HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 229 Health Care Practitioner Licensure
SPONSOR(S): Health & Human Services Committee, Health Quality Subcommittee; Byrd
TIED BILLS: **IDEN./SIM. BILLS:** SB 876

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health Quality Subcommittee	15 Y, 0 N, As CS	Siples	McElroy
2) Health Care Appropriations Subcommittee	12 Y, 0 N	Mielke	Pridgeon
3) Health & Human Services Committee	16 Y, 0 N, As CS	Siples	Calamas

SUMMARY ANALYSIS

The impaired practitioner program was established within the Department of Health (DOH), by s. 456.076, F.S., to assist health care practitioners who are impaired as a result of the misuse or abuse of alcohol or drugs, or of a mental or physical condition, which could affect the ability to practice with skill and safety.

Currently, DOH must contract with at least one entity to serve as a consultant for the impaired practitioner program. The consultant receives referrals from DOH, regulatory boards or health care entities, as well as self-referrals. Upon receipt of a referral, the consultant coordinates an evaluation of the practitioner. After the evaluation, a treatment plan, if needed, is developed, and as the practitioner undergoes treatment, the consultant monitors the progress. The consultant advises the appropriate board, or DOH if there is no board, when a practitioner successfully completes treatment and is able to practice safely. However, if a practitioner fails to complete treatment, the consultant notifies the appropriate board or DOH to initiate disciplinary proceedings, as warranted. Consultants have sovereign immunity.

CS/CS/HB 229 authorizes, rather than requires, DOH to retain one or more consultants to operate its impaired practitioner program. Under the bill, the contract with the consultant must require the consultant to accept referrals of practitioners who have or are suspected of having an impairment; arrange the evaluation and treatment of such practitioners, and monitor their progress and status to determine if and when they are able to safely to return to practice. The bill prohibits the consultant from providing evaluation and treatment services. Under the bill, a practitioner found to have an impairment may be accepted into the impaired practitioner program, and must enter into a participant contract which defines the planned or recommended treatment.

The bill requires DOH or licensure boards, rather than probable cause panels, to oversee matters involving impaired practitioners. As with current law, if a participant fails or is terminated from the impaired practitioner program, a consultant must notify DOH for disciplinary proceedings. If the consultant concludes that a practitioner's impairment constitutes an immediate, serious danger to public health, the consultant must notify DOH, rather than the Surgeon General.

The bill authorizes the consultant to release information to the participant, referral, or legal representative of the participant or referral. If the consultant discloses information to DOH, the participant, referral, or legal representative of the participant or referral may obtain a copy of the consultant's file from either the consultant or DOH.

Current law requires licensees to report violations of the core licensure statute (ch. 456, F.S.) and individual practice acts. The bill allows licensees to report certain individuals having an impairment or suspected of having an impairment to the consultant, rather than DOH.

The bill retains the sovereign immunity for the consultant provided under current law, but deletes certain requirements that must be met by the consultant to be eligible for sovereign immunity.

The bill repeals the authority of regulatory boards and DOH to adopt rules relating to the impaired practitioner program. Currently, the rules adopted under this section provide definitions of terms and designates the entities authorized as consultants.

The bill authorizes DOH to issue or renew licenses of individuals who were convicted of or entered a plea of guilty or nolo contendere to a disqualifying offense before July 1, 2009, when the licensure disqualification law was enacted. The bill authorizes DOH to issue or renew the license of an individual who is convicted of or enters a plea of guilty or nolo contendere to a disqualifying felony if the applicant successfully completes a pretrial diversion program and the plea has been withdrawn or the charges have been dismissed.

The bill has no fiscal impact on state and local governments.

The bill provides the act is effective upon becoming law except as otherwise provided in the bill.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Medical Quality Assurance

The Department of Health (DOH) is created under the authority of s. 20.43, F.S., which outlines the composition of the agency structure to include the Division of Medical Quality Assurance (MQA). MQA is statutorily responsible for the following boards and professions established within the division:

