

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: SB 1184

INTRODUCER: Senator Broxson

SUBJECT: Free Speech of Health Care Practitioners

DATE: January 25, 2022

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Smith	Brown	HP	Pre-meeting
2.			JU	
3.			AP	

I. Summary:

SB 1184 prohibits regulatory boards within the Department of Health (DOH), or the DOH if there is no applicable board, and recognizing agencies approved by the Board of Osteopathic Medicine (for purposes of certifying osteopathic physicians in specialty areas) from reprimanding, sanctioning, revoking or threatening to revoke a license, certificate, or registration of a health care practitioner for:

- Exercising his or her constitutional right of free speech through the use of a social media platform.
- Any reason unless the DOH, board, or recognizing agency proves beyond a reasonable doubt that the use of free speech by a health care practitioner led to the direct physical harm of a person with whom the health care practitioner had a practitioner-patient relationship within the three years immediately preceding the incident of physical harm. Under the bill, the DOH, board, or recognizing agency is liable for a sum of up to \$1.5 million per occurrence for direct or indirect damages to a health care practitioner if such proof beyond a reasonable doubt has not been established for reprimanding, sanctioning, or revoking, or threatening to revoke, a license, certificate, or registration of the health care practitioner.

The bill requires the DOH, board, or recognizing agency to provide the health care practitioner with any complaint it has received that may result in revocation of licensure, certification, or registration, within seven days after receiving the complaint. If the DOH, board, or recognizing agency fails to provide such a complaint to the health care practitioner, it must pay the practitioner an administrative penalty of \$500 each day the complaint is not provided to the practitioner.

The bill provides an effective date of July 1, 2022.

II. Present Situation:

Department of Health Regulation

The Florida Department of Health (DOH) is responsible to regulate health practitioners for the preservation of the health, safety, and welfare of the public.¹ Chapter 456 of the Florida Statutes governs health professions and occupation regulated by the DOH. For purposes of ch. 456, F.S. the term “health care practitioner” includes any person licensed under:

- Chapter 457 (Acupuncturists);
- Chapter 458 (Physicians);
- Chapter 459 (Osteopathic Physicians);
- Chapter 460 (Chiropractors);
- Chapter 461 (Podiatrists);
- Chapter 462 (Naturopathic Physicians);
- Chapter 463 (Optometrists);
- Chapter 464 (Nurses);
- Chapter 465 (Pharmacists);
- Chapter 466; (Dentists, Dental Hygienists);
- Chapter 467 (Midwives);
- Part I of chapter 468 (Speech Language Pathologists, Audiologists);
- Part II of chapter 468 (Nursing Home Administrators);
- Part III of chapter 468 (Occupational Therapists);
- Part V of chapter 468 (Respiratory Therapists);
- Part X of chapter 468 (Dietitian/nutritionists, Nutrition Counselor);
- Part XIII of chapter 468 (Athletic Trainers);
- Part XIV of chapter 468 (Orthotists, Pedorthists, Prosthetists);
- Chapter 478 (Electrologists);
- Chapter 480 (Massage Therapists);
- Part I of chapter 483 (Clinical Laboratory Personnel);
- Part II of chapter 483 (Medical Physicists);
- Part III of chapter 483 (Genetic Counselors);
- Chapter 484 (Opticians and Hearing Aid Specialists);
- Chapter 486 (Physical Therapists);
- Chapter 490 (Psychologists); and
- Chapter 491 (Psychotherapists, Clinical Social Workers, Marriage and Family Therapists, Mental Health Counselors).

Due to the diverse practices and differences between these health care professions, various licensing Boards exist within the DOH to ensure that health care practitioners are meeting the minimum requirements for safe practice in each practice area. The Division of Medical Quality Assurance within the DOH serves as the principle administrative support unit for the Boards.² The Boards are supported by a full-time professional staff based in Tallahassee. Board members

¹ Section 20.42(1)(g), F.S.

