

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1521 Professional Counselors Licensure Compact

SPONSOR(S): Professions & Public Health Subcommittee, Koster

TIED BILLS: HB 1523 **IDEN./SIM. BILLS:** CS/SB 358

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Professions & Public Health Subcommittee	18 Y, 0 N, As CS	Morris	McElroy
2) Government Operations Subcommittee	17 Y, 0 N	Roth	Toliver
3) Health & Human Services Committee	20 Y, 0 N	Morris	Calamas

SUMMARY ANALYSIS

Current law allows a Florida-licensed health care practitioner, a practitioner licensed under a multistate health care licensure compact of which Florida is a member, or a registered out-of-state-health care provider to provide health care services to Florida patients via telehealth. Whether health care practitioners, including Florida licensed clinical social workers, marriage and family therapists, and mental health counselors, can use telehealth to provide services to out-of-state patients is a matter of law in other states.

An interstate compact is agreement between states to enact legislation and enter into a contract for a specific, limited purpose. In 2020, the National Center for Interstate Compacts adopted model legislation for the Professional Counselors Licensure Compact (PCLC or compact) which authorizes both telehealth and in-person practice across state lines in compact states.

The compact establishes the Counseling Compact Commission (Commission), made up of a representative of each party state's licensing board. The Commission is responsible for administering the compact. The compact becomes effective on the date of enactment by the tenth state and currently has two member states. CS/HB 1521 enacts the PCLC and authorizes Florida to enter into the compact. The Department of Health (DOH) must notify the Division of Law Revision when the compact is enacted into law by ten states.

Professional counselors licensed in compact states may apply to other compact states for the privilege to practice through either telehealth or in-person. Thus, under the compact a Florida licensed clinical social worker, marriage and family therapist, or mental health counselor is eligible to provide services to out-of-state patients through either telehealth or in-person. It also allows out-of-state licensed professional counselors in compact states to provide services to Florida patients through telehealth and in-person, which is already authorized by current law.

The compact requires all participating states to report certain licensure information to a data system, including identifying information, licensure data, and adverse actions taken against a professional counselor's license or practice privileges in a compact state. Such information is public under the compact unless a compact state designates the information it contributes to the data system as confidential, prohibiting disclosure to the public without express permission of the reporting state.

The bill has a significant, negative fiscal impact on DOH and no fiscal impact on local governments.

The bill is effective upon enactment of the PCLC into law by ten states.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Health Care Professional Shortage

There is currently a health care provider shortage in the U.S.¹ This shortage is predicted to continue into the foreseeable future and will likely worsen with the aging and growth of the U.S. population² and the passage of the Patient Protection and Affordable Care Act.³ Additionally, as more individuals qualify for health care benefits, there will necessarily be a greater demand for more health care professionals to provide these services.

According to the U.S. Health Resources and Services Administration (HRSA), the U.S. will experience a 7% increase in demand for mental health counselors by 2030, producing a shortage of approximately 6,870 mental health counselors nationwide.⁴ In Florida, HRSA estimates a shortage of 3,400 mental health counselors by 2030.⁵ Exacerbated by the COVID-19 pandemic, the American Academy of Pediatrics declared a national state of emergency in children's mental health, creating a need for more mental health professionals and increased access to such.⁶

Mental Health Counselor Licensure in Florida

A mental health counselor is an individual who uses scientific and applied behavioral science theories, methods, and techniques to describe, prevent, and treat undesired behavior and enhance mental health and human development. Counseling is based on research and theory in personality, family, group, and organizational dynamics and development, career planning, cultural diversity, human growth and development, human sexuality, normal and abnormal behavior, psychopathology, psychotherapy, and rehabilitation.⁷ To qualify for licensure as a mental health counselor, an individual must:⁸

- Have a master's degree from a mental health counseling program accredited by the Council for the Accreditation of Counseling and Related Educational Programs, or a program related to the practice of mental health counseling that includes coursework and a 700-hour practicum, internship, or fieldwork of which at least 280 hours must be in direct client services;

¹ For example, as of December 31, 2021, the U.S. Department of Health and Human Services has designated 7,613 Primary Care Health Professional Shortage Area (HPSA) (requiring 15,184 additional primary care physicians to eliminate the shortage), 6,803 Dental HPSAs (requiring 11,181 additional dentists to eliminate the shortage), and 6,078 Mental Health HPSAs (requiring 6,851 additional mental health providers to eliminate the shortage). U.S. Department of Health and Human Services, *Designated Health Professional Shortage Areas Statistics* (Feb. 3, 2022), <https://data.hrsa.gov/Default/GenerateHPSAQuarterlyReport> (last visited Feb. 3, 2022).

