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 Rules

BILL:	CS/CS/HB 861
INTRODUCER:	Health and Human Services Committee; Professions and Public Health Subcommittee; and Representative Massullo
SUBJECT:	Medical Specialty Designations
DATE:	March 7, 2022 REVISED: 03/08/22

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	Phelps	RC	**Fav/1 amendment**

Please see Section IX. for Additional Information:

AMENDMENTS - Significant amendments were recommended

I. Summary:

CS/CS/HB 861 creates s. 456.072(1)(tt), F.S., to provide a new behavior that, if carried out by a licensed health care practitioner, constitutes grounds for which the disciplinary actions contained in s. 456.072(2), F.S., may be imposed on the practitioner.

The specific behavior created under the bill as new grounds for discipline is the act of using a term designating a medical specialty for which the Accreditation Council for Graduate Medical Education or the American Osteopathic Association accredits or recognizes as a residency or fellowship program, unless one of three exceptions applies.

The bill provides that the Department of Health (DOH) must enforce the bill's provisions and has the same enforcement authority as an applicable board.

The bill authorizes the DOH to adopt rules to implement the bill's provisions.

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

II. Present Situation:

Licensure and Regulation of Health Care Practitioners

The Division of Medical Quality Assurance (MQA), within the DOH, has general regulatory authority over health care practitioners.[1] The MQA works in conjunction with 22 regulatory boards and four councils to license and regulate seven types of health care facilities and more than 40 health care professions.[2] Each profession is regulated by an individual practice act and by ch. 456, F.S., which provides general regulatory and licensure authority for the MQA. The MQA is statutorily responsible for the following boards and professions established within the division:[3]

- The Board of Acupuncture, created under ch. 457, F.S.;
- The Board of Medicine, created under ch. 458, F.S.;
- The Board of Osteopathic Medicine, created under ch. 459, F.S.;
- The Board of Chiropractic Medicine, created under ch. 460, F.S.;
- The Board of Podiatric Medicine, created under ch. 461, F.S.;
- Naturopathy, as provided under ch. 462, F.S.;
- The Board of Optometry, created under ch. 463, F.S.;
- The Board of Nursing, created under part I of ch. 464, F.S.;
- Nursing assistants, as provided under part II of ch. 464, F.S.;
- The Board of Pharmacy, created under ch. 465, F.S.;
- The Board of Dentistry, created under ch. 466, F.S.;
- Midwifery, as provided under ch. 467, F.S.;
- The Board of Speech-Language Pathology and Audiology, created under part I of ch. 468, F.S.;
- The Board of Nursing Home Administrators, created under part II of ch. 468, F.S.;
- The Board of Occupational Therapy, created under part III of ch. 468, F.S.;
- Respiratory therapy, as provided under part V of ch. 468, F.S.;
- Dietetics and nutrition practice, as provided under part X of ch. 468, F.S.;
- The Board of Athletic Training, created under part XIII of ch. 468, F.S.;
- The Board of Orthotists and Prosthetists, created under part XIV of ch. 468, F.S.;
- Electrolysis, as provided under ch. 478, F.S.;
- The Board of Massage Therapy, created under ch. 480, F.S.;
- The Board of Clinical Laboratory Personnel, created under part I of ch. 483, F.S.;
- Medical physicists, as provided under part II of ch. 483, F.S.;
- The Board of Opticianry, created under part I of ch. 484, F.S.;

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[1] Pursuant to s. 456.001(4), F.S., health care practitioners are defined to include 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, electrologists, massage therapists, clinical laboratory personnel, medical physicists, dispensers of optical devices or hearing aids, physical therapists, psychologists, social workers, counselors, and psychotherapists, among others.

[2] Florida Department of Health, Division of Medical Quality Assurance, *Annual Report and Long-Range Plan, Fiscal Year 2019-2020*, p. 5, http://www.floridahealth.gov/licensing-and-regulation/reports-and-publications/_documents/2019-2020-annual-report.pdf (last visited Mar. 7, 2022).

[3] Section 456.001(4), F.S.

- The Board of Hearing Aid Specialists, created under part II of ch. 484, F.S.;
- The Board of Physical Therapy Practice, created under ch. 486, F.S.;
- The Board of Psychology, created under ch. 490, F.S.;
- School psychologists, as provided under ch. 490, F.S.;
- The Board of Clinical Social Work, Marriage and Family Therapy, and Mental Health Counseling, created under ch. 491, F.S.; and
- Emergency medical technicians and paramedics, as provided under part III of ch. 401, F.S.

The DOH and the practitioner boards have different roles in the regulatory system. Boards establish practice standards by rule, pursuant to statutory authority and directives. The DOH receives and investigates complaints about practitioners, and prosecutes cases for disciplinary action against practitioners.

The DOH, on behalf of the professional boards, investigates complaints against practitioners.[4] Once an investigation is complete, the DOH presents the investigatory findings to the boards. The DOH recommends a course of action to the appropriate board's probable cause panel which may include:[5]

- Having the file reviewed by an expert;
- Issuing a closing order; or
- Filing an administrative complaint.

The boards determine the course of action and any disciplinary action to take against a practitioner.[6] For professions in which there is no board, the DOH determines the action and discipline to take against a practitioner and issues the final orders.[7] The DOH is responsible for ensuring that licensees comply with the terms and penalties imposed by the boards.[8] If a case is appealed, DOH attorneys defend the final actions of the boards before the appropriate appellate court.[9]

The different DOH and board roles apply to all statutory grounds for discipline against a practitioner. Under current law, the DOH takes on the disciplinary functions of a board only for practitioner types that do not have a board. Currently, the DOH itself takes no final disciplinary action against practitioners for which there is a board.

