The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Health Policy

BILL: CS/SB 876

INTRODUCER: Health Policy Committee; and Senator Young and others

SUBJECT: Programs for Impaired Health Care Practitioners

DATE: March 16, 2017 REVISED: ________ ________ ________ ________

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Rossitto-Van Winkle	Stovall	HP	**Fav/CS**
2.			AHS	
3.			AP	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 876 revises multiple statutory provisions relating to treatment programs for impaired healthcare providers. Primarily it clarifies in law the roles and responsibilities of the parties involved in the program, including the Department of Health (DOH or department), consultant, evaluator, treatment provider, and impaired practitioner. The bill no longer authorizes the DOH to specify by rule the manner in which consultants must work with DOH in intervening, evaluating, treating, monitoring, providing continuing care, or expelling a professional from the program. This will now be governed by a contract between the DOH and each consultant. The bill defines certain terms relating to impaired practitioner programs; and provides that a licensee may report an impaired practitioner to a consultant who operates an impaired practitioner program, rather than to the DOH, under certain circumstances.

The bill amends the provisions relating to the disqualification for health care practitioners for licensure or renewal to help ensure due process; and provides an exception for pretrial diversion.

The bill is effective upon becoming law.

II. Present Situation:

Treatment Programs for Impaired Practitioners

Section 456.076, F.S., provides resources to assist health care practitioners[1] who are impaired as a result of illness or use of alcohol, drugs, narcotics, chemicals, or any other type of material, or as a result of any mental or physical condition, which could affect the practitioners' ability to practice with skill and safety. For professions that do not have impaired practitioner programs provided for them in their practice acts, the DOH designates approved impaired practitioners programs.

The DOH is required to retain one or more impaired practitioner consultants who are each licensed under the jurisdiction of the Division of Medical Quality Assurance within the DOH and who must be:

- A practitioner or recovered practitioner licensed under chs. 458, 459, or part I, ch. 464, F.S.; or
- An entity that employs:
  - A medical director who must be a practitioner or recovered practitioner licensed under ch. 458 or ch. 459; or
  - An executive director who must be a registered nurse or a recovered registered nurse licensed under part I, ch. 464, F.S.

There are currently two department-approved treatment programs for impaired practitioners in Florida, the Professionals Resource Network (PRN) and the Intervention Project for Nurses (IPN).[2]

The PRN provides evaluations and treatment referrals, and monitoring, for all health professions, except nursing and certified nursing assistants.[3] The IPN provides those same services to nurses and certified nursing assistants.[4] The IPN and PRN initiate interventions, recommend evaluations, and refer impaired practitioners to department-approved treatment programs or treatment providers, and monitor the progress of impaired practitioners. PRN and IPN do not provide medical services. They act as liaisons between the DOH and approved treatment programs and providers. The DOH is not responsible for paying for the care provided by approved treatment providers or a consultant.

A medical school, nursing program or other health professional school, providing education for students enrolled in preparation for licensure as a health care professional, may also contract

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[1] Health care practitioners are defined in s. 456.001(4), F.S., to include licensed acupuncturists, physicians, physician assistants, chiropractors, podiatrists, naturopaths, dentists, dental hygienists, optometrists, nurses, nursing assistants, pharmacists, midwives, speech language pathologists, nursing home administrators, occupational therapists, respiratory therapists, dieticians, athletic trainers, orthotists, prosthetists, practitioners of electrolysis, massage therapists, clinical laboratory personnel, medical physicists, dispensers of optical devices or hearing aids, physical therapists, psychologists, social workers, counselors, and psychotherapists, among other professions. These practitioners are regulated by the MQA within the DOH.

[2] *See* Professionals Resource Network, *available at* http://www.flprn.org/ *and* http://www.ipnfl.org/ (last visited Mar. 7, 2017).

[3] Professionals Resource Network, *About Us, available at* http://www.flprn.org/about (last visited Mar. 9, 2017).

[4] Intervention Project for Nurses, *IPN History, available at* http://www.ipnfl.org/ipnhistory.html (last visited Mar. 9, 2017)

with the PRN or IPN, to provide services to an enrolled student, if the student is allegedly impaired as a result of the misuse or abuse of alcohol or drugs, or both, or due to a mental or physical condition.[5]

The PRN also contracts with the Department of Business and Professional Regulation (DBPR) to provide evaluations, treatment referrals, and monitoring for veterinarians and veterinary students.[6] The DBPR regulates veterinarians and veterinary students, but has no statutory authority under the general provisions in ch. 455, F.S., to create its own impaired practitioner program for veterinarians and veterinary students. However, ch. 455, F.S., provides for disciplinary action against persons who do not fully participate in an impaired practitioner program operated by the DOH.[7] Further, s. 474.221, F.S., addresses impaired practitioner provisions for veterinarians licensed under ch. 474, F.S., and states that they shall be governed by the treatment of impaired practitioners under the provisions of s. 456.076, F.S.