- The Board of Acupuncture, created under chapter 457.
- The Board of Medicine, created under chapter 458.
- The Board of Osteopathic Medicine, created under chapter 459.
- The Board of Chiropractic Medicine, created under chapter 460.
- The Board of Podiatric Medicine, created under chapter 461.
- Naturopathy, as provided under chapter 462.
- The Board of Optometry, created under chapter 463.
- The Board of Nursing, created under part I of chapter 464.
- Nursing assistants, as provided under part II of chapter 464.
- The Board of Pharmacy, created under chapter 465.
- The Board of Dentistry, created under chapter 466.
- Midwifery, as provided under chapter 467.
- The Board of Speech-Language Pathology and Audiology, created under part I of chapter 468.
- The Board of Nursing Home Administrators, created under part II of chapter 468.
- The Board of Occupational Therapy, created under part III of chapter 468.
- Respiratory therapy, as provided under part V of chapter 468.
- Dietetics and nutrition practice, as provided under part X of chapter 468.
- The Board of Athletic Training, created under part XIII of chapter 468.
- The Board of Orthotists and Prosthetists, created under part XIV of chapter 468.
- Electrolysis, as provided under chapter 478.
- The Board of Massage Therapy, created under chapter 480.
- The Board of Clinical Laboratory Personnel, created under part III of chapter 483.
- Medical physicists, as provided under part IV of chapter 483.
- The Board of Opticianry, created under part I of chapter 484.
- The Board of Hearing Aid Specialists, created under part II of chapter 484.
- The Board of Physical Therapy Practice, created under chapter 486.
- The Board of Psychology, created under chapter 490.
- School psychologists, as provided under chapter 490.
- The Board of Clinical Social Work, Marriage and Family Therapy, and Mental Health Counseling, created under chapter 491.
- Emergency medical technicians and paramedics, as provided under part III of chapter 401.

DOH regulates most health care professions.[1] Each profession is governed by an individual practice act and by ch. 456, F.S., which contains core licensure provisions that apply uniformly across all individual practice acts for health care practitioners[2].

[1] The Department of Business and Professional Regulation regulates veterinarians pursuant to ch. 474, F.S.

[2] Section 456.001(4), defines "health care practitioner" as any person licensed under: ch. 457, F.S., (acupuncture); ch. 458, F.S., (medical practice); ch. 459, F.S., (osteopathic medicine); ch. 460, F.S., (chiropractic medicine); ch. 461, F.S., (podiatric medicine); ch. 462, F.S., (naturopathy); ch. 463, F.S., (optometry); ch. 464, F.S., (nursing); ch. 465, F.S., (pharmacy); ch. 466, F.S., (dentistry, dental

Impaired Practitioner Treatment Program

The impaired practitioner treatment program was created in s. 456.076, F.S., to provide resources to assist health care practitioners who are impaired as a result of the misuse or abuse of alcohol or drugs, or both, or a mental or physical condition which could affect the practitioners' ability to practice with skill and safety.[3] For a profession that does not have a program established within its individual practice act, the DOH is required to designate an approved program by rule.[4] DOH has designated by rule that an approved impaired practitioner program is one that is designated by DOH through contract with a consultant to initiate intervention, recommend evaluation, and refer impaired practitioners to treatment providers and monitor progress of impaired practitioners. The impaired practitioner program may not provide medical services.[5] The terms "impaired practitioner program" and "consultant" appear to be used interchangeably.

DOH must retain at least one impaired practitioner consultant[6] who is licensed under the jurisdiction of MQA and who is a licensed physician or nurse; or an entity that employs a medical director who is a licensed physician, or an executive director who is a licensed nurse.[7] DOH currently contracts with the Professionals Resource Network (PRN) and the Intervention Project for Nurses (IPN) to provide approved treatment programs[8] for impaired practitioners.[9] PRN performs evaluation, treatment referrals, and monitoring for medical doctors and all allied health professions, except nurses and certified nursing assistants, which are served by IPN.[10]

A consultant may also to enter into a contract with a school or program to provide services to students preparing for a licensure as a health care practitioner or a veterinarian who may be impaired as a result of the misuse or abuse of alcohol or drugs, or both or due to a mental or physical condition.[11] DOH is not responsible for paying costs of care by an approved treatment program or the services provided by the consultant for students. Additionally, a school that is governed by accreditation standards requiring notice and the provision of due process procedures to students, is not liable in any civil action for referring a student to the consultant or for any disciplinary action that adversely affects the status of a student when the disciplinary actions are instituted in reasonable reliance on the recommendations, reports, or conclusions provide by a consultant.[12]

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hygiene, and dental laboratories); ch. 467, F.S., (midwifery); parts I, II, III, V, X, XIII, and XIV of ch. 468, F.S., (speech-language pathology and audiology, nursing home administration, occupational therapy, respiratory therapy, dietetics and nutrition practice, athletic trainers, and orthotics, prosthetics, and pedorthics); ch. 478, F.S., (electrolysis); ch. 480, F.S., (massage therapy); parts III and IV of ch. 483, F.S., (clinical laboratory personnel or medical physicists); ch. 484, F.S., (dispensing of optical devices and hearing aids); ch. 486, F.S., (physical therapy practice); ch. 490, F.S., (psychological services); and ch. 491, F.S. (clinical, counseling, and psychotherapy services).

[3] Section 456.076, F.S. The provisions of s. 456.076, also apply to veterinarians under s. 474.221, F.S. and radiological personnel under s. 486.315, F.S.

[4] Section 456.076(1), F.S.

[5] Rule 64B31-10.001(1)(a), F.A.C.