² Florida Department of Health, Boards and Councils *available at* <http://www.floridahealth.gov/licensing-and-regulation/boards-and-councils.html> (last visited Jan. 24, 2022).

are appointed by the governor and are subject to confirmation by the Senate. The following Boards exist within the DOH:

- Board of Acupuncture.
- Board of Occupational Therapy.
- Board of Athletic Trainers.
- Board of Opticianry.
- Board of Chiropractic Medicine.
- Board of Optometry.
- Board of Clinical Laboratory Personnel.
- Board of Orthotists and Prosthetists.
- Board of Clinical Social Work, Marriage & Family Therapy, and Mental Health Counseling.
- Board of Osteopathic Medicine.
- Board of Dentistry.
- Board of Pharmacy.
- Board of Hearing Aid Specialists.
- Board of Physical Therapy.
- Board of Massage.
- Board of Podiatric Medicine.
- Board of Medicine.
- Board of Psychology.
- Board of Nursing.
- Board of Respiratory Care.
- Board of Nursing Home Administrators.
- Board of Speech-Language Pathology and Audiology.³

Grounds for Discipline and Penalties

Section 456.072(1), F.S., sets out 45 separate grounds for discipline for health care practitioners. These grounds address criminal activity, fraud, sexual harassment, practicing under the influence, making misleading, deceptive, untrue or fraudulent representations in or related to the practice of the licensee's profession, and many other situations.

When the board, or the department when there is no board, regulating the applicable health care profession, finds a health care practitioner guilty of any of the grounds set forth in the health care practitioner's applicable practice act or rules adopted thereunder, of violating any of the 45 separate grounds for discipline listed in s. 456.072(1), F.S., or of substantially violating the grounds for discipline within that subsection prior to obtaining a license, the board or department may issue an order:

- Refusing to license the individual.
- Suspending or permanently revoking a license.
- Restricting the practice or license, including, but not limited to, restricting the licensee from practicing in certain settings, restricting the licensee to work only under designated conditions or in certain settings, restricting the licensee from performing or providing designated clinical and administrative services, restricting the licensee from practicing more

³ *Id.*

than a designated number of hours, or any other restriction found to be necessary for the protection of the public health, safety, and welfare.

- Imposing an administrative fine not to exceed \$10,000 for each count or separate offense. If the violation is for fraud or making a false or fraudulent representation, the board, the fine must be \$10,000 per count or offense.
- Issuing of a reprimand or letter of concern.
- Putting the licensee on probation, subject to conditions which may include, but are not limited to, requiring the licensee to undergo treatment, attend continuing education courses, submit to be reexamined, work under the supervision of another licensee, or satisfy any terms which are reasonably tailored to the violations found.
- Issuing corrective action.
- When the health care provider fails to make available to patients a summary of their rights, imposing an administrative fine of up to \$100 for nonwillful violations and up to \$500 for willful violations.⁴
- Requiring the fund fees billed and collected from the patient or a third party on behalf of the patient.
- Requiring remedial education.⁵

In determining what action is appropriate, the board, or the DOH if there is no board, must first consider what sanctions are necessary to protect the public or to compensate the patient. After those sanctions are considered, the board or department may consider rehabilitating the practitioner. The health care practitioner is responsible for all costs associated with the compliance of such orders.⁶

If the ground for disciplinary action is the first-time violation of a practice act for unprofessional conduct and no actual harm to the patient occurred, the board or department, as applicable, shall issue a citation and assess a penalty as determined by rule of the board or department.⁷

Freedom of Speech

The First Amendment of the United States Constitution protects the right to freedom of expression from government interference. The First Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment.⁸ “The First Amendment assures the broadest tolerable exercise of free speech, free press, and free assembly, not merely for religious purposes, but for political, economic, scientific, news, or informational ends as well.”⁹

It is well established that a government regulation based on the content of speech is presumptively invalid and will be upheld only if it is necessary to advance a compelling governmental interest, precisely tailored to serve that interest, and is the least restrictive means

⁴ Section 381.0261(4), F.S.

⁵ Section 456.072(2), F.S.

⁶ *Id.*

⁷ Section 456.072(3)(b), F.S.

⁸ See *De Jonge v. Oregon*, 299 U.S. 353, 364–65 (1937) (incorporating right of assembly); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating right of freedom of speech).