² According to the U.S. Census Bureau, the U.S. population is expected to increase by almost 100 million between 2014 and 2060, and by 2030, one in five Americans is projected to be 65 and over. Sandra L. Colby & Jennifer M. Ortman, U.S. Census Bureau, *Projections of the Size and Composition of the U.S. Population: 2014 to 2060* (March 2015), <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p25-1143.pdf> (last visited Feb. 3, 2022).

³ U.S. Dep't of Health and Human Services, *Department of Health and Human Services Strategic Plan: Goal 1: Strengthen Health Care*, available at <http://www.hhs.gov/secretary/about/goal5.html> (last visited on Feb. 3, 2022).

⁴ Health Resources Services Administration, *Behavioral Health Workforce Projections, 2016-2030: Clinical, Counseling and School Psychologists*, <https://bhw.hrsa.gov/sites/default/files/bureau-health-workforce/data-research/psychologists-2018.pdf> (last visited Feb. 4, 2022).

⁵ Health Resources Services Administration, *State-Level Projections of Supply and Demand for Behavioral Health Occupations: 2016-2030* (September 2018), <https://bhw.hrsa.gov/sites/default/files/bureau-health-workforce/data-research/state-level-estimates-report-2018.pdf> (last visited Feb. 4, 2022).

⁶ American Academy of Pediatrics, AAP-AACAP-CHA Declaration of a National Emergency in Child and Adolescent Mental Health, <https://www.aap.org/en/advocacy/child-and-adolescent-healthy-mental-development/aap-aacap-cha-declaration-of-a-national-emergency-in-child-and-adolescent-mental-health/> (last visited Feb. 4, 2022).

⁷ Sections 491.003(6) and (9), F.S.

⁸ Section 491.005(4), F.S.

- Have at least two years of post-master's supervised clinical experience in mental health counseling;
- Pass an examination from the Professional Examination Service for the National Academy of Certified Clinical Mental Health Counselors; and
- Pass an eight-hour course on Florida laws and rules approved by the Board of Clinical Social Work, Marriage and Family Therapy, and Mental Health Counseling.⁹

Telehealth

A Florida-licensed health care practitioner, a practitioner licensed under a multistate health care licensure compact of which Florida is a member,¹⁰ or a registered out-of-state-health care provider can provide health care services to Florida patients via telehealth.¹¹ Current law sets the standard of care for telehealth providers at the same level as the standard of care for health care practitioners or health care providers providing in-person health care services to patients in this state. This ensures that a patient receives the same standard of care irrespective of the modality used by the health care professional to deliver the services. A patient receiving telehealth services may be in any location at the time services are rendered and a telehealth provider may be in any location when providing telehealth services to a patient.¹²

Under current law, in-state and out-of-state licensed or registered health care practitioners may use telehealth to provide health care services to patients physically located in Florida.¹³ The law does not allow health care practitioners, including Florida licensed mental health counselors, to use telehealth to provide services to out-of-state patients. Whether Florida licensed practitioners can treat patients in other states is governed by laws in those states.

Sovereign Immunity

Sovereign immunity generally bars lawsuits against the state or its political subdivisions for torts committed by an officer, employee, or agent of such governments unless the immunity is expressly waived. The Florida Constitution recognizes that the concept of sovereign immunity applies to the state, although the state may waive its immunity through an enactment of general law.¹⁴

In 1973, the Legislature enacted s. 768.28, F.S., a partial waiver of sovereign immunity, allowing individuals to sue state government and its subdivisions.¹⁵ According to subsection (1), individuals may sue the government under circumstances where a private person "would be liable to the claimant, in accordance with the general laws of [the] state" Section 768.28(5), F.S., imposes a \$200,000 limit on the government's liability to a single person, and a \$300,000 total limit on liability for claims arising out of a single incident.