Board Certification and Florida Licensure

The DOH does not license health care practitioners by specialty or subspecialty; rather, practitioners become board-certified in specialties by private, national specialty boards, such as

[4] Department of Health, *Investigative Services*, http://www.floridahealth.gov/licensing-and-regulation/enforcement/admin-complaint-process/isu.html (last visited Mar. 7, 2022).
[5] Department of Health, *Prosecution Services*, http://www.floridahealth.gov/licensing-and-regulation/enforcement/admin-complaint-process/psu.html (last visited Mar. 7, 2022).
[6] Section 456.072(2), F.S.
[7] Professions which do not have a board include naturopathy, nursing assistants, midwifery, respiratory therapy, dietetics and nutrition, electrolysis, medical physicists, and school psychologists.
[8] *Supra*, note 5.
[9] *Id.*

the American Board of Medical Specialties (ABMS), the Accreditation Board for Specialty Nursing Certification, and the American Board of Dental Specialties.[10]

Prohibitions

Current law limits which health care practitioners may hold themselves out as board-certified specialists. An allopathic physician may not hold himself or herself out as a board-certified specialist unless he or she has received formal recognition as a specialist from a specialty board of the ABMS or other recognizing agency[11] approved by the Board of Medicine.[12] Additionally, an allopathic physician may not hold himself or herself out as a board-certified specialist in dermatology unless the recognizing agency, whether authorized in statute or by rule, is triennially reviewed and reauthorized by the Board of Medicine.[13]

Similarly, an osteopathic physician may not hold himself or herself out as a board-certified specialist unless he or she has successfully completed the requirements for certification by the American Osteopathic Association (AOA) or the Accreditation Council on Graduate Medical Education (ACGME) and is certified as a specialist by a certifying agency[14] approved by the board.[15]

A dentist may not hold himself or herself out as a specialist, or advertise membership in or specialty recognition by an accrediting organization, unless the dentist has completed a specialty education program approved by the American Dental Association and the Commission on Dental Accreditation and the dentist is:[16]

- Eligible for examination by a national specialty board recognized by the American Dental Association; or
- Is a diplomate of a national specialty board recognized by the American Dental Association.

If a dentist announces or advertises a specialty practice for which there is not an approved accrediting organization, the dentist must clearly state that the specialty is not recognized or that the accrediting organization has not been approved by the American Dental Association or the Florida Board of Dentistry.[17]

Additionally, an advanced practice registered nurse (APRN) may not advertise or hold himself or herself out as a specialist for which he or she has not received certification.[18]

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[10] Examples of specialties include dermatology, emergency medicine, ophthalmology, pediatric medicine, certified registered nurse anesthetist, clinical nurse specialist, cardiac nurse, nurse practitioner, endodontics, orthodontics, and pediatric dentistry.
[11] The Board of Medicine has approved the specialty boards of the ABMS as recognizing agencies. See Rule 64B8-11.001(1)(f), F.A.C.
[12] Section 458.3312, F.S.
[13] *Id.*
[14] The osteopathic board has approved the specialty boards of the ABMS and AOA as recognizing agencies. Rule 64B15-14.001(h), F.A.C.
[15] Section 459.0152, F.S.
[16] Section 466.0282, F.S. A dentist may also hold himself or herself out as a specialist if the dentist has continuously held himself or herself out as a specialist since December 31, 1964, in a specialty recognized by the American Dental Association.
[17] Section 466.0282(3), F.S.
[18] Section 464.018(1)(s), F.S.

By rule, the Board of Chiropractic Medicine (BCM) prohibits chiropractors from using deceptive, fraudulent, and misleading advertising. However, the BCM permits chiropractors to advertise that he or she has attained Diplomate status in a chiropractic specialty area recognized by the BCM. BCM recognized specialties include those which are recognized by the Councils of the American Chiropractic Association, the International Chiropractic Association, the International Academy of Clinical Neurology, or the International Chiropractic Pediatric Association.[19]

Disciplinary Proceedings under Chapter 456, F.S.

Section 456.072, F.S., sets out grounds for discipline and due process that are applicable to all licensed health care practitioners, in addition to the grounds set out in each practice act, and includes:

- Making misleading, deceptive, or fraudulent representations in or related to the practice of the licensee's profession;
- Intentionally violating any board or DOH rule;
- Being convicted or found guilty of, or entering a plea of guilty or nolo contendere to, regardless of adjudication, and failing to report the violation within 30 days, including a crime:
  - Relating to practice, or ability to practice, a profession;
  - Relating to Medicaid fraud; and
  - Relating to health care fraud.
- Using a Class III or Class IV laser device without having complied with registration rules for the devices;
- Failing to comply with the continuing education (CE) requirements for:
  - HIV/AIDS;
  - Domestic violence.
- Having a license revoked, suspended, or acted against, including denial, or by relinquishment, stipulation, consent order, or settlement, in any jurisdiction;
- Having been found civilly liable for knowingly filing a false report or complaint with the DOH against another licensee;
- Attempting to obtain, or renewing a license by bribery, fraudulent misrepresentation, or through DOH error;
- Failing to report to the DOH any person who the licensee knows is in violation of ch. 456, F.S., or the chapter and rules regulating the practitioner;
- Aiding, assisting, procuring, employing, or advising a person to practice a profession without a license;
- Failing to perform a statutory or legal obligation;
- Knowingly making or filing a false report;
- Making deceptive, untrue, or fraudulent representations in the licensee's practice;
- Exercising undue influence on the patient for financial gain;
- Knowingly practicing beyond his or her scope of practice or is not competent to perform;
- Delegating professional responsibilities to person licensee knows is not qualified to perform;

[19] Rule 64B2-15.001(2)(e), F.A.C. Examples of chiropractic specialties include chiropractic acupuncture, chiropractic internist, chiropractic and clinical nutrition, radiology chiropractic, and pediatric chiropractors.