[6] Rule 64B31-10.001(1)(b), F.A.C., provides that a consultant operate an approved impaired practitioner program which receives allegations of licensee impairment, personally intervene or arrange intervention with licensees, refer licensees to approved treatment programs or treatment providers, evaluate treatment progress, and monitor continued care provided by approved programs and providers.

[7] Section 456.076(2), F.S.

[8] A treatment program is approved by a designated impaired practitioner program and must be a nationally accredited or state licensed residential, intensive outpatient, partial hospital, or other program with a multidisciplinary team approach with individual treatment providers treating licensees depending on the licensee's individual diagnosis and treatment plan that has been approved by an approved practitioner program. A treatment provider is approved by a designated impaired practitioner program and must be a state licensed or nationally certified individual with experience treating specific types of impairment. 64B31-10.001(1)(c), F.A.C.

[9] DOH, Board of Medicine, *Help Center: Does the Department Have Assistance Programs for Impaired Health Care Professionals*, http://flboardofmedicine.gov/help-center/does-the-department-have-assistance-programs-for-impaired-health-care-professionals/ (last visited Jan. 11, 2016).

[10] DOH, *2017 Agency Legislative Bill Analysis: House Bill 229*, on file with the Health Quality Subcommittee.

[11] Section 456.076(2)(c)2., F.S.

[12] Section 456.076(2)(d), F.S.

Operation of the Program

When DOH receives a legally sufficient complaint[13] alleging that a licensed practitioner is impaired and no other complaints exist against the practitioner, the complaint is forwarded to the consultant, who assists DOH in determining if the practitioner is, in fact, impaired. In addition to assisting DOH in determining the existence of an impairment, the consultant also facilitates and monitors progress in the treatment of the impairment.

Impairment is not grounds for discipline, if the probable cause panel[14] of the appropriate board, or the department when there is no board, finds that the licensee:

- Acknowledges the impairment;
- Voluntarily enrolls in an appropriate, approved treatment program;
- Voluntarily withdraws from practice or limits his or her scope of practice, as required by the consultant, until the licensee has successfully completed an approved treatment program; and
- Authorizes the release of medical records, including all records of evaluations, diagnoses, and treatment, to the consultant.[15]

An impaired practitioner may voluntarily withdraw from practice and seek treatment from a provider approved by DOH without a complaint being filed. In such situations, DOH and the applicable board are not involved in the case.

After an evaluation is completed, the evaluator will submit a report to the consultant advising whether the practitioner is in fact impaired and recommending treatment or that the practitioner is not impaired. The impaired practitioners are referred to DOH-approved treatment providers or treatment programs.[16] Although the impaired practitioner is not responsible for paying for the services of the consultant, the impaired practitioner must pay for his or her treatment.

The consultant evaluates the treatment progress of an impaired practitioner and monitors the continued care provided by treatment programs.[17] Consultants do not provide medical treatment, nor do they have the authority to render decisions relating to licensure of a particular practitioner. However, the consultant is required to make recommendations to DOH regarding a practitioner patient's ability to practice.[18]

If, in the opinion of the consultant, the health care practitioner has not made satisfactory progress in a treatment program, the consultant must disclose all information regarding the licensee's impairment and participation in a treatment program in its possession to DOH. Such disclosure constitutes a complaint. If the consultant concludes that a health care practitioner's impairment constitutes an immediate danger to the public health, safety, or welfare, the Surgeon General must be notified.[19] DOH may then take any disciplinary action against the license as authorized under law, including issuing an emergency order restricting or suspending the license.[20]

[13] A complaint is legally sufficient if it contains ultimate facts that show the occurrence of a violation of a practice act, ch. 456, F.S., or a rule adopted by the DOH or a board. Section 456.073(1), F.S.
[14] A probable cause panel is a panel designated by rule of each regulatory board that is composed of at least two members, including at least one current board member, that review investigative information related to a complaint and determine, based on that information, whether probable cause exists to believe that a health care practitioner violated statutes governing the practice of the licensee's profession. If probable cause exists, the probable cause panel will direct DOH to file a formal complaint against the licensee. (s. 456.073(4), F.S.)
[15] Section 456.076(4), F.S.
[16] *Supra* note 10.
[17] Rule 64B31-10.001, F.A.C.
[18] Section 456.076(6), F.S.
[19] Section 456.074(7), F.S.
[20] *Supra* note 10.

