting attorney may file exceptions to the hearing officer's findings of facts. The boards resolve the exceptions to the hearing officer's findings of facts when they issue a final order for the disciplinary action.

The boards within the Department of Health have the status of an agency for certain administrative actions, including licensee discipline. A board may issue an order imposing discipline on any licensee under its jurisdiction as authorized by the profession's practice act and the provisions of ch. 456, F.S. Typically, boards are authorized to impose the following disciplinary penalties against licensees: refusal to certify, or to certify with restrictions, an application for a license; suspension or permanent revocation of a license; restriction of practice or license; imposition of an administrative fine for each count or separate offense; issuance of a reprimand or letter of concern; placement of the licensee on probation for a specified period of time and subject to specified conditions; or corrective action.

**Emergency Suspension of a License**

Section 120.60(6), F.S., authorizes an agency to take emergency action against a license if the agency finds that immediate serious danger to the public health, safety, or welfare requires emergency suspension, restriction, or limitation of a license.[1] The agency may take such action by any procedure that is fair under the circumstances if: the procedure provides at least the same procedural protection as is given by other statutes, the State Constitution, or the United States Constitution; the agency takes only that action necessary to protect the public interest under the emergency procedure; and the agency states in writing at the time of, or prior to, its action the specific facts and reasons for finding an immediate danger to the public health, safety, or welfare and its reasons for concluding that the procedure used is fair under the circumstances. The agency's findings of immediate danger, necessity, and procedural fairness are judicially reviewable.[2] Summary suspension, restriction, or limitation may be ordered, but a suspension or revocation proceeding under ss. 120.569 and 120.57, F.S., must also be promptly instituted and acted upon.

## III. Effect of Proposed Changes:

The bill revises substantive rights for health care practitioners who are alleged to be impaired. The consultant for the impaired practitioner treatment program when he or she suspects that a practitioner is impaired, must give the practitioner information regarding the investigation process. The Department of Health is granted rulemaking authority to determine what information should be provided. If the consultant fails to comply with providing the required information to the practitioner, such failure constitutes harmless error. If the consultant asks a practitioner to participate in a voluntary examination to determine whether the practitioner is in fact impaired, the practitioner is given the option of locating an examiner who meets the consultant's qualifications and who will record the examination. The examiner conducting the voluntary examination may not solicit the practitioner to enroll in a treatment program from which the examiner receives benefit.

The effective date of the bill is July 1, 2003.

[1] Similar procedures are required for emergency rulemaking under the Administrative Procedure Act (s. 120.54(4)(a), F.S.)
[2] See also, s. 120.68, F.S., which provides for immediate judicial review of final agency action.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Art. VII, s. 18 of the Florida Constitution.

### B. Public Records/Open Meetings Issues:

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Art. I, s. 24(a) and (b) of the Florida Constitution.

### C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Art. III, ss. 19(f) of the Florida Constitution.

## V. Economic Impact and Fiscal Note:

### A. Tax/Fee Issues:

None.

### B. Private Sector Impact:

None.

### C. Government Sector Impact:

The Department of Health will incur costs to adopt rules required by the bill to set forth the information that the consultant for the impaired practitioner treatment program must provide a practitioner who is believed to be impaired.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Amendments:

None.