- Violating a lawful order of the DOH or a board, or failing to comply a DOH subpoena;
- Improperly interfering with an investigation, inspection, or disciplinary proceeding;
- Failing to identify through written notice, which may include the wearing of a name tag, or orally to a patient, the type of license under which the practitioner is practicing, including in advertisements;[20]
- Failing to provide patients information about their rights and how to file a complaint;
- Engaging or attempting to engage in sexual misconduct;
- Failing to comply with the requirements for profiling and credentialing;
- Failing to report within 30 days that the licensee has been convicted or found guilty of, or entered a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction;
- Using information from police reports, newspapers, other publications, or through a radio or television, for commercial purposes or solicitation;
- Being unable to practice with reasonable skill and safety because of illness or use of alcohol, drugs, narcotics, chemicals, or as a result of a mental or physical condition;
- Testing positive for any illegal drug on any pre-employment or employer-ordered screening when the practitioner does not have a prescription;
- Performing or attempting to perform health care services on the wrong patient, wrong-site, or an unauthorized procedure or medically unnecessary procedure;
- Leaving a foreign body in a patient;
- Violating any provision of the applicable practice act or rules;
- Intentionally submitting a Personal Injury Protection (PIP) claim, that has been "upcoded;"
- Intentionally submitting a PIP claim for services not rendered;
- Engaging in a pattern of practice when prescribing medicinal drugs or controlled substances which demonstrates a lack of reasonable skill or safety to patients;
- Being terminated from an impaired practitioner program for failing to comply;
- Failure to comply with controlled substance prescribing requirements;
- Intentionally entering any information concerning firearm ownership into the patient's medical record; and
- Willfully failing to authorize emergency care or services with such frequency as to indicate a general business practice.

The DOH, on behalf of the boards, investigates any complaint that is filed against a health care practitioner if the complaint is:[21]

- In writing;
- Signed by the complainant;[22] and
- Legally sufficient.

A complaint is legally sufficient if it contains allegations of ultimate facts that, if true, show that a regulated practitioner has violated:

[20] These grounds do not apply to a practitioner while the practitioner is providing services in a facility licensed under chs. 394, 395, 400, or 429, F.S.
[21] Section 456.073(1), F.S.
[22] *Id.* The DOH may also investigate an anonymous complaint, or that of a confidential informant, if the complaint is in writing and is legally sufficient, if the alleged violation of law or rules is substantial, and if the DOH has reason to believe, after preliminary inquiry, that the violations alleged in the complaint are true.

- Chapter 456, F.S.;
- His or her practice act; or
- A rule of his or her board or the DOH.[23]

The Consumer Services Unit receives the complaints and refers them to the closest Investigative Services Unit (ISU) office. The ISU investigates complaints against health care practitioners. Complaints that present an immediate threat to public safety are given priority; however, all complaints are investigated as timely as possible. When the complaint is assigned to an investigator, the complainant will be contacted and given the opportunity to provide additional information. A thorough investigation will be conducted. The steps taken in the investigation are determined by the specifics of the allegations, but generally include the following:

- Obtaining medical records, documents, and evidence;
- Locating and interviewing the complainant, the patient, the subject, and any witnesses; and
- Drafting and serving subpoenas for necessary information.

The ISU includes a staff of professional investigators and senior pharmacists who conduct interviews, collect documents and evidence, prepare investigative reports for the Prosecution Services Unit (PSU), and serve subpoenas and official orders for the DOH.[24]

The PSU is responsible for providing legal services to the DOH in the regulation of all health care boards and councils. The PSU will review the investigative file and report from ISU and recommend a course of action to the State Surgeon General (when an immediate threat to the health, safety, and welfare of the people of Florida exists), the appropriate board's probable cause panel, or the DOH, if there is no board, which may include:

- Having the file reviewed by an expert;
- Issuing a closing order (CO);
- Filing an administrative complaint (AC); or
- Issuing an emergency order (ERO or ESO).[25]

If the ISU investigative file received by PSU does not pose an immediate threat to the health, safety, and welfare of the people of Florida, then the PSU attorneys review the file and determine, first, whether expert review is required and, then, whether to recommend to the board's probable cause panel:

- A CO;
- An AC; or
- A Letter of guidance.[26,27]

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[23] *Supra* note 21.
[24] Department of Health, Licensing and Regulation, Enforcement, Administrative Complaint Process, *Investigative Services, available at* http://www.floridahealth.gov/licensing-and-regulation/enforcement/admin-complaint-process/isu.html (last visited Mar. 8, 2022).
[25] Department of Health, Licensing and Regulation, Enforcement, Administrative Complaint Process, *Prosecution Services, available at* http://www.floridahealth.gov/licensing-and-regulation/enforcement/admin-complaint-process/psu.html (last visited Mar. 8, 2022).
[26] Section 456.073(2), F.S. The DOH may recommend a letter of guidance in lieu of finding probable cause if the subject has not previously been issued a letter of guidance for a related offense.
[27] *Id.*