The IPN and PRN, if requested, also serve as consultants to the DOH in cases that come before the practice boards or the DOH, including credentialing and monitoring of applicants, and assisting in the development of plans for licensee practice in a structured environment. They must also be available to testify in administrative hearings and other legal proceedings on behalf of the DOH.

If an impaired practitioner fails to satisfactorily progress, or continue in a treatment program, the PRN and IPN must follow specific procedures set forth in the contract with the DOH, up to, and including, sending notification to the DOH of the dismissal of a practitioner from the program and for the DOH to initiate disciplinary action. When a licensee is dismissed from a treatment program the consultant provides an evaluation of the licensee's impairment condition to the DOH. The evaluation is used by the DOH to determine if the licensee poses an immediate and serious danger to the public for the purpose of issuing an emergency order restricting or suspending his or her license to practice.

Whenever a PRN or IPN consultant, licensee, or approved treatment provider makes a disclosure of confidential information regarding a practitioner to the DOH pursuant to law, that individual is not subject to civil liability for such disclosure, or its consequences. If the contract with the consultant contains specified provisions, the consultant, the consultant's officers and employees, and those acting at the direction of the consultant are considered agents of the DOH for purposes of s. 768.28, F.S., relating to sovereign immunity. The Department of Financial Services is required to defend any claim, suit, action, or proceeding, including proceedings for injunctive, affirmative, or declaratory relief, against a consultant, the consultant's officers, employees, or those acting at the direction of the consultant, for acts or omissions relating to an emergency intervention on behalf of a licensee or student, if the act or omission arises out of the course and scope of the consultant's duties under the DOH's contract.[8]

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[5] Section 456.076(1)(c)2., F.S.
[6] Department of Business and Professional Regulation, *Senate Bill 876 Analysis* (March 2, 2017) (on file with the Senate Committee on Health Policy).
[7] Section 455.227(1)(u), F.S.
[8] Section 456.076(8), F.S.

When the DOH receives a legally sufficient written or oral complaint, alleging that a licensee is impaired as a result of the misuse or abuse of alcohol or drugs, or due to a mental or physical condition, that could affect the licensee's ability to practice with skill and safety; and no other complaint against the licensee exists, the reporting of such information does not constitute grounds for discipline if certain conditions are met.[9] Those conditions include, findings by the appropriate board's probable cause panel, or the DOH, if there is no board, that the licensee:

- Acknowledged the impairment problem;
- Enrolled in an appropriate, approved treatment program;
- Voluntarily withdrew from practice, or limit the scope of his or her practice, until he or she has successfully completed the treatment program; and
- Released his or her medical records to the consultant.

If, however, the DOH has not received a legally sufficient complaint, other than impairment, and the licensee agrees to withdraw from practice until such time as the consultant determines the licensee has satisfactorily completed an evaluation and approved treatment program, if appropriate, neither the probable cause panel nor the DOH will become involved in the licensee's case.[10]

Section 456.072(1)(hh), F.S., sets forth, as grounds for disciplinary action against a health care practitioner, being terminated from a treatment program for impaired practitioners, which is overseen by an impaired practitioner consultant, for failure to comply, without good cause, with the terms of the monitoring or treatment contract entered into by the licensee; or for not successfully completing any drug treatment or alcohol treatment program.

Section 456.072, F.S., also requires practitioners to report to the DOH any person who the licensee knows is in violation of this chapter, the chapter regulating the alleged violator, or the rules of the department or the board,[11] which would include any person unable to practice with reasonable skill and safety to patients by reason of illness or use of alcohol, drugs, narcotics, chemicals, or any other type of material or as a result of any mental or physical condition.