As of January 2017, there were approximately 928 practitioners enrolled in the PRN program,[21] and IPN was providing services to 1,216 individuals.[22]

Consultant Sovereign Immunity

The legal doctrine of sovereign immunity prevents a government from being sued in its own courts without its consent.[23] According to United States Supreme Court Justice Oliver Wendell Holmes, citing the noted 17th century Hobbes work, *Leviathan*, "a sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."[24] State governments in the United States, as sovereigns, inherently possess sovereign immunity.[25]

Article X, section 13 of the Florida Constitution recognizes the concept of sovereign immunity and gives the Legislature the power to waive immunity in part or in full by general law. Section 768.28, F.S., contains the limited waiver of sovereign immunity applicable to the state. Under this statute, officers, employees, and agents of the state[26] will not be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function. However, personal liability may result from actions committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.[27]

When an officer, employee, or agency of the state is sued, the state steps in as the party litigant and defends against the claim. The recovery by any one person is limited to $200,000 for one incident and the total for all recoveries related to one incident is limited to $300,000.[28] The sovereign immunity recovery caps do not prevent a plaintiff from obtaining a judgment in excess of the caps, but the plaintiff cannot recover the excess damages without action by the Legislature.[29]

Whether sovereign immunity applies turns on the degree of control of the agent of the state retained by the state.[30] In *Stoll v. Noel*, the Florida Supreme Court explained that independent contractor physicians may be agents of the state for purposes of sovereign immunity: [31]

> 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.

The Court examined the employment contract between the physicians and the state to determine whether the state's right to control was sufficient to create an agency relationship.[32] The facts of the case demonstrated the state's control over the independent contractor physicians and, therefore, the Court held that an agency relationship existed.[33]

[21] PRN, "PRN Monthly Report for January 2017," (February 9, 2017), on file with the Health Quality Subcommittee.
[22] IPN, "January 2017 Monthly Report," (February 2, 2017), on file with the Health Quality Subcommittee.
[23] Black's Law Dictionary, 3rd Pocket Edition, 2006.
[24] *Kawananakoa v Polyblank*, 205 U.S. 349, 353 (1907).
[25] *See, e.g.,* Fla. Jur. 2d, Government Tort Liability, Sec. 1.
[26] The statutes define state agencies or subdivisions to include executive departments, the legislature, the judicial branch, and independent establishments of the state, such as state university boards of trustees, counties and municipalities, and corporations primarily acting as instrumentalities or agencies of the state, including the Florida Space Authority. Section 768.28(2), F.S.
[27] Section 768.28(9)(a), F.S.
[28] Section 768.28(5), F.S.
[29] *Id.*
[30] *Stoll v. Noel*, 694 So. 2d 701, 703 (Fla. 1997).
[31] *Id.* at 703, quoting from the *Restatement (Second) of Agency* s. 14N (1957).
[32] *Id.*
[33] *Id.* at 703.

Impaired Practitioner Program Consultant

Impaired practitioner consultants have sovereign immunity for the limited purpose of an emergency intervention, for actions taken within the scope of its contract with DOH.[34] Such contract must:

- Require the consultant to indemnify the state for any liabilities incurred up to the limits set out in chapter 768, F.S.;
- Require the consultant to establish a quality assurance program to monitor services delivered under the contract;
- Require the consultant's quality assurance program, treatment, and monitoring records to be evaluated quarterly;
- Require the consultant's quality assurance program to be subject to review and approval by DOH;
- Require the consultant to operate under policies and procedures approved by the DOH;
- Require the consultant to provide the DOH, for its approval, a policy and procedure manual that comports with all statutes, rules, and contract provisions;
- Require DOH to be entitled to review the records relating to the consultant's performance under the contract for purposes of management and financial audits or program evaluation;
- Require all performance measures and standards to be subject to verification and approval by DOH; and
- Allow DOH to terminate the contract with the consultant for noncompliance.[35]

The Department of Financial Services is required to defend the consultant, its officers, employees, and any person acting at the direction of the consultant for the limited purpose of an emergency intervention, when the consultant is unable to perform the intervention, from any legal action brought as a result of contracted program activities.

Mandatory Reporting

A licensed health care practitioner must report any person who the licensee knows is violating ch. 456, F.S., or the provisions of an individual practice act, or the rules adopted thereunder.[36] If a licensed health care practitioner knows that a person is unable to practice with reasonable skill and safety due to an impairment due to the use of alcohol or drugs, or due to a physical or mental illness in violation of ch. 456, F.S., or a practice act, that practitioner is obligated to report such impairment to the appropriate board, or DOH if there is not board.[37]

Failure to report such information may result in discipline for the licensed health care practitioner.