A CO is recommended if the investigation and/or the expert opinion does not support the allegation(s). The subject and the complainant are notified of the results. The complainant may appeal the decision within 60 days of notification by providing additional information for consideration. Cases closed with no finding of probable cause are confidential and are not available through a public records request.[28]

An AC is recommended when the investigation and/or the expert opinion supports the allegation(s). The subject is entitled to a copy of the complete case file prior to the probable cause panel meeting. When an AC is filed with the agency clerk, the subject has the right to choose one of the following options:

- *An Administrative Hearing Involving Disputed Issues of Material Fact* – The subject disputes the facts in the AC and elects to have a hearing before the Division of Administrative Hearings (DOAH).[29] If this occurs, all parties may be asked to testify and the administrative law judge will issue a recommended order that will then go to the board, or the DOH if there is no board, for final agency action.
- *A Settlement/Stipulation/Consent Agreement* – The subject enters into an agreement to be presented before the board or the DOH if there is no board. Terms of this agreement may impose penalties negotiated between the subject or the subject's attorney and the DOH's attorney.
- *A Hearing Not Involving Disputed Issues of Material Fact* – The subject of the AC does not dispute the facts. The subject elects to be heard before the board or the DOH if there is no board. At that time, the subject will be permitted to give oral and/or written evidence in mitigation or in opposition to the recommended action by the DOH.
- *Voluntary Relinquishment of License* – The subject of the AC may elect to surrender his or her license and to cease practice.[30]

Final DOH action, including all of the above, as well as cases where the subject has failed to respond to an AC, are presented before the applicable board, or the DOH if there is no board. The subject may be required to appear. The complainant is notified of the date and location of the hearing and may attend. If the subject is entitled to, and does, appeal the final decision, PSU defends the final order before the appropriate appellate court.[31]

If the ISU investigative file received by the PSU presents evidence of an immediate threat to the health, safety, and welfare of the people of Florida, then PSU will present the file to the State Surgeon General and recommend one of two types of emergency orders – ESO or ERO – which are exclusively issued by the State Surgeon General against licensees who pose such a threat to the people of Florida.[32]

Whether the State Surgeon General issues an ERO or an ESO depends on the level of danger the licensee presents because the DOH is permitted to use only the "least restrictive means" to stop the danger.[33] The distinction between the two orders is:

[28] *Supra* note 26.
[29] *See* ss. 120.569 and 120.57, F.S.
[30] *Id.*
[31] *Supra* note 24.
[32] Section 456.073(8) and 120.60(6), F.S.
[33] Section 120.60(6)(b), F.S.

- ESOs – Licensees are deemed to be a threat to the public at large; or
- EROs – Licensees are considered a threat to a segment of the population.[34]

The emergency order process is carried out without a hearing, restricting someone's right to work, and when the order is served on the licensee, it must contain a notice to the licensee of his or her right to an immediate appeal of the emergency order.[35] An ESO or ERO is not considered final agency action, and the DOH must file an AC on the underlying facts supporting the ESO or ERO within 20 days of its issuance.[36] The appeal of the emergency order and the normal disciplinary process under the AC, and regular prosecution can run simultaneously.[37]

Due Process Under Chapter 120, F.S.

Chapter 120, F.S., known as the Administrative Procedure Act, provides uniform procedures for the exercise of specified authority. Section 120.60, F.S., pertains to licensing and provides for due process for persons seeking government-issued licensure or who have been granted such licensure. Section 120.60(5), F.S., provides that:

- No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the entry of a final order, the governmental agency has served, by personal service or certified mail, an administrative complaint which affords reasonable notice to the licensee of facts or conduct which warrant the intended action and unless the licensee has been given an adequate opportunity to request a hearing under ss. 120.569 and 120.57, F.S.
- When personal service cannot be made and the certified mail notice is returned undelivered, the agency must cause a short, plain notice to the licensee to be published once each week for four consecutive weeks in a newspaper published in the county of the licensee's last known address as it appears on the records of the agency, or, if no newspaper is published in that county, the notice may be published in a newspaper of general circulation in that county.

Section 120.60(6), F.S., provides a process for cases in which a governmental agency finds that immediate serious danger to the public health, safety, or welfare requires emergency suspension, restriction, or limitation of a license. In such cases, the agency may take such action by any procedure that is fair under the circumstances if:

- The procedure provides at least the same procedural protection as is given by other statutes, the State Constitution, or the U.S. Constitution;
- The agency takes only that action necessary to protect the public interest under the emergency procedure; and
- The agency states in writing at the time of, or prior to, its action the specific facts and reasons for finding an immediate danger to the public health, safety, or welfare and its reasons for concluding that the procedure used is fair under the circumstances. The agency's findings of immediate danger, necessity, and procedural fairness are judicially reviewable. Summary suspension, restriction, or limitation may be ordered, but a suspension or revocation

[34] Department of Health, Licensing and Regulation, Enforcement, Administrative Complaint Process, Prosecution Services, *A Quick Guide to the MQA Disciplinary Process Discretionary Emergency Orders – 3 Things to Know, available at* http://www.floridahealth.gov/licensing-and-regulation/enforcement/admin-complaint-process/_documents/a-quick-guide-to-the-mqa-disciplinary-process-discrtionary-emergency-orders.pdf (last visited Mar. 8, 2022).
[35] *See* Fla. Admin. Code R. 28-106.501(3) (2020), and ss. 120.569(2)(n) or 120.60(6), F.S.
[36] Fla. Admin. Code R. 28-106.501(3) (2020).
[37] Section 120.60(6)(c), F.S.

proceeding pursuant to ss. 120.569 and 120.57, F.S., must also be promptly instituted and acted upon.