Emergency medical technicians (EMTs), paramedics and emergency medical services[12] personnel (EMS) are not healthcare practitioners regulated under ch. 456, F.S.[13] All three are "certified" by the DOH under ch. 401, F.S., relating to Medical Telecommunications and Transportation. Section 456.076, F.S., requires the DOH to designate approved impaired practitioner programs for these professions, and PRN provides those services.[14] Section 401.411, F.S., sets forth disciplinary guidelines for the DOH to take action against EMTs, paramedics, and EMS personnel. The guidelines includes a penalty for failure to report any person known to be in violation of s. 401.411, F.S.;[15] and a penalty for practicing as an EMT, paramedic or EMS

[9] Section 456.076(4)(a), F.S.
[10] Section 456.076(4)(b), F.S.
[11] Section 456.072(1)(i), F.S.
[12] Section 401.107(3), F.S., defines "emergency medical services" as the activities or services to prevent or treat a sudden critical illness or injury and to provide emergency medical care and prehospital emergency medical transportation to sick, injured, or otherwise incapacitated persons in this state.
[13] Section 456.001(4), F.S., defines a "health care practitioner." See *supra* n.1.
[14] Professional Resource Network, "*About Us*" available at http://www.flprn.org/about, (last visited Mar. 9, 2017).
[15] Section 411.23(1)(l), F.S.

without reasonable skill and without regard for the safety of the public by reason of illness, drunkenness, or the use of drugs, narcotics, or chemicals or any other substance or as a result of any mental or physical condition.[16]

III. Effect of Proposed Changes:

CS/SB 876 revises the title of s. 456.076, F.S., from, "Treatment programs for impaired practitioners" to, "Impaired practitioner programs"; and specifically defines the terms "consultant," "evaluator," "impaired practitioner," "impaired practitioner program," "impairment," "inability to progress," "material noncompliance," "participant," "participant contract," "practitioner," "referral," "treatment program", and "treatment provider." Defining these terms would provide legislative guidance to the DOH for contractual purposes and in legal proceedings.

The bill expands the list of providers who may contract as a consultant, to operate the DOH's impaired practitioner program, to include a licensed practical nurse (LPN).[17] To operate the program a consultant must be:

- A practitioner licensed under ch. 458, ch. 459, or part I, ch. 464, F.S.;[18] or
- An entity that employs:
  - A medical director who is must be a practitioner licensed under chapter 458 or chapter 459; or
  - An executive director who is licensed under part I, ch. 464, F.S.[19]

The bill deletes the provisions authorizing the DOH to adopt, by rule, the manner in which consultants work with the DOH in interventions, in evaluating and treating professionals, in providing and monitoring continued care of impaired professionals, and in expelling professionals from the program. Much of the detail and the parameters for the program are provided in the bill and will be specified in the contract.

The bill requires that, if the DOH elects to retain one or more consultants to operate its impaired practitioner program, the terms and conditions of the impaired practitioner programs must be specified by the contract, which, at a minimum, must contain the following agreements,[20] to:

- Accept referrals;
- Arrange for evaluation and treatment of impaired practitioners when the consultant deems it necessary;
- Monitor the impaired practitioner's recovery process until monitoring is no longer needed or the practitioner is terminated for material non-compliance[21] or an inability to progress,[22] and

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[16] Section 411.23(1)(k), F.S.
[17] SB 876, proposed s. 456.076(2), F.S.
[18] Part I, ch. 464, F.S., issues certificates and licenses to ARNPs, RNs and LPNs.
[19] Id.
[20] See s. 456.076(3) F.S., of the bill.
[21] The bill defines "Material noncompliance" to mean an act or omission by a participant in violation of his or her participant contract as determined by the department or consultant.
[22] "Inability to progress" means a determination by a consultant based on a participant's response to treatment and prognosis that the participant is unable to safely practice despite compliance with the treatment requirement and his or her participant contract.

- Not directly evaluate, treat, or otherwise provide patient care to a practitioner in the program.

This codifies current DOH practices, and thus, would not impact how the programs currently operate.[23]

The bill requires the consultant to execute a participant contract with an impaired practitioner that addresses, among other things, the terms of the monitoring. The consultant may modify the terms of the monitoring if the consultant concludes that extended, additional or amended terms are needed to protect the health, safety and welfare of the public.

The bill provides that an impaired practitioner may self-report, or report another impaired professional, to a consultant rather than the DOH under certain circumstances.