⁹ *Douglas v. City of Jeannette (Pennsylvania)*, 319 U.S. 157, 179, (1943) (Jackson, J., concurring in result).

available for establishing that interest.¹⁰ The government bears the burden of demonstrating the constitutionality of any such content-based regulation.¹¹ “Falsity alone may not suffice to bring the speech outside the First Amendment; the statement must be a knowing and reckless falsehood.”¹²

In regards to speech made on internet platforms, the Supreme Court has clarified, “Online speech is equally protected under the First Amendment as there is ‘no basis for qualifying the level of First Amendment scrutiny that should be applied’ to online speech.”¹³

Professional Speech

In 2018, the U.S. Supreme Court clarified that professional speech of individuals who perform personalized services that require a professional license from the state is not a separate category of speech exempt from the rule that content-based regulations of speech are subject to strict scrutiny.¹⁴ Justice Thomas delivered the opinion of the court, “The dangers associated with content-based regulations of speech are also present in the context of professional speech. As with other kinds of speech, regulating the content of professionals’ speech poses the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.”¹⁵ “When the government polices the content of professional speech, it can fail to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.”¹⁶

III. Effect of Proposed Changes:

The bill creates s. 456.61, F.S., which prohibits a board within the jurisdiction of the DOH or the DOH if there is no board and recognizing agencies approved by the Board of Osteopathic Medicine under Rule 64B15-14.001, F.A.C.¹⁷ from reprimanding, sanctioning, revoking or threatening to revoke a license, certificate, or registration of a health care practitioner:

- For exercising his or her constitutional right of free speech through the use of a social media platform.
- For any reason unless the DOH, board, or recognizing agency proves beyond a reasonable doubt that the use of free speech by a health care practitioner led to the direct physical harm of a person with whom the health care practitioner had a practitioner-patient relationship¹⁸ within the 3 years immediately preceding the incident of physical harm. Under the bill, the DOH, board, or recognizing agency is liable for a sum of up to \$1.5 million per occurrence

¹⁰ *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 665-66 (2004).

¹¹ *Id.* at 660.

¹² See *U.S. v. Alvarez*, 617 F. 3d 1198 (2012) and *New York Times v. Sullivan*, 376 U.S. 254 (1964).

¹³ *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997).

¹⁴ *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2365 (2018).

¹⁵ *Id.* at 2374.

¹⁶ *Id.* at 2366.

¹⁷ Under the rule, the Board has approved the following organizations as recognizing agencies for purposes of certifying Florida-licensed osteopathic physicians as specialists in certain aspects of the practice of osteopathic medicine: American Board of Medical Specialties, American Osteopathic Association, American Association of Physician Specialists, Inc., and American Board of Interventional Pain Physicians. 64B15-14.001, F.A.C. available at <https://www.flrules.org/gateway/ruleNo.asp?id=64B15-14.001> (last visited Jan. 23, 2022).

¹⁸ In medical malpractice or negligence cases against health care practitioners, a practitioner must have established a practitioner-client relationship with the injured person so that the physician owed a duty of care to the patient. Without that duty, there is no breach of that duty, and negligence or malpractice would not be established.

for direct or indirect damages to a health care practitioner if such proof beyond a reasonable doubt has not been established for reprimanding, sanctioning, or revoking or threatening to revoke a license, certificate, or registration of the health care practitioner.

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IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

The bill applies to recognizing agencies approved by the Board of Osteopathic Medicine in Rule 64B15-14.001 for purposes of certifying Florida-licensed osteopathic physicians as specialists in certain aspects of the practice of osteopathic medicine. Under that rule, the Board has approved the following organizations as recognizing agencies:

- American Board of Medical Specialties
- American Osteopathic Association
- American Association of Physician Specialists, Inc.¹⁹
- American Board of Interventional Pain Physicians

These 501(c) recognizing agencies are national in scope. They choose to develop their own standards by which they certify health care practitioners as specialists. While the state of Florida may prohibit persons from holding themselves out to be certified