Anesthesiology

Under chs. 458 and 459, F.S., "anesthesiology" is defined as the practice of medicine that specializes in the relief of pain during and after surgical procedures and childbirth, during certain chronic disease processes, and during resuscitation and critical care of patients in the operating room and intensive care environments.[38]

The term "anesthesiologist" is defined as an allopathic or osteopathic physician who holds an active, unrestricted license; who has successfully completed an anesthesiology training program approved by the Accreditation Council on Graduate Medical Education or its equivalent; and who is certified by the American Board of Anesthesiology, is eligible to take that board's examination, or is certified by the Board of Certification in Anesthesiology affiliated with the American Association of Physician Specialists.[39]

Nurse Anesthetists

A certified registered nurse anesthetist (CRNA) is an APRN, licensed by the Board of Nursing (BON), who specializes in anesthetic services.

APRNs are regulated under part I of ch. 464, F.S., the Nurse Practice Act. The BON provides, by rule, the eligibility criteria for applicants to be licensed as APRNs and the applicable regulatory standards for APRN nursing practices.[40] Additionally, the BON is responsible for administratively disciplining an APRN who commits prohibited acts.[41]

In Florida "advanced or specialized nursing practice" includes, in addition to practices of professional nursing that registered nurses are authorized to perform, advanced-level nursing acts approved by the BON as appropriate for APRNs to perform by virtue of their post-basic specialized education, training, and experience.[42] Advanced or specialized nursing acts may only be performed if authorized under a supervising physician's protocol.[43] In addition to advanced or specialized nursing practices, APRNs are authorized to practice certain medical acts, as opposed to nursing acts, as authorized within the framework of an established supervisory physician's protocol.[44]

A CRNA may, to the extent authorized by established protocol approved by the medical staff of the facility in which the anesthetic service is performed, perform any or all of the following:

- Determine the health status of the patient as it relates to the risk factors and to the anesthetic management of the patient through the performance of the general functions.

[38] Sections 458.3475(1)(c) and 459.023(1)(c), F.S.
[39] Sections 458.3475(1)(a) and 459.023(1)(a), F.S.
[40] *See* s. 464.004, F.S., and Fla. Admin. Code R. 64B9-3 (2020).
[41] *See* ss. 464.018 and 456.072, F.S.
[42] Section 464.003(2), F.S.
[43] Section 464.012(3)-(4), F.S.
[44] *Id.*

- Based on history, physical assessment, and supplemental laboratory results, determine, with the consent of the responsible physician, the appropriate type of anesthesia within the framework of the protocol.
- Order pre-anesthetic medication under the protocol.
- Perform under the protocol procedures commonly used to render the patient insensible to pain during the performance of surgical, obstetrical, therapeutic, or diagnostic clinical procedures. These procedures include ordering and administering regional, spinal, and general anesthesia; inhalation agents and techniques; intravenous agents and techniques; and techniques of hypnosis.
- Order or perform monitoring procedures indicated as pertinent to the anesthetic health care management of the patient.
- Support life functions during anesthesia health care, including induction and intubation procedures, the use of appropriate mechanical supportive devices, and the management of fluid, electrolyte, and blood component balances.
- Recognize and take appropriate corrective action for abnormal patient responses to anesthesia, adjunctive medication, or other forms of therapy.
- Recognize and treat a cardiac arrhythmia while the patient is under anesthetic care.
- Participate in management of the patient while in the post-anesthesia recovery area, including ordering the administration of fluids and drugs.
- Place special peripheral and central venous and arterial lines for blood sampling and monitoring as appropriate.

"Nurse Anesthesiologist"

On August 8, 2019, at the general BON meeting, the BON considered requests for declaratory statements.[45] The second request for a declaratory statement was made by John P. McDonough, A.P.R.N., C.R.N.A., license number 3344982.[46]

For the meeting, McDonough's Petition for Declaratory Statement acknowledged that the type of Florida nursing license he held was as an *A.P.R.N.*, and that he was a certified registered nurse anesthetist (C.R.N.A.), but requested that he be permitted to use the phrase "nurse anesthesiologist" as a descriptor for him or his practice, and that the BON not subject him to discipline under ss. 456.072 and 464.018, F.S.,[47] based on the following grounds:

[45] Section 120.565, F.S. Provides that, "[a]ny substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision as it applies to the petitioner's particular set of circumstances. The agency must give notice of the filing of a petition in the Florida Administrative Register, provide copies of the petition to the board, and issue a declaratory statement or deny the petition within 90 days after the filing. The declaratory statement or denial of the petition is then noticed in the next Florida Administrative Register, and disposition of a petition is a final agency action."

[46] The Florida Board of Nursing, Meeting Minutes, Disciplinary Hearings & General Business, *Declaratory Statements*, No. 2, Aug. 8, 2019, *available at* https://floridasnursing.gov/meetings/minutes/2019/08-august/08072019-minutes.pdf p. 28 (last visited Mar. 7, 2022).

[47] *Petition for Declaratory Statement Before the Board of Nursing, In re: John P. McDonough, A.P.R.N., C.R.N.A., Ed.D.*, filed at the Department of Health, July 10, 2019 (on file with the Senate Rules Committee).