The bill provides that when the DOH receives a legally sufficient complaint alleging that a practitioner has an impairment, and no complaint exists other than impairment, the DOH must refer the practitioner to the consultant, along with all information in the DOH's possession relating to the impairment. The impairment does not constitute grounds for discipline pursuant to s. 456.072, F.S., or the applicable practice act, if the practitioner:

- Has acknowledged the impairment;
- Becomes a participant in an impaired practitioner program and successfully completes a participant contract;
- Has voluntarily withdrawn from practice, or has limited the scope of his or her practice, if required by the consultant;
- Has provided to the consultant, or has authorized the consultant to obtain, all records and information relating to the impairment from any source and all other medical records of the practitioner requested by the consultant; and
- Has authorized the consultant, in the event of the practitioner's termination from the impaired practitioner program, to report the termination to the DOH and provide the department with copies of all information in the consultant's possession relating to the practitioner.[24]

The mandatory requirement that the practitioner release all records and information relating to the impairment from any source, and all other medical records of the practitioner requested by the consultant, may be broader than the release requirement under current law.[25] Current law requires the practitioner to authorize the release of all records of evaluations, diagnoses and

[23] Department of Health, *Senate Bill 876 Analysis*, (February 10, 2017) (on file with the Senate Committee on Health Policy).

[24] See s. 456.076(10)(a), F.S., of the bill.

[25] For example, in 2016. the Legislature enacted Senate Bill 964 authorizing, among other things, an impaired practitioner consultant indirect access to the Florida Prescription Drug Monitoring Program (PDMP) for the purpose of reviewing the database information of an impaired practitioner program participant or a referral who has separately agreed in writing to the consultant's access to and review of such information. *See* ss. 893.055(7)(c)5 and 893.0551(3)(h), F.S. This potentially creates a coercive method of requiring the practitioner to give up his or her PDMP records to the consultant, and by extension, to the DOH for disciplinary action. In order to attempt to avoid discipline for the practitioner, the requires the practitioner to release any information that relate to the practitioner's impairment; and any other records the consultant requests. The PDMP records would certainly be medical records related to the impairment and of the nature the consultant would request the practitioner to release. Were the practitioner then to be terminated from the impaired practitioner program for any reason, the consultant would be required to turn those records over to the DOH. The DOH does not have authority to access these PDMP records, either directly or indirectly.

treatment of the licensee, including records of treatment for emotional or mental conditions, to the consultant.

The bill modifies when a consultant must report an impaired practitioner in a treatment program to the DOH. To encourage practitioners who are or may be impaired to voluntarily self-refer to a consultant, the consultant may not provide information to the department relating to a self-referring participant if the consultant has no knowledge of a pending department investigation, complaint, or disciplinary action against the participant, and if the participant is in compliance and making progress with the terms of the impaired practitioner program and contract, unless authorized by the participant.[26]

When a referral or participant is terminated from the impaired practitioner program for a material noncompliance with a participant contract, an inability to progress, or any other reason than completion, the consultant is required to disclose all information in the consultant's possession relating to the practitioner to the DOH. Such disclosure constitutes a complaint that the DOH will then investigate. Whenever the consultant concludes that impairment affects a practitioner's practice and constitutes an immediate, serious danger to the public health, safety, or welfare, the consultant is required to immediately communicate such conclusion to the DOH and provide all information in the consultant's possession relating to the practitioner to the DOH.[27]

A consultant may request of an approved evaluator, treatment program, or treatment provider, with the authorization of the practitioner when required by law, all information in the evaluator's, treatment programs', or treatment provider's possession regarding a referral or participant. Failure to provide such information to the consultant is grounds for withdrawal of approval of such evaluator, treatment program, or treatment provider.[28]

The confidential or exempt information obtained by the consultant, retains its confidential or exempt status.[29] However, the bill does not provide any protection for the information once sent to the DOH, or obtained by an evaluator or treatment provider, from a public records request.

The bill protects the consultant, or a director, officer, employee, or agent of a consultant, from financial liability or any other cause of action for damages related to making a disclosure, or for any action or omission, against a license, registration, or certification.[30] Under current law a consultant, the consultant's officers and employees, and those acting at the direction of the consultant are considered agents of the DOH, and have sovereign immunity while acting within the course and scope of their contract.[31] The bill extends that protection to include directors, officers, employees or agents of a consultant.[32] The provisions of s. 766.101, F.S., apply to any consultant and the consultant's directors, officers, employees, or agents in regards to providing

[26] See s. 465.076,(9)(b),F.S., of the bill
[27] See s. 456.076,(11)(b), F.S., of the bill.
[28] See s. 456.076,(11)(a), F.S., of the bill.
[29] See s 456.016,(2), F.S., of the bill.
[30] See s. 456.076,(13), F.S., of the bill.
[31] See s. 456.076,(15)(a), F.S., of the bill.
[32] See s. 456.076, (13), F.S., of the bill.

information relating to a participant to a medical review committee if the participant authorizes such disclosure.[33]

The bill directs the Department of Financial Services to defend the consultant, consultant's directors, officers, employees and agents against any claim, suit, action, or proceeding for injunction, affirmative, or declaratory relief, as the result of any action or omission relating to the impaired practitioner program.[34]

The bill also clarifies and reauthorized existing provisions and responsibilities of the DOH, boards, and the consultant. The bill provides that if another state agency retains a consultant under contract with DOH, that the provisions of this law apply to the consultant's operation of an impaired practitioner program for that agency. The bill also reauthorizes programs for health care students and certain DBPR practitioners.