Disqualification from Licensure

In 2009, a law was enacted that prohibited DOH from issuing or renewing the license of an individual who was convicted of, or entered a plea of nolo contendere to, regardless of adjudication of certain felonies related to Medicaid, Medicare, fraud, or controlled substances.[38] In 2012, the law was

[34] Section 768.28, F.S., provides the procedures that must be followed if an individual wishes to bring an action against the state for injury due to the negligence of a state employee, agent, or volunteer.
[35] Section 456.076(8), F.S.
[36] Section 456.072, F.S. *See also* s. 457.109, F.S., (acupuncture); s. 458.331, F.S., (medical practice); s. 459.015, F.S., (osteopathic medicine); s. 460.413, F.S., (chiropractic medicine); s. 461.013, F.S., (podiatric medicine); s. 462.14, F.S., (naturopathy); s. 463.016, F.S., (optometry); s. 464.018, F.S., (nursing); s. 465.016, F.S., (pharmacy); s. 466.028, F.S., (dentistry, dental hygiene, and dental laboratories); s. 467.203, F.S., (midwifery); s. 468.217, F.S.; (occupational therapy); and s. 474.221, F.S., (veterinary medicine).
[37] Section 456.072(1)(z), F.S.
[38] Chapter 2009-223, Laws of Fla., codified at s. 456.0635, F.S. If the sentences or any probation for a conviction ended more than 15 years before the date of application, DOH was not required to deny the license.

amended to create a tiered system of exclusions based on the severity of the crime and the amount of time elapsed between the crime and the application for licensure and provided an exception.[39]

Current law prohibits a board or DOH, if there is no board, from allowing a person to sit for an examination or issue a license, certificate, or registration, if the applicant has been convicted of a felony under ch. 409, F.S., relating to social and economic programs, including Medicaid; ch. 817, F.S., relating to fraud; or ch. 893, F.S.; relating to controlled substances; or a similar felony offense committed in another jurisdiction unless the individual successfully completed a drug court program for the felony and the plea was withdrawn or the charges were dismissed. A board or DOH, if there is no board, may allow an applicant to sit for an examination or issue a license, certificate, or registration if the sentence or any related period of probation for a conviction ended:

- More than 15 years before the date of application for felonies of the first or second degree;
- More than 10 years before the date of application for felonies of the third degree, except for those under s. 893.13(6)(a), F.S.[40]; or
- More than 5 years before the date of application for felonies of the third degree under s. 893.13(6)(a), F.S.

These exclusions also apply to an applicant who:

- Has been convicted of, or entered a plea of guilty or no contest to, regardless of adjudication, a felony under 21 U.S.C. ss. 801-970 or 42 U.S.C. ss. 1395-1396, unless the sentence and any subsequent period of probation for such convictions or plea ended more than 15 years before the date of application; or
- Is listed on the United States Department of Health and Human Services Office of Inspector General's List of Excluded Individuals and Entities.

Additionally, a board or DOH is prohibited from renewing a license, certification, or registration if the applicant or candidate falls under the same restrictions established for initial licensure, certification, or registration. The same exceptions to the restrictions on initial licensure, certification, or registration apply for renewal applications; however, the renewal applicant or candidate must show that she or he is currently enrolled in a drug court program, rather than showing successful completion, as required of initial applicants, above.

Until 2016, this disqualification from licensure did not apply to individuals for felony convictions or pleas of guilty or no contest of the specified violations to applicants for initial licensure or certification who were enrolled in a recognized training or education program as of July 1, 2009, and who applied for initial licensure after July 1, 2012. In 2016, this exception to the disqualification was repealed because individuals who were denied renewal based on one of the offenses, regardless of the date it was committed, were able to re-apply and obtain new licenses based on the exemption.

Effect of Proposed Changes

Impaired Practitioner Treatment Program

The bill authorizes, rather than requires, DOH to retain one or more consultants[41] to operate its impaired practitioner program.[42] DOH's contract with a consultant must specify the types of licenses,

[39] Chapter 2012-64, Laws of Fla.
[40] S. 893.13(6)(a), F.S., makes it unlawful for a person to be in actual or constructive possession of a controlled substance unless such controlled substance was lawfully obtained from a practitioner or pursuant to a valid prescription or order of a practitioner while acting the course of his or her professional practice or to be in actual or constructive possession of a controlled substance except as otherwise authorized under ch. 893, F.S. Any person who violates this provision commits a felony in the third degree.
[41] The bill defines consultant as the individual or entity who operates an approved impaired practitioner program pursuant to a contract with DOH and is retained by DOH as provided in the bill.

registrations, or certifications of the practitioners to be served by the consultant, and at a minimum, provide for the consultant to:

- Accept referrals;
- Arrange for the evaluation and treatment of impaired practitioners by a treatment provider, when the consultant deems the evaluation and treatment necessary; and
- Monitor the recovery progress and status of impaired practitioners to ensure such practitioners are able to practice the profession with skill and safety until such time as the consultant or DOH concludes such monitoring is no longer necessary for the protection of the public or until such time the practitioner's participation in the program is terminated for material noncompliance[43] or inability to progress.[44]

The bill prohibits the consultant from evaluating, treating, or otherwise providing direct patient care to practitioners in the operation of the impaired practitioner program. Evaluations are provided by an evaluator,[45] and treatment is provided by a treatment program[46] or treatment provider.[47] Current law also prohibits the consultant from providing medical services.[48]

The bill requires the consultant to enter into a participant contract[49] with each impaired practitioner that establishes the terms of monitoring, which may be based on recommendations from evaluators, treatment programs, or treatment providers. If through the course of monitoring, the consultant determines that extended, additional, or amended terms are necessary to ensure public health, safety, and welfare, the consultant may modify the terms of the participant contract.