- A New Hampshire Board of Nursing's Position Statement that the nomenclature, *Nurse Anesthesiologist* and *Certified Registered Nurse Anesthesiologist*, are not title changes or an expansion of scope of practice, but are optional, accurate descriptors;[48] and
- Florida law grants no title protection to the words *anesthesiologist* or *anesthetist.*[49]

The Florida Association of Nurse Anesthetists (FANA) and the Florida Medical Association, Inc. (FMA), Florida Society of Anesthesiologists, Inc. (FSA), and Florida Osteopathic Medical Association, Inc. (FOMA), filed timely and legally sufficient[50] motions to intervene[51] pursuant to Florida Administrative Code Rule 28-106.205.[52] The FANA's petition[53] was in support of petitioner's Declaratory Statement while the motion filed jointly by the FMA, FSA, and FOMA was in opposition.

The FMA, FSA, and FOMA argued they were entitled to participate in the proceedings, on behalf of their members, as the substantial interests of their members – some 32,300 – could be adversely affected by the proceeding.[54] Specifically, the FMA, FSA, and FOMA argued that the substantial interests of their respective members would be adversely affected by the issuance of a Declaratory Statement that petitioner could use the term "nurse anesthesiologist," without violating ss. 456.072 and 464.018, F.S., on the grounds that:

- A substantial number of their members use the term "anesthesiologist" with the intent and understanding that patients, and potential patients, would recognize the term to refer to them as physicians licensed under chs. 458 or 459, F.S., not "nurse anesthetists;"
- Sections 458.3475(1)(a) and 459.023(1)(a), F.S., both define the term "anesthesiologist" as a licensed allopathic or osteopathic physician and do not include in those definitions a "nurse anesthetist;"

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[48] New Hampshire Board of Nursing, *Position Statement Regarding the use of Nurse Anesthesiologist as a communication tool and optional descriptor for Certified Registered Nurse Anesthetists (CRNAs)*, Nov. 20, 2018, *available at* https://static1.squarespace.com/static/5bf069ef3e2d09d0f4e0a54f/t/5f6f8a708d2cb23bb10f50a0/1601145457231/NH+BON+NURSE+ANESTHESIOLOGIST.pdf (last visited Mar. 7, 2022).

[49] *Id.*

[50] Fla. Adm. Code R. 28-105.0027(2) and 28.106.205(2) (2019), both of which state that to be legally sufficient, a motion to intervene in a proceeding on a petition for a declaratory statement must contain the following information: (a) The name, address, the e-mail address, and facsimile number, if any, of the intervenor; if the intervenor is not represented by an attorney or qualified representative;(b) The name, address, e-mail address, telephone number, and any facsimile number of the intervener's attorney or qualified representative, if any; (c) Allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to agency rule, or *that the substantial interests of the intervenor are subject to determination or will be affected by the declaratory statement;* (d) The signature of the intervener or intervener's attorney or qualified representative; and (e) The date.

[51] The Florida Medical Association, Inc., Florida Society of Anesthesiologists, Inc., and Florida Osteopathic Medical Association, Inc., *Motion to Intervene In Florida Board of Nursing's Consideration of the Petition for Declaratory Statement in Opposition of Petitioner John P. McDonough, A.P.R.N., C.R.N.A., Ed.D.*, filed at the Department of Health, Aug. 1, 2019, (on file with the Senate Rules Committee).

[52] Fla. Adm. Code. R. 28-106.205 (2019), in pertinent part, provides, "Persons other than the original parties to a pending proceeding whose substantial interest will be affected by the proceeding and who desire to become parties may move the presiding officer for leave to intervene."

[53] *Florida Association of Nurse Anesthetists Motion to Intervene,* filed at the Department of Health, July 31, 2019, (on file with the Senate Rules Committee).

[54] *See Florida Home Builders Association, et al., Petitioners, v. Department of Labor And Employment Security, Respondent*, 412 S.2d 351 (Fla. 1982), holding that a trade association does have standing under s. 120.56(1), F.S., to challenge the validity of an agency ruling on behalf of its members when that association fairly represents members who have been substantially affected by the ruling.

- The Merriam-Webster Dictionary defines an "anesthesiologist" as a "physician specializing in anesthesiology," not as a nurse specializing in anesthesia; and
- The Legislature clearly intended a distinction between the titles to be used by physicians practicing anesthesiology and nurses delivering anesthesia, to avoid confusion, as s. 464.015(6), F.S., specifically states that:
  - Only persons who hold valid certificates to practice as certified registered nurse anesthetists in this state may use the title "Certified Registered Nurse Anesthetist" and the abbreviations "C.R.N.A." or "nurse anesthetist;" and
  - Petitioner is licensed as a "registered nurse anesthetist" under s. 464.012(1)(a), F.S., and the term "nurse anesthesiologist" is not found in statute.

At the hearing, the attorney for the BON advised the BON that, "[t]he first thing the Board need[ed] to do [was] determine whether or not the organizations that [had] filed petitions to intervene have standing in order to participate in the discussion of the Declaratory Statement"[55] and that:

> "Basically in order to make a determination of whether an organization has standing, they have to show that the members of their organization would have an actual injury in fact, or suffer an immediate harm of some sort of immediacy were the Board to issue this particular Declaratory Statement, and then the Board also has to make a determination of whether the nature of the injury would be within the zone of interest that the statute is addressing."[56]

However, the above special injury standard,[57] provided by board counsel to the BON to apply to determine the organizations' standing to intervene, based on their members' substantial interests being affected by the declaratory statement, was held inapplicable to trade associations in *Florida Home Builders Ass'n. v. Department of Labor and Employment Security*, 412 So.2d 351 (Fla. 1982). The Florida Supreme Court, in *Florida Home Build*ers, *Ass'n.*, held that a trade or professional association is able to challenge an agency action on behalf of its members, even though each member could individually challenge the agency action, if the organization could demonstrate that:

- A substantial number of the association members, though not necessarily a majority, would be "substantially affected" by the challenged action;
- The subject matter of the challenged action is within the association's scope of interest and activity; and
- The relief requested is appropriate for the association's members.[58]

The FANA's motion to intervene was granted, based on the application of an incorrect standard, without the BON making the findings required by *Florida Home Build*ers, *Ass'n.* However, the

[55] Record at p. 3, ll. 13-17. Declaratory Statement, Dr. John P. McDonough, Before the Board of Nurses, State of Florida, Department of Health, Sanibel Harbor Marriott. (on file with the Senate Rules Committee).
[56] *Id.* p. 3-4, ll. 22- 25, 1-6.
[57] *United States Steel Corp. v. Save Sand Key, Inc.*, 303 So.2d 9 (Fla. 1974).
[58] *Florida Home Builders Ass'n. v. Department of Labor and Employment Security*, 412 So.2d 351 (Fla. 1982), pp. 353-354.

motion to intervene filed by the FMA, FSA, and FOMA was denied, also based on the application of an incorrect standard, on the grounds that:

- Their members are regulated by the Board of Medicine, not the Board of Nursing;
- Nursing disciplinary guidelines were being discussed;
- Their members' licenses and discipline would not be affected by an interpretation of nursing discipline;[59] and
- Their members are not regulated by the Nurse Practice Act.

A motion was made to approve McDonough's Petition for Declaratory Statement, and it passed unanimously. According to the BON's approval, McDonough may use of the term "nurse anesthesiologist" as a descriptor, and such use is not grounds for discipline against his nursing license. The final order, DOH-19-1500-DS-MQA, was issued September 13, 2019.[60]

However, while s. 120.565, F.S., provides that any person may seek a declaratory statement regarding the potential impact of a statute, rule or agency opinion on a petitioner's particular situation, approval or denial of the petition only applies to the petitioner. It is not a method of obtaining a policy statement from a board of general applicability.[61] News media have reported that the BON's Declaratory Statement in favor of McDonough has created significant concern for patient safety and the potential for confusion in the use of the moniker "anesthesiologist" among Florida's medical professionals.[62, 63, 64]

III. Effect of Proposed Changes:

As described above, current law prohibits a physician from holding himself or herself out as a specialist unless he or she has received formal recognition as a specialist from a specialty board of the ABMS or other recognizing agency approved by the Board of Medicine or the Board of Osteopathic Medicine. Such law is applicable only to licensed physicians.

CS/CS/HB 861 creates s. 456.072(1)(tt), F.S., to make using a term that indicates a practitioner has completed a residency or fellowship program accredited by the ACGME or the AOA in a medical specialty grounds for discipline, unless the licensee:

- Completed a residency or fellowship program recognized by the ACGME or AOA in such specialty;

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[59] Record at p. 7, ll. 1-13. Declaratory Statement, Dr. John P. McDonough, Before the Board of Nurses, State of Florida, Department of Health, Sanibel Harbor Marriott. (on file with the Senate Rules Committee).
[60] State of Florida Board of Nursing, *Final Order*, Sept. 13, 2019, *available at* https://www.floridahealth.gov/licensing-and-regulation/declaratory/_documents/nursing/DOH-19-1500-DS.pdf (last visited Mar. 7, 2022).
[61] Florida Department of Health, Board of Nursing, *What is a Declaratory Statement?*, *available at* https://floridasnursing.gov/help-center/what-is-a-declaratory-statement/ (last visited Mar. 7, 2022).
[62] Christine Sexton, The News Service of Florida, "*Nursing Board Signs Off On 'Anesthesiologist' Title,"* August 16, 2019, The Gainesville Sun, *available at*: https://www.gainesville.com/news/20190816/nursing-board-signs-off-on-anesthesiologist-title (last visited Mar. 7, 2022).
[63] Christine Sexton, The News Service of Florida, *"Florida Lawmaker Takes Aim At Health Care Titles*," October 10, 2019, Health News Florida, *available at* https://health.wusf.usf.edu/post/florida-lawmaker-takes-aim-health-care-titles (last visited Mar. 7, 2022).
[64] Christine Section, The News Service of Florida, "*What's In A Name? Health Panel Seeks Clarity on Health Care Providers,"* Nov. 14, 2019, *available at* https://health.wusf.usf.edu/post/what-s-name-health-panel-seeks-clarity-health-care-providers (last visited Mar. 7, 2022).

- Attained diplomate status in a chiropractic specialty; or
- Is otherwise expressly authorized by law to use such specialty terms.

Under the bill, any practitioner who is a not a physician and has not completed a residency or fellowship is prohibited from using terms such as "oncologist" or "dermatologist" to describe his or her practice. However, the bill allows a licensed chiropractor who has attained diplomate status, and any other licensed practitioner specifically authorized by law to use specialty terms, to use such ACGME-recognized or AOA-recognized specialty terms to describe his or her practice.

The bill also requires the DOH to enforce the bill's provisions and grants the DOH the same enforcement authority as an applicable board.

The bill authorizes the DOH to adopt rules for the bill's implementation.