Impaired Practitioner Program

The impaired practitioner treatment program was created 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.¹⁶ For a profession that does not have a program established within its individual practice act, DOH is required to designate an approved program by rule.¹⁷ By rule, DOH designates the approved program by contract with a consultant to initiate intervention, recommend evaluation, refer impaired

⁹ Section 491.005(4), F.S., and r. 64B4-3.0035, F.A.C.

¹⁰ Florida is a member of the Nurse Licensure Compact. See s. 464.0095, F.S.

¹¹ Section 456.47(4), F.S.

¹² Section 456.47(2)(d), F.S.

¹³ Section 456.47(1) and (4), F.S.

¹⁴ Fla. Const. art. X, s. 13.

¹⁵ Chapter 73-313, L.O.F., codified at s. 768.28, F.S.

¹⁶ 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.

¹⁷ Section 456.076(1), F.S.

practitioners to treatment providers, and monitor the progress of impaired practitioners. The impaired practitioner program may not provide medical services.¹⁸

Interstate Compacts

An interstate compact is an agreement between two or more states to address common problems or issues, create an independent, multistate governmental authority, or establish uniform guidelines, standards or procedures for the compact's member states.¹⁹ Article 1, Section 10, Clause 3 (Compact Clause) of the U.S. Constitution authorizes states to enter into agreements with each other, without the consent of Congress. However, the case law has provided that not all interstate agreements are subject to congressional approval, but only those that may encroach on the federal government's power.²⁰

Florida is a party to multiple interstate compacts, including the Nurse Licensure Compact,²¹ Driver's License Compact,²² Compact on Adoption and Medical Assistance,²³ and the Interstate Compact on Educational Opportunity for Military Children.²⁴

Professional Counselors Licensure Compact

The Professional Counselors Licensure Compact (PCLC or compact) was created by the National Center for Interstate Compacts as an interstate compact which authorizes professional counselors to practice via telehealth and in-person across state lines in compact states without limits.²⁵

The compact establishes the Counseling Compact Commission (Commission) made up of member states which is responsible for creating and finalizing rules and enforcing the compact. Licensed professional counselors must obtain the privilege to practice from other compact states in order to provide services to clients in such states.²⁶ Nothing in the compact is to be construed as a waiver of sovereign immunity. Additionally, compact states are authorized to charge a fee for granting the privilege to practice. Licensed professional counselors may only utilize the compact if their home state joins the compact.

The PCLC currently has two member states (Georgia and Maryland).²⁷ Florida is not a member of the compact. The compact becomes effective when enacted into law by ten states.

¹⁸ Rule 64B31-10.001(1)(a), F.A.C.

¹⁹ National Center for Interstate Compacts, *What Are Interstate Compacts?*, <https://compacts.csg.org/compacts/> (last visited Feb. 4, 2022).

²⁰ *For example, see Virginia v. Tennessee*, 148 U.S. 503 (1893), *New Hampshire v. Maine*, 426 U.S. 363 (1976)

²¹ Section 464.0095, F.S.

²² Section 322.44, F.S.