¹⁹ Note that the American Association of Physician Specialists, Inc., are incorporated in Tampa, Florida. Florida Department of State Division of Corporations, Sunbiz.org available at <http://search.sunbiz.org/Inquiry/CorporationSearch/ByName> (last visited Jan. 22, 2022).

specialists in aspects of the practice of osteopathic medicine, the state does not have the ability to prohibit these recognizing agencies from reprimanding, sanctioning, or revoking the certification of persons who fail to meet the recognizing agency's standards. The state of Florida has no control over the certification processes created by these independent organizations and might not be able to enforce the provisions of subsection (1), (2), or (4) of s. 456.61, F.S., as created in the bill, merely because the Board of Osteopathic Medicine has selected the organization as a recognizing agency.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Subsection (3) of s. 456.61, F.S., as created in the bill, appears to establish a civil cause of action that authorizes a court to award a sum of up to \$1.5 million per occurrence to a health care practitioner when the DOH, a board within its jurisdiction, or a specified recognizing agency fails to meet the burden of proof required in subsection (2) of that section. It is probable that this bill would have a negative fiscal impact resulting from increased litigation for the DOH and its boards.

VI. Technical Deficiencies:

In s. 456.61(2), F.S., as created in the bill, the board, DOH, or recognizing agency must prove beyond a reasonable doubt that the use of free speech by a health care practitioner led to the direct physical harm of a person with whom the health care practitioner had a practitioner-patient relationship within the three years immediately preceding the incident of physical harm to reprimand, sanction, or revoke or threaten to revoke a license, certificate, or registration of a health care practitioner *for any reason*. If this is not the intent of the bill, then the bill should be amended. It is unclear if the burden of proof and the civil cause of action apparently established in the bill were meant to apply solely to discipline for issues relating to speech, solely to discipline for issues relating to speech through social media, or to discipline on any grounds and for any reason.

VII. Related Issues:

It is possible that this bill may be interpreted to conflict with authorizations in s. 456.072(1)(a) and (m), F.S., and other similar grounds for discipline in a health care practitioner's applicable practice act or rules adopted thereunder.

Section 456.072(1)(a), F.S. authorizes discipline for a practitioner making misleading, deceptive, or fraudulent representations in or related to the practice of the licensee's profession.

Section 456.072(1)(m), F.S., authorizes discipline for a practitioner making deceptive, untrue, or fraudulent representations in or related to the practice of a profession or employing a trick or scheme in or related to the practice of a profession.

On July 29, 2021, the Federation of State Medical Boards, issued the following statement:

“Physicians who generate and spread COVID-19 vaccine misinformation or disinformation are risking disciplinary action by state medical boards, including the suspension or revocation of their medical license. Due to their specialized knowledge and training, licensed physicians possess a high degree of public trust and therefore have a powerful platform in society, whether they recognize it or not. They also have an ethical and professional responsibility to practice medicine in the best interests of their patients and must share information that is factual, scientifically grounded and consensus-driven for the betterment of public health. Spreading inaccurate COVID-19 vaccine information contradicts that responsibility, threatens to further erode public trust in the medical profession and puts all patients at risk.”²⁰

Ultimately, the DOH and the boards established within it are responsible to regulate health practitioners for the preservation of the health, safety, and welfare of the public. This bill does not protect speech that is not already protected under the U.S. and Florida constitutions. Rather, it prohibits the DOH and its boards from administratively penalizing a person exercising free speech unless it meets a specific burden of proof. The \$1.5 million liability established in the bill may deter the DOH and the boards from taking action against health care practitioners in their efforts to preserve the health, safety, and welfare of the public

VIII. Statutes Affected:

This bill creates section 456.61 of the Florida Statutes:

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

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

None.

B. Amendments:

None.

²⁰ Federation of State Medical Boards, FSMB: Spreading COVID-19 Vaccine Misinformation May Put Medical License at Risk (July 29, 2021) available at <https://www.fsmb.org/advocacy/news-releases/fsmb-spreading-covid-19-vaccine-misinformation-may-put-medical-license-at-risk/> (last visited Jan. 24, 2022).

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