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

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:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The DOH advises that:[65]

- The bill establishes a type of title protection that may restrict licensed health care practitioners from advising the public regarding the specialized nature of their practice. Some certifications issued by the ACGME use terms that are so common that practitioners could inadvertently violate this provision of law. Examples may include the psychologist or mental health counselor who limits his or her practice to child and adolescent psychology, a massage therapist who specializes in working with oncology patients, and a surgeon who performs orthopedic surgery but is not currently certified in that specialty.
- Certifications offered by other recognized professional organizations use the same terminology as the ACGME. It is unclear how a health care practitioner who earns a recognized certification or specialization in such an area could use that credential under the bill.
- The BON's final order DOH-19-1500-DS-MQA held that a particular CRNA could use the term "nurse anesthesiologist" to refer to himself and his duties. The bill's language will not prevent a nurse from using the term "nurse anesthesiologist."

C. Government Sector Impact:

The DOH advises that:[66]

- The bill provides enforcement authority to the DOH that is the same as the regulatory boards and requires the DOH to enforce the bill. However, the DOH does not currently have a process or the personnel to enforce the bill separate from the boards. Establishing such an office would require recurring financial resources and additional full-time equivalent positions, including additional professional legal staff, but the precise impact of the bill is unknown; therefore, the fiscal impact of creating a separate disciplinary office within the DOH, separate from the boards, cannot be calculated.
- While the bill does not specifically require licensed practitioners to report specialty designations to the DOH, the DOH would need to gather that information from each practitioner, then store and maintain it, in order to regulate disciplinary matters and associated penalties resulting from practitioners who violate the bill. The DOH would experience a non-recurring increase in workload and costs associated with updating the Licensing and Enforcement Information Database System (LEIDS), Online Service and Data Download Portals, Cognitive Virtual Agent, Continuing Education Tracking System, License Verification and other search sites, MQA Business Intelligence Portal, and the boards' websites to create and support detailed specialty information by practitioners. The MQA would experience recurring costs associated with establishing and maintaining additional transactions in LEIDS and Versa Online for providers updating their credentials. Updates to fully integrate these credentials are estimated to need six months.

[65] Department of Health, *2022 Agency Legislative Bill Analysis for HB 861,* Jan. 11, 2022, on file with the Senate Rules Committee.
[66] *Id.*

VI. Technical Deficiencies:

The DOH advises that the bill appears to create statutory conflicts.[67] To wit:

- The bill provides enforcement authority to the department that is the same as a regulatory board. This provision creates a situation where two entities have the same enforcement authority, which they are required to exercise, which in turn creates competing enforcement provisions within the Florida Statutes and will make implementation problematic.
- The DOH does not have the power to circumvent a board's authority to take disciplinary action against a licensed practitioner, except under emergency circumstances. According to s. 456.072(2), F.S., the DOH may impose penalties on disciplinary acts provided in s. 456.072(1), F.S., only for professions for which there is no regulatory board.
- Section 456.073, F.S., provides that the DOH investigates complaints and determines legal sufficiency, but the appropriate board determines whether or not probable cause exists to pursue disciplinary action. The statute further provides that the DOH must follow the direction of the probable cause panel regarding filing a formal administrative complaint. The bill's requirement for the DOH to enforce the bill in place of a regulatory board appears to conflict with the requirements of s. 456.073, F.S.

VII. Related Issues:

The DOH advises that line 18 of the bill provides that a practitioner may not use a term designating a medical specialty unless one or more of three exceptions is met. No context is provided for the term "using," and it is not defined in the bill or in any other statute. Terms may be "used" in any number of ways. This may subject the bill to challenge as being so vague as to be unenforceable. Any rules promulgated in response to the bill may also be subject to challenge as lacking sufficient statutory authority.

VIII. Statutes Affected:

This bill substantially amends section 456.072 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:

Barcode 175492 by Rules on March 8, 2022:
Senate amendment barcode 175492:

- Removes the bill's creation of s. 456.072(1)(tt), F.S., and instead amends s. 456.072(1)(t), F.S., relating to behaviors that, if carried out by a licensed health care practitioner, constitute grounds for which the disciplinary actions contained in s. 456.072(2), F.S., may be imposed on the practitioner.

[67] *Id.*

- Provides that any of the following constitute such grounds:
  - A practitioner's failure to identify his or her full name through the wearing of a name tag or embroidered identification that also includes the professional license and professional degree(s) issued to the practitioner.
  - The failure of any advertisement for health care services naming a practitioner to identify the practitioner's professional license and professional degree(s) the practitioner holds.
  - Running an advertisement naming a practitioner which contains deceptive or misleading information, including, but not limited to, any affirmative communication or representation that misstates, falsely describes, holds out, or falsely details the practitioner's skills, training, expertise, education, public or private board certification, or licensure.
- Eliminates the following provisions from s. 456.072(1)(t), F.S.:
  - The option for a practitioner to identify orally to a patient the type of license under which he or she is practicing or through written notice other than a name tag.
  - The statute's provision that paragraph (t) does not apply to a practitioner while the practitioner is providing services in a facility licensed under chs. 394, 395, 400, or 429, F.S.[68]
- Maintains the current-law provision that each regulatory board, or the DOH if there is no board, is authorized to determine by rule how its practitioners may comply with the paragraph's disclosure requirement.
- Requires the DOH to enforce paragraph (t) and provides that the DOH has the same enforcement authority as an applicable board.
- Authorizes the DOH to adopt rules to implement paragraph (t).

(WITH TITLE AMENDMENT)

[68] Those chapters of statute include the licensure of various health care facilities, including hospitals, ambulatory surgical centers, community mental health centers, long-term care facilities, and assisted living facilities.