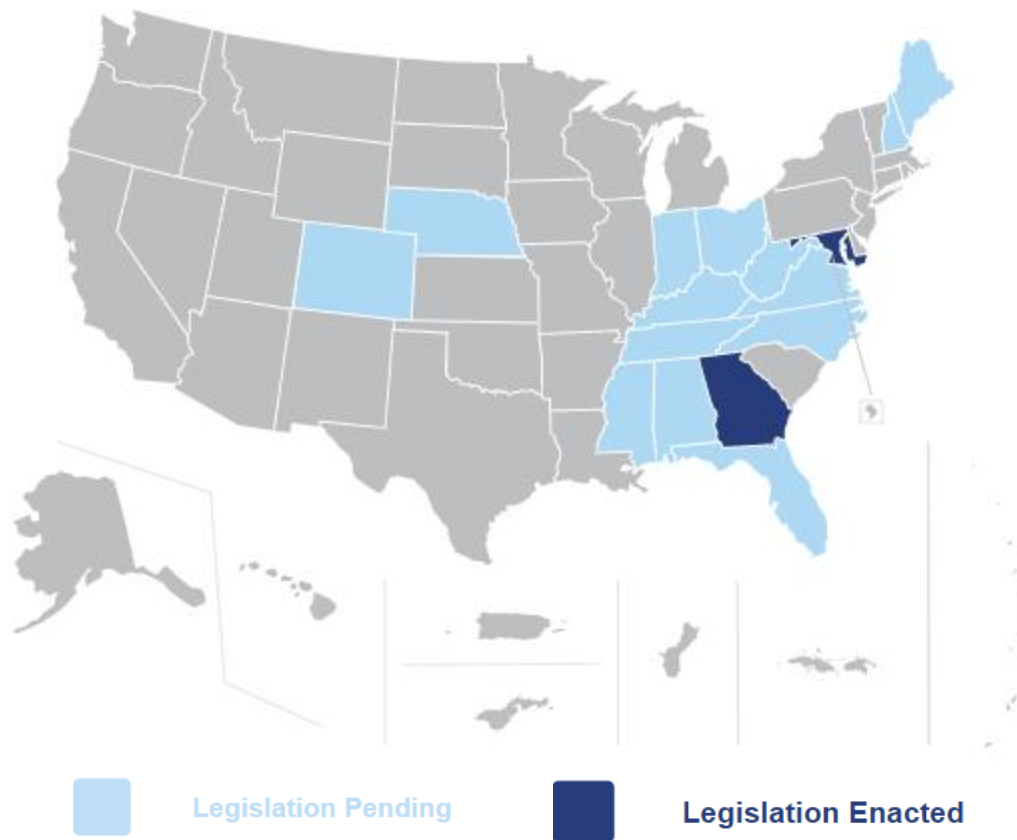
²³ Section 409.406, F.S.

²⁴ Section 1000.36, F.S.

²⁵ Counseling Compact, *Counseling Compact Finalized*, <https://counselingcompact.org/first-post/> (last visited Feb. 4, 2022).

²⁶ Counseling Compact, *Counseling Compact Model Legislation* (Dec. 2020), https://counselingcompact.org/wp-content/uploads/2021/06/Final_Counseling_Compact_With_Cover.pdf (last visited Feb. 4, 2022).

²⁷ Counseling Compact, *Map*, <https://counselingcompact.org/map/> (last visited Feb. 4, 2022).



The compact is arranged in 15 sections and addresses the following issues.²⁸

Purpose (Section 1)

The purposes of the PCLC are:

- Provide for the mutual recognition of other compact state licenses;
- Enhance states' abilities to protect the public's health and safety;
- Encourage the cooperation of member states in regulating multistate practice for licensed professional counselors;
- Support active duty military personnel and their spouses;
- Enhance the exchange of licensure, investigative, and disciplinary information among member states;
- Allow for the use of telehealth to increase access to counseling services;
- Support the uniformity of professional counseling licensure requirements throughout states;
- Eliminate the necessity for licenses in multiple states; and
- Facilitate interstate practice by licensed professional counselors who meet uniform requirements.

State Participation in the Compact (Section 3)

To participate in the compact, a state must:

- License and regulate professional counselors;
- Require passage of a Commission-approved, nationally recognized exam;
- Require licensees to meet specified educational and post graduate professional experience standards;
- Have a mechanism in place for receiving and investigating complaints;

²⁸ *Supra*, note 26.
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- Participate in the Commission's data system;
- Notify the Commission of any adverse action or the availability of investigative information regarding a licensee;
- Implement a process for considering the criminal history of applicants;
- Comply with the rules of the Commission;
- Require applicants to obtain or retain a license in his or her home state and meet the home state's qualifications for licensure or renewal of licensure; and
- Provide for the state's representative to the Commission to attend the Commission meetings.

Privilege to Practice (Section 4)

To exercise the privilege to practice under the terms and provisions of the PCLC, the licensee must:

- Hold a license in the home state;
- Have a valid United States social security number or national practitioner identifier;
- Be eligible for a privilege to practice in any member state;
- Have no encumbrance or restriction against any license or privilege to practice within the previous two years;
- Notify the Commission that the licensee is seeking the privilege to practice within a remote state or states;
- Pay any applicable fees, including any state fee, for the privilege to practice;
- Meet any continuing competence or education requirements established by the home state;
- Meet any jurisprudence requirements established by the remote state or states in which the licensee is seeking a privilege to practice; and
- Report to the Commission any adverse action, encumbrance, or restriction on a license taken by any non-member state within 30 days from the date the action is taken.