A consultant may disclose to a referral or participant, or to the legal representative of the referral or participant, the documents, records, or other information from the consultant's file, including information received by the consultant from other sources, and information on the terms required for the referral's or participant's monitoring contract, the referral's or participant's progress or inability to progress, the referral's or participant's discharge or termination, information supporting the conclusion of material noncompliance, or any other information required by law. If a consultant discloses information to the DOH in accordance with this program, a referral or participant, or his or her legal representative, may obtain a complete copy of the consultant's file from the consultant or the DOH.[35]

The bill provides an exception to health care professionals' statutory duty to report themselves, or another professional, to the DOH when they know the professional is practicing without reasonable skill and safety by reason or illness, drunkenness,[36] or the use of alcohol drugs, narcotics, chemicals, or any other substance, or as a result of a mental or physical condition.[37] The exception is only applicable to impairment issues, and allows a professional to report himself or herself, or another impaired practitioner, to a consultant operating an approved impaired practitioner program. The bill similarly amends s. 401.411(1)(l), F.S., relating to disciplinary actions and penalties for EMTs, Paramedics and EMS personnel and ss. 455.227, F.S., and 474.221, F.S., for veterinarians.

This bill is effective upon becoming a law.

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[33] See s. 456.076, (14), F.S., of the bill.
[34] See s. 456.076, (15)(b), F.S., of the bill.
[35] See s. 456.076, (17), F.S., of the bill.
[36] The term "drunkenness" is only used in s. 401.411, F.S., and perhaps should be deleted and replaced with the phrase "use of alcohol" for consistency with other similar statutory provision.
[37] The bill creates this exception in ch. 456, F.S., and all healthcare professional practice acts, except part I, ch. 486, F.S., regulating speech and language pathologists, and audiologists and part IV, ch. 483, F.S., governing medical physicists. However, a professional under these sections would have the exception available to them through the additional professional obligations imposed on them set out in ch. 456, F,S.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The bill protects the confidential or exempt information obtained by the consultant from a public records request; but the bill does not protect any of the information sent to the DOH, or obtained by an evaluator or treatment provider, from a public records request.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The bill's definitions of, "inability to progress," and "material noncompliance," may create due process issues as conclusive presumptions.[38]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The authority for licensed healthcare professionals to report impairments directly to a consultant, may have a positive impact on reporting by licensees and self-reporting by impaired licensees if the perceived threat of discipline by the department is removed.

C. Government Sector Impact:

Due to the expansion of individuals who are afforded a defense by the Department of Financial Services for claims, actions, suits, etc., and the board nature of the protection, there may be a negative financial impact on that agency's Risk Management Trust Fund.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

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[38] A "conclusive presumption" is one in which proof of a basic fact renders the existence of the presumed fact conclusive and irrevocable regardless of any evidence to the contrary. Black's Law Dictionary, 6th Ed., 1992.

VIII. None. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes:
456.076, 401.411, 455.227, 456.0635, 456.072, 457.109, 458.331, 459.015, 460.413, 461.013, 462.14, 463.016, 464.018, 464.204, 465.016, 466.028, 467.203, 468.217, 468.3101, 474.221, and 483.825.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Health Policy on March 14, 2017:
The CS:

- Amends the definition of referral to make it clear it includes self-referrals, referrals of one practitioner by another, and referrals reported by the DOH.
- Condenses and reorganizes the section which provides for contract terms and conditions with a consultant, but makes no substantive changes.
- Changes the terms "certify" and "decline to certify" to "approve" and "deny" to more accurately describe the actions.
- Clarifies that the consultant is not required to disclose information to the DOH on self- referring practitioners if the consultant has no knowledge of a complaint.
- Reinstates and amends the language that specifies that the consultant is an agent of the state for purposes of sovereign immunity when acting pursuant to its contract.
- Authorizes disclosure to the referral, participant or the legal representative of either, the documents and information received by the consultant pertaining to and supporting the participant's discharge or termination from an impaired practitioner program; and any information the consultant discloses to the DOH.
- Amends the provisions relation to disqualification for Licensure, and provides an exception for pretrial diversion.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.