The bill requires DOH to refer a practitioner to the consultant if it receives a legally sufficient complaint alleging that the practitioner has an impairment and no other complaint exists against the practitioner. Such impairment will not be considered grounds for discipline if the practitioner:

- Acknowledges the impairment;
- Becomes a participant in an impaired practitioner program and successfully completes the participant contract;
- Voluntarily withdraws for practice or limits the scope of his or her practice, if required by the consultant;
- Provides to the consultant, or authorizes the consultant to obtain all records and information relating to the impairment from any and all sources and all other medical records requested by the consultant; and
- Authorizes the consultant, in the event of the practitioner's termination from the impaired practitioner program, to report the termination to DOH and provide DOH will all information in the consultant's possession relating to the practitioner.

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[42] The bill defines impaired practitioner program as a program established by DOH by contract with one or more consultants to serve impaired and potentially impaired practitioners for the protection of the health, safety, and welfare of the public.
[43] The bill defines material noncompliance as an act or omission by a participant in violation of his or her participant contract as determined by the consultant or DOH.
[44] The bill defines inability to progress as a determination by the consultant based on a participant's response to treatment and prognosis that the participant is unable to safely practice despite compliance with treatment requirements and his or her participant contract.
[45] The bill defines an evaluator as a state-licensed or nationally certified individual who has been approved by a consultant or DOH, has completed an evaluator training program established by the consultant, and who is therefore authorized to evaluate practitioners as a part of impaired practitioner program.
[46] The bill defines treatment program as a DOH- or consultant-approved residential, intensive outpatient, partial hospitalization, or other program through which an impaired practitioner is treated based on the impaired practitioner's diagnosis and the treatment plan approved by the consultant.
[47] The bill defines treatment provider as a DOH- or consultant-approved state-licensed or nationally certified individual who provides treatment to an impaired practitioner based on the practitioner's diagnosis and the treatment plan approved by the consultant.
[48] Rule 64B31-10.001(1)(a), F.A.C.
[49] The bill defines participant contract as a formal written document outlining the requirements established by a consultant for a participant to successfully complete the impaired practitioner program, including the participant's monitoring plan.

Under current law, probable cause panels reviewing complaints against a practitioner may work directly with a consultant to determine if an impairment played a role in the complaint against a practitioner, and what, if any, disciplinary action needs to be taken. The bill requires the consultant to assist DOH and licensure boards in matters involving impaired practitioners, including a determination of whether a practitioner is in fact impaired rather than this process taking place before probable cause panels.

The bill also authorizes emergency medical personnel who have or are suspected of having an impairment due to the use of alcohol or drugs, or as a result of a mental or physical condition to be reported to the consultant rather than DOH as required under current law.

If an impaired practitioner self-reports to a consultant, the bill prohibits the consultant from providing information to DOH on such individual if the consultant has no knowledge of a pending investigation, complaint, or disciplinary action and the individual is in compliance and making progress with the terms of the impaired practitioner program and participant contract, unless the participant authorizes the release of such information to DOH. The consultant does not have access to information regarding pending complaints or disciplinary, because complaints and investigative information are confidential and exempt until 10 days after probable cause is found or until waived.[50] Prior to that time, a consultant does not know if there is a pending complaint or disciplinary action unless DOH asks if a specific practitioner is a participant or the practitioner reports that he or she is the subject of a pending complaint or disciplinary action.

Currently, a licensed health care practitioner must report any person that he or she knows is in violation of the provisions of the core licensure statute (ch. 456, F.S.), or the provisions of an individual practice act. However, the bill creates an exception to this mandatory reporting to allow a licensee who knows that a person is unable to practice with reasonable skill and safety due to an impairment, to report such information to the consultant, rather than DOH or the applicable regulatory board. Both the core licensure statute and individual practice acts are amended to include this language.[51]

The bill authorizes an evaluator or treatment program to disclose information to the consultant regarding a referral or participant upon the request of the consultant and with the authorization of the practitioner when required by law.[52]

The bill requires a consultant to provide DOH with all the information in its possession for a referral or participant who is terminated from the impaired practitioner program for material noncompliance with the participant contract, inability to progress, or any other reason. If the consultant concludes that a practitioner has an impairment that affects his or her ability to practice and such impairment constitutes an immediate, serious danger to public health, the consultant must immediately notify DOH, rather than the Surgeon General, and provide all information it has in its possession regarding that practitioner. This provision brings the process into the established disciplinary process at DOH.[53]

The bill retains the civil liability protections afforded to consultants for providing information regarding a participant to medical review committees[54] if the participant authorizes such disclosure, but eliminates

[50] Section 456.073(10), F.S.