Obtaining a New Home State License Based on a Privilege to Practice (Section 5)

The PCLC requires a professional counselor to hold a home state license in only one compact state at a time. A licensee who moves from one compact state to another compact state may obtain a new, expedited home state license in the new state of residence if he or she holds a privilege to practice in the new state. A licensee must complete a new background screening, any required state-level background check, and any other requirements to obtain licensure in the new home state.

If a professional counselor moves from a non-compact state to a compact state, or from a compact state to a non-compact state, he or she must apply for licensure in the new state under such state's requirements. Licensees may hold more multiple state licenses, but only the license tied to his or her primary state of residence serves as the home state license under the compact.

Active Duty Military Personnel or Their Spouses (Section 6)

The PCLC allows an active duty service member or his or her spouse to designate a home state where he or she has a current license in good standing, which serves as the home state for the duration of the service member's active duty.

Compact Privilege to Practice Telehealth (Section 7)

The PCLC authorizes the provision of telehealth services to patients in remote states as a privilege to practice. Professional counselors practicing via telehealth in a remote state must follow the laws and regulations of the remote state.

Adverse Actions (Section 8)

Only the home state has the power to take adverse action against a professional counselor's home state license. The compact authorizes remote states to take adverse actions against a licensed professional counselor's privilege to practice within that compact state and issue subpoenas for

witnesses and evidence from other compact states. Under the compact, compact states are authorized to initiate joint investigations of licensees and must share investigative materials in furtherance of a joint investigation initiated under the compact. Adverse actions must be reported to the data system which alerts the home state of such action. Compact states are authorized to take adverse actions based on the factual findings of a remote state.

If a licensee changes his or her home state while under active investigation of the former home state, the former home state must complete the investigation, take appropriate action under its laws, and report its findings to the data system.

The compact states that nothing in it overrides a compact state's decision to require a licensee to participate in an alternative program in lieu of adverse action.

Establishment of Counseling Compact Commission (Section 9)

The compact establishes the Commission. Each compact state has one delegate selected by that state's licensing board. The delegate must be a current member or an administrator of the licensing board. The Commission must establish term limits, a code of ethics, bylaws, rules, and a budget in order to carry out the compact. The Commission must elect an executive committee of up to 11 members, at least seven of which must be from the Commission and up to four must be ex-officio, nonvoting members from recognized national professional counselor organizations. All Commission meetings must be open to the public except for when the Commission must discuss:

- Noncompliance of a compact state with its obligations under the compact;
- The employment, compensation, discipline, or other personnel matters, practices, or procedures related to specific employees or other matters related to the Commission's internal personnel practices and procedure;
- Current, threatened, or reasonably anticipated litigation;
- Contract negotiations for the purchase or sale of goods, services, or real estate;
- Accusing a person of a crime or formally censuring a person;
- Disclosure of trade secrets or commercial or financial information that is privileged or confidential;
- Disclosure of information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy if disclosed to the public;
- Disclosure of active investigatory records compiled for law enforcement purposes;
- Disclosure of information related to any reports prepared by or on behalf of the Commission for the purpose of investigation for compliance with the compact; and
- Matters specifically exempted from disclosure by federal law or the laws of any party state.

Commission members are immune from liability related to their positions except in cases of wanton misconduct.

Data System (Section 10)

The compact requires all compact states to share licensee information. Compact states must submit a uniform dataset to the data system on all counselors to whom the compact applies, as required by the rules of the Commission. The data system allows for expedited sharing of adverse action or significant investigative information against professional counselors with privilege to practice under the compact. Data system information must be expunged according to the laws of the reporting compact state.

Rulemaking (Section 11)

The PCLC provides rulemaking authority to the Commission. Rules and amendments to the rules passed by the Commission are binding on the party states as of the effective date specified in each rule or amendment.

Prior to the promulgation and adoption of a rule, and at least 30 days in advance, the Commission must provide notice of the meeting at which the rule is to be considered and voted upon. The notice must be posted on the Commission's website and the website of the licensing board of each member state, or the publication in which each state would otherwise publish proposed rules, and include:

- The time, date, and location of the meeting;
- The text of the proposed rule or amendment,
- A request for comment from interested persons; and
- The manner in which interested persons may submit comments.

The public may submit written comments, which must be made publicly available, prior to the adoption of the proposed rule. The Commission must hold a public hearing before it adopts a rule if requested by:

- At least 25 people;
- A state or federal governmental entity; or
- An association having at least 25 members.

If a hearing is held, the Commission must publish the place, time, and date of the scheduled public hearing. Anyone wishing to speak at the hearing must notify the Executive Director of the Commission, or another designated member, within five business days before the hearing. Hearings must be conducted in a manner that provides fair and reasonable opportunity for the public to comment orally or in writing. Transcripts of hearings are not required unless a written request is made. All hearings must be recorded and a copy of the recording must be made available upon request. Rules may be grouped together in the same hearing for convenience of the Commission.

Following the hearing, the Commission must consider all comments received from the public. A majority vote of the Commission is required for adoption of rules and the Commission may decide the effective date of the rule.

The Commission has the authority to consider and adopt emergency rules, without prior notice, if there is an imminent threat to public health, safety, or welfare; to prevent a loss of funds of the Commission or a party state; or to meet a deadline for the promulgation of an administrative rule that is required by federal law.

Oversight, Dispute Resolution, and Enforcement (Section 12)

The executive, legislative, and judicial branches of state government in each compact state is charged with enforcing the compact and must take any necessary action to effectuate its purpose and intent. The Commission is entitled to receive service of process relating to its powers, responsibilities, or actions, and may intervene in any proceeding affecting such.

If a party state defaults in the performance of its duties or responsibilities under the compact, the Commission must notify the defaulting state, as well as other party states, in writing of the nature of the default and proposed cure of the default. The Commission will also provide remedial training and technical assistance related to the default. If the defaulting state fails to cure the default, the Commission may terminate its membership in the compact, upon majority affirmative vote of the majority of the administrators. The Commission must notify the governor and the majority and minority leaders of the defaulting state's legislature, as well as all compact states, of its intent to suspend or terminate the state's membership in the compact. However, termination of membership is to only be imposed after all other means of compliance have been exhausted.

A termination of membership in the compact may be appealed by petitioning the U.S. District Court for the District of Columbia or the federal district in which the compact's principal office is located. The compact's principal office is located in Lexington, Kentucky. The Commission may also bring an action in federal court against a defaulting state to enforce compliance with the provisions of the compact. The

Commission may seek injunctive relief, damages, or any other remedies available under state or federal law. A prevailing party in either action is entitled to court costs and reasonable attorneys' fees.

In the event that a dispute arises between party states, the Commission will attempt to resolve such disputes.

Date of Implementation of the Counseling Compact Commission and Associated Rules, Withdrawal, and Amendment (Section 13)

The compact takes effect on the date of enactment by the tenth state. States that join after such date are subject to the rules of the Commission as they exist on the date when the compact becomes law in that state.

To withdraw from the PCLC, a state must enact a statute repealing the compact. Such withdrawal does not take effect until six months after the enactment of the repealing legislation. Any adverse actions or investigations that occur prior to the effective date of a withdrawal must be reported as required under the compact.

The compact may be amended by the party states; however, an amendment will not be effective until it is enacted into the laws of all compact states.

Construction and Severability (Section 14)

The compact states it is to be liberally construed to effectuate its purposes. The PCLC contains a severability clause that provides that if the entire compact is found to be held contrary to the constitution of any state member thereto, the compact shall remain in full force and effect as to the remaining compact states.

Binding Effect of Compact and Other Laws (Section 15)

This section reiterates that licensees must adhere to the laws and regulations, including scope of practice, of the state in which they are practicing. The compact requires that all rules and bylaws of the Commission are binding on compact states. In the event of a conflict between a law of a compact state and the compact, the state law is superseded to the extent of the conflict.

Effect of the Bill

Professional Counselors Licensure Compact

CS/HB 1521 enacts the PCLC (see description of compact provisions in the Background section) and authorizes Florida to enter into the compact with all other jurisdictions that have legally joined the compact. This allows eligible Florida licensed clinical social workers, marriage and family therapists, and mental health counselors to provide services to out-of-state patients through either telehealth or in-person across compact states. It also allows out-of-state licensed professional counselors in compact states to provide services to Florida patients through telehealth and in-person.