[51] This includes the core licensure provision in s. 456.072, F.S., as well as s. 457.109, F.S., (acupuncture); s. 458.331, F.S., (medical practice); s. 459.015, F.S., (osteopathic medicine); s. 460.413, F.S., (chiropractic medicine); s. 461.013, F.S., (podiatric medicine); s. 462.14, F.S., (naturopathy); s. 463.016, F.S., (optometry); s. 464.018, F.S., (nursing); s. 465.016, F.S., (pharmacy); s. 466.028, F.S., (dentistry, dental hygiene, and dental laboratories); s. 467.203, F.S., (midwifery); s. 468.217, F.S.; (occupational therapy); and s. 474.221, F.S., (veterinary medicine).

[52] The bill defines a referral as a practitioner who has been referred, as a self-referral or otherwise, or reported to a consultant for impaired practitioner program services, but is not under a participant contract. The bill defines a participant as a practitioner who is participating in the impaired practitioner program by having entered into a participant contract.

[53] *Supra* note 10.

[54] Pursuant to s. 766.101, F.S., a medical review committee are committees found within entities such as health care facilities, insurers, professional societies of health care practitioners, mental health treatment facilities, and rural health networks, which may evaluate the quality of health care rendered by health care practitioners, determine if services rendered were professionally indicated or performed in compliance with applicable standards of care, or determine if the cost of health care rendered was reasonable. A medical review committee may also be formed by an insurer to perform medical malpractice pre-suit procedures.

such protection for DOH and the board. However, civil liability protections are provided elsewhere in current law. Section 766.101, F.S., currently provides that health care practitioners or other persons furnishing information to a medical review committee have no personal liability for any act or proceeding undertaken or performed within the scope of the functions of the committee, if the information provided is not intentionally fraudulent.[55]

The bill retains sovereign immunity for the consultant while acting within the scope of its duties under the contract with DOH, but removes the prerequisites for sovereign immunity. Deletion of these requirements will prevent arguments in court regarding the applicability of sovereign immunity.[56] The bill retains the requirement in current law that the Department of Financial Services must provide a defense for any claim, suit, action, or proceeding brought against the consultant.

If the consultant is retained to provide an impaired practitioner program for another state agency, the bill provides that the provisions of s. 456.076, F.S., will apply to that agency's impaired practitioner program. This provision will essentially bind another agency to the impaired practitioner program contract that DOH negotiates, without such agency being a party to the negotiations.

The bill repeals the authority of a regulatory board or DOH, if there no board, to adopt rules relating to the impaired practitioner program. Current rules designate the consultants of the impaired practitioner program as PRN and IPN and provide definitions; but do not provide any other provisions related to the operation of the program. The bill incorporates the definitions of the terms that are currently defined in rule. The designation of the consultant is no longer needed, as the bill authorizes DOH to contract with any entity that qualifies under the provisions of the bill.

The bill preserves the ability of a consultant to contract with a school to provide impaired practitioner services to its students but moves the provision to another paragraph within the subsection.

Under current law, the consultant has a public records exemption for all materials it receives pursuant to s. 456.076, F.S. Currently, the consultant receives information regarding the evaluation, as well as information from a treatment provider regarding the participant's participation in a treatment program. The bill retains the public records exemption and relocates it. The consultant will still hold the same information under the bill as it holds under current law.

The bill authorizes the consultant to disclose documents, records, or other information in the consultant's file to the referral, participant, or legal representative of the referral or participant, including:

- Information received by the consultant from other sources;
- The terms of the participant contract;
- Information about the referral's or participant's progress or inability to progress;
- Information about the referral's or participant's discharge or termination
- Information supporting the conclusion of material noncompliance; and
- Any other information required by law.

If the consultant discloses information to DOH, a referral, participant, or his or her legal representative may obtain a complete copy of the consultant's file from the consultant or DOH.

Disqualification from Licensure

The bill exempts individuals convicted of or entered a plea of guilty or nolo contendere to, disqualifying offenses prior to July 1, 2009, from being disqualified for licensure, preventing retroactive applicability. The bill also authorizes DOH to allow an individual to person to sit for an examination or issue or renew

[55] Section 766.101, F.S.
[56] E-mail correspondence with Department of Financial Services staff, dated March 7, 2017, (on file with the Health and Human Services Committee).

a license, certificate, or registration for a person who is convicted of or enters a plea of guilty or nolo contendere to a disqualifying felony if the applicant successfully completes a pretrial diversion program for that felony and provides proof that the plea has been withdrawn or the charges have been dismissed.