The bill amends current law to allow compact implementation. It requires DOH to report any significant investigation information relating to a professional counselor's practicing under the compact to the data system. It requires counselors practicing under the compact to withdraw from all practice under the compact if the professional counselor is in an impaired practitioner program. It requires the Board of Clinical Social Work, Marriage and Family Therapy, and Mental Health Counseling (Board) to appoint an individual to serve on the Commission and exempts out-of-state licensed clinical social workers, marriage and family therapists, and mental health counselors who practice under the compact from licensure requirements in this state. The bill authorizes the Board to take adverse action against a mental health counselor's authority to practice under the compact and impose disciplinary actions for violation of prohibited acts.

The bill makes conforming changes to statute to reference the compact and the requirements under the compact. The bill does not require changes to Florida's licensure and license renewal requirements.

Sovereign Immunity

The bill provides that an individual of the Board, when serving as the state administrator of the compact, and any administrator, officer, executive director, employee, or representative of the Commission, when acting within the scope of their employment, duties, or responsibilities in this state, is considered an agent of the state. The bill also requires the Commission to pay any claims or judgments up to the statutory waived amount of sovereign immunity and authorizes it to maintain insurance coverage to pay any such claims or judgments.

The bill is effective upon enactment of the PCLC into law by ten states.

B. SECTION DIRECTORY:

- Section 1:** Creates s. 491.017, F.S., relating to Professional Counselors Licensure Compact.
- Section 2:** Amends s. 414.065, F.S., relating to noncompliance with work requirements.
- Section 3:** Amends s. 456.073, F.S., relating to disciplinary proceedings.
- Section 4:** Amends s. 456.076, F.S., relating to impaired practitioner programs.
- Section 5:** Amends s. 491.003, F.S., relating to definitions.
- Section 6:** Amends s. 491.004, F.S., relating to Board of Clinical Social Work, Marriage and Family Therapy, and Mental Health Counseling.
- Section 7:** Amends s. 491.005, F.S., relating to licensure by examination.
- Section 8:** Amends s. 491.006, F.S., relating to licensure by endorsement.
- Section 9:** Amends s. 491.009, F.S., relating to discipline.
- Section 10:** Amends s. 768.28, F.S., relating to waiver of sovereign immunity in tort actions; recovery limits; civil liberty for damages caused during a riot; limitation on attorney fees; statute of limitation; exclusions; indemnification; risk management programs.
- Section 11:** Requires DOH to notify the Division of Law Revision upon enactment of the Professional Counselors Licensure Compact into law by 10 states.
- Section 12:** Provides the bill shall take effect upon enactment of the Professional Counselors Licensure Compact into law by 10 states.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The compact allows states to collect fees for granting privilege to practice under the compact. If DOH chooses to collect such fees, a fee bill is needed.

2. Expenditures:

DOH estimates 1 full-time equivalent (FTE) position will be needed to implement the provisions of the bill at a total cost of \$56,892 (\$44,314/Salary, \$12,272/Expense, and \$306/Human Resources).²⁹

DOH may also experience an increase in cost related to annual membership with the PCLC, additional complaints and investigations, rulemaking, and updating licensure systems, which can be absorbed within current resources.³⁰

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Applicants for the Florida Interstate Licensed Professional Counselors compact will be required to pay a fee to participate in the compact, as well as incurring cost for a background check.³¹

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

As discussed below in the section entitled, "RULE-MAKING AUTHORITY," the bill delegates authority to the Commission to adopt rules that facilitate and coordinate the implementation and administration of the PCLC.

If enacted into law, the state will effectively bind itself to rules not yet adopted by the Commission. The Florida Supreme Court has held that while it is within the province of the Legislature to adopt federal statutes enacted by Congress and rules promulgated by federal administrative bodies that are in existence at the time the Legislature acts, it is an unconstitutional delegation of legislative power to prospectively adopt federal statutes not yet enacted by Congress and rules not yet promulgated by federal administrative bodies.³²³³ Under this holding, the constitutionality of the bill's adoption of prospective rules might be questioned, and there does not appear to be binding Florida case law that squarely address this issue in the context of interstate compacts.

²⁹ Department of Health Agency Analysis of 2022 House Bill 1521 (Jan. 25, 2022).

³⁰ Id.

³¹ Id.

³² *Freimuth v. State*, 272 So.2d 473, 476 (Fla. 1972) (quoting *Fla. Ind. Comm'n v. State ex rel. Orange State Oil Co.*, 155 Fla. 772 (1945)).

³³ This prohibition is based on the separation of powers doctrine, set forth in Article II, Section 3 of the Florida Constitution, which has been construed in Florida to require the Legislature, when delegating the administration of legislative programs, to establish the minimum standards and guidelines as ascertainable by reference to the enactment creating the program. See *Avatar Development Corp. v. State*, 723 So.2d 199 (Fla. 1998).

The most recent opportunity Florida courts have had to address this issue appears to be in *Department of Children and Family Services v. L.G.*, involving the Interstate Compact for the Placement of Children (ICPC).³⁴ The First District Court of Appeal considered an argument that the regulations adopted by the Association of Administrators of the Interstate Compact were binding and that the lower court's order permitting a mother and child to relocate to another state was in violation of the ICPC. The court denied the appeal and held that the Association's regulations did not apply as they conflicted with the ICPC and the regulations did not apply to the facts of the case.

The court also references language in the ICPC that confers to its compact administrators the "power to promulgate rules and regulations to carry out more effectively the terms and provisions of this compact."³⁵ The court states that "the precise legal effect of the ICPC compact administrators' regulations in Florida is unclear," but noted that it did not need to address the question to decide the case.³⁶ However, in a footnote, the court provided:

Any regulations promulgated before Florida adopted the ICPC did not, of course, reflect the vote of a Florida compact administrator, and no such regulations were ever themselves enacted into law in Florida. When the Legislature did adopt the ICPC, it did not (and could not) enact as the law of Florida or adopt prospectively regulations then yet to be promulgated by an entity not even covered by the Florida Administrative Procedure Act. See *Freimuth v. State*, 272 So.2d 473, 476 (Fla.1972); *Fla. Indus. Comm'n v. State ex rel. Orange State Oil Co.*, 155 Fla. 772, 21 So.2d 599, 603 (1945) ("[I]t is within the province of the legislature to approve and adopt the provisions of federal statutes, and all of the administrative rules made by a federal administrative body, that are in existence and in effect at the time the legislature acts, but it would be an unconstitutional delegation of legislative power for the legislature to adopt in advance any federal act or the ruling of any federal administrative body that Congress or such administrative body might see fit to adopt in the future."); *Brazil v. Div. of Admin.*, 347 So.2d 755, 757–58 (Fla. 1st DCA 1977), *disapproved on other grounds by LaPointe Outdoor Adver. v. Fla. Dep't of Transp.*, 398 So.2d 1370, 1370 (Fla.1981). The ICPC compact administrators stand on the same footing as federal government administrators in this regard.³⁷

In accordance with the discussion provided by the court in this above-cited footnote, it may be argued that the bill's delegation of rule-making authority to the Commission is similar to the delegation to the ICPC compact administrators, and thus, could constitute an unlawful delegation of legislative authority. This case, however, does not appear to be binding as precedent as the court's footnote discussion is dicta.³⁸

B. RULE-MAKING AUTHORITY:

The bill authorizes the Commission to adopt rules to facilitate and coordinate the implementation and administration of the compact. The compact specifies that the rules have the force and effect of law and are binding in all compact states. If a compact state fails to meet its obligations under the compact or the promulgated rules, the state may be subject to remedial training, alternative dispute resolution, suspension, termination, or legal action.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

³⁴ 801 So.2d 1047 (Fla. 1st DCA 2001).

³⁵ *Id.* at 1052.

³⁶ *Id.*

³⁷ *Id.*

³⁸ Dicta are statements of a court that are not essential to the determination of the case before it and are not a part of the law of the case. Dicta has no binding legal effect and is without force as judicial precedent. 12A FLA JUR. 2D *Courts and Judges* s. 191 (2015).

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On February 2, 2022, the Professions and Public Health Subcommittee adopted two amendments and reported the bill favorably as a committee substitute. The amendments removed a reference to ch. 491, F.S., under the compact and created a definition for “licensed professional counselor,” in ch. 491, F.S.

This analysis is drafted to the committee substitute as passed by the Professions and Public Health Subcommittee.