The bill states that it will take effect upon becoming law except as otherwise provided in the bill. The bill's provision revising the impaired practitioner program will supersede the Nurse Licensure Compact when it becomes effective on December 31, 2018, or upon enactment of the Nurse Licensure Compact in 28 states.[57]

B. SECTION DIRECTORY:

Section 1: Amends s. 456.076, F.S., relating to treatment programs for impaired practitioners.
Section 2: Amends s. 456.076, F.S., relating to treatment programs for impaired practitioners.
Section 3: Amends s. 456.0635, F.S., relating to health care fraud; disqualification for license, certificate, or registration.
Section 4: Amends s. 401.411, F.S., relating to disciplinary action; penalties.
Section 5: Amends s. 455.227, F.S., relating to grounds for discipline; penalties; enforcement.
Section 6: Amends s. 456.072, F.S., relating to grounds for discipline; penalties; enforcement.
Section 7: Amends s. 457.109, F.S., relating to disciplinary actions; grounds; action by the board.
Section 8: Amends s. 458.331, F.S., relating to grounds for disciplinary action; action by the board and department.
Section 9: Amends s. 459.015, F.S., relating to grounds for disciplinary action; action by the board and department.
Section 10: Amends s. 460.413, F.S., relating to grounds for disciplinary action; action by the board or department.
Section 11: Amends s. 461.013, F.S., relating to grounds for disciplinary action; action by the board; investigations by the department.
Section 12: Amends s. 462.14, F.S., relating to grounds for disciplinary action; action by the department.
Section 13: Amends s. 463.016, F.S., relating to grounds for disciplinary action; action by the board.
Section 14: Amends s. 464.018, F.S., relating to disciplinary actions.
Section 15: Amends s. 464.204, F.S., relating to denial, suspension, or revocation of certification; disciplinary actions.
Section 16: Amends s. 465.016, F.S., relating to disciplinary actions.
Section 17: Amends s. 466.028, F.S., relating to grounds for disciplinary action; action by the board.
Section 18: Amends s. 467.203, F.S., relating to disciplinary actions; penalties.
Section 19: Amends s. 468.217, F.S., relating to denial of or refusal to renew license; suspension and revocation of license and other disciplinary measures.
Section 20: Amends s. 468.3101, F.S., relating to disciplinary grounds and actions.
Section 21: Amends s. 474.221, F.S., relating to impaired practitioner provisions; applicability.
Section 22: Amends s. 483.825, F.S., relating to grounds for disciplinary action.
Section 23: Provides that the act shall take effect upon becoming a law except as otherwise expressly provided in the act.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

[57] In 2016, the Legislature enacted the Nurse Licensure Compact which authorized Florida to join a multistate compact for nurses to practice in this state and other member state with a multistate license. *See* ch. 2016-139, Laws of Fla.

2. Expenditures:

   Due to the expansion of individuals that are afforded a defense by the Department of Financial Services for claims, actions, suits, or proceedings, there may be an indeterminate, insignificant negative fiscal impact on the Risk Management Trust Fund.[58]

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

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:

   None.

B. RULE-MAKING AUTHORITY:

The bill repeals the authority of DOH to adopt rules designating an approved impaired practitioner program for professions that do not have a board, and provides DOH the freedom to contract with any entity to operate an impaired practitioner program.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 8, 2107, the Health Quality Subcommittee adopted an amendment and reported the bill as a committee substitute. The amendment:

- Redefined “impairment” to delete the term “potential” to avoid conflict with the Americans with Disability Act;

[58] Department of Financial Services, “House Bill 229 Analysis,” (January 25, 2017), on file with the Health Quality Subcommittee.

- Redefined “referral” to include mandatory health care practitioner reports of an impaired practitioner;
- Made technical improvements to the subsection which delineates the contract requirements for a consultant, but makes no substantive changes;
- Changed the terms “certify” and “decline to certify” to “approval” and “intent to deny” to reflect actual practice;
- For a case of a self-referral, required a consultant to report the impaired practitioner to DOH only if the consultant has knowledge of a pending complaint or investigation (because complaint and investigatory information is confidential and exempt from public records until 10 days after a finding is made by a probable cause panel or waived); and
- Reinstated and amended language deleted by the bill granting sovereign immunity to a consultant acting pursuant to its contract.

On March 30, 2017, the Health and Human Services Committee adopted an amendment which:

- Removed civil liability immunity for the impaired practitioner consultant, but retained the sovereign immunity in current law;
- Authorized the consultant to release to the referral, participant, or his or her legal representative certain information held by the consultant or DOH;
- Clarified that a referral or participant may obtain a complete copy of the consultant’s records provided to DOH any time after such disclosure;
- Exempted an individual from the licensure disqualification if he or she completed a pre-trial diversion program and the plea was withdrawn or the charges were been dropped;
- Exempted certain individuals from licensure disqualification if they committed criminal offenses prior to 2009, when the disqualification provision was originally enacted; and
- Made other technical and stylistic changes.

The bill was reported favorably as a committee substitute. The analysis is drafted to the committee substitute as passed by the Health and Human Services Committee.