

STORAGE NAME: h1905a.grr
DATE: April 21, 1997

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
GOVERNMENTAL RULES AND REGULATIONS
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: HB 1905

RELATING TO: Administrative Procedure Act

SPONSOR(S): Representatives Wallace and Burroughs

STATUTE(S) AFFECTED: §§ 120.52, 120.53, 120.541, 120.542, 120.56, 120.569, 120.57, 120.573, 120.574, 120.595, 120.60, 120.65, 120.66, 120.68, 120.74, and 120.81, Fla. Stat. (1996 Supp.)

COMPANION BILL(S): CS/SB 1066(identical)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) GOVERNMENTAL RULES AND REGULATIONS YEAS 4 NAYS 0
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I. SUMMARY:

The Administrative Procedure Act (APA), ch. 120, F.S. (1996 Supp.), was thoroughly revised in 1996 to improve clarity and readability of the provisions, and to reorganize the Act into a more logical format.

HB 1905 is a glitch bill to correct technical problems in cross-references, timing, and definitions that have been identified in the interim. There are no substantial changes to the APA made in this bill.

There were seven amendments offered in committee. Two addressed concerns of local school districts. Four conformed HB 1905 to its Senate companion, CS/SB 1066. The final amendment, agreed to after Senate passage of CS/SB 1066, clarified a section of HB 1905 relating to the awarding of attorney's fees. All seven amendments passed without objection.

HB 1905 takes effect upon becoming law.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

The 1996 revisions to the Administrative Procedure Act (APA) clarified and simplified the procedures used to promulgate rules and address administrative disputes. Though there were no substantive changes made to existing sections of the Act, it was rewritten for clarity and readability. Provisions relating to rulemaking, challenges to rules, hearings, meetings, and workshops, attorney's fees, indexing of orders and rules, as well as exceptions to the APA were consolidated and clarified. Sections were created to provide for waiver and variance procedures, a Statement of Estimated Regulatory Costs, mediation of administrative disputes, and a summary hearing process for administrative disputes. Finally, definitions of terms were clarified and consolidated in s. 120.52, F.S. (1996 Supp.).

In the interim since enactment of the 1996 revisions, technical problems in cross-references, timing, and definitions have been identified. Additionally, several areas of concern within the revised Act have been identified and reviewed. The proposed bill addresses the technical problems and clarifies the language within the identified areas of concern.

B. EFFECT OF PROPOSED CHANGES:

HB 1905 addresses technical problems that have been identified since the enactment of the 1996 revisions to the APA. It corrects timing inconsistencies, clarifies certain sections of the APA, and recreates for local school districts an exception from the requirement to publish APA-related notices in the Florida Administrative Weekly.

Please see the section-by-section research for details.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

While it does not create any new rulemaking authority, HB 1905 clarifies provisions of the APA relating to the promulgation of rules, rule challenges, and procedures

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

No.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

None.

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

No.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

- (1) Who evaluates the family's needs?

N/A

- (2) Who makes the decisions?

N/A

- (3) Are private alternatives permitted?

N/A

- (4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

No.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. SECTION-BY-SECTION RESEARCH:

Section 1.

Inserts in § 120.54(1), F.S. (1996 Supp.), “educational units” as part of the definition of an “agency”.

Section 2.

Republishes § 120.53, F.S. (1996 Supp.), describing the standards to be used to maintain and index agency rules and orders.

Section 3.

Amends §120.54, F.S. (1996 Supp.) concerning rulemaking procedures:

1. amends §120.54(2)(a), F.S. (1996 Supp.) to provide an exception for the noticing of the development of proposed rules where the intended action is to repeal a rule;

2. amends §120.54(2)(c), F.S. (1996 Supp.), to allow an agency with a service area that is less than state-wide to hold its workshops for rule development within the agency’s service area;

3. creates § 120.54(2)(d)3., F.S. (1996 Supp.), to clarify that an agency's decisions regarding negotiated rulemaking, the selection of participants, and its decisions concerning applications to participate in negotiated rulemaking are not agency action for the purposes of the APA;
4. amends § 120.54(3)(a)1., F.S. (1996 Supp.), to provide that a notice of intent to adopt or amend a rule must include a reference to the date on which and the place where the notice of rule development appeared;
5. amends § 120.54(3)(b)2.b(I), F.S. (1996 Supp.), with a technical change to reflect the current structure of state government;
6. amends § 120.54(3)(b)2.b(II), F.S. (1996 Supp.), to provide that the small business ombudsman is to provide to the agency, no later than 21 days after receipt of the written notice of the rule, alternatives to the proposed rule, and where such alternatives are offered, the 90 day period for filing the rule is extended by 21 days;
7. amends § 120.54(3)(d)1., F.S. (1996 Supp.), to insert the word "final" on line 20 to provide that any change to a proposed rule other than a technical change must be in response to written material received on or before the date of the final public hearing, and that the agency shall provide a copy of a notice of change to any person making written request no later that 21 days after the notice of rule adoption;
8. amends § 120.54(e)2., F.S. (1996 Supp.), to clarify the timing for filing a notice of change and to extend the 90 day time period by which an agency must file a rule. This makes clear that the extensions apply to the existing period of time to file the rule for adoption, which with last year's new exceptions may or may not be 90 days. It also makes it easier to determine if the extension is permitted, because it requires the notice of change or of a public meeting to be published prior to the filing deadline. The term "[f]or purposes of this subparagraph. . ." is stricken as being unnecessarily restrictive;
9. amends § 120.54(4)(a), F.S. (1996 Supp.), with a technical change to insert language to make clear that it is a rule that is being adopted by any procedure, and not just a procedure; and
10. amends § 120.54(7)(b), F.S. (1996 Supp.), to strike language that is not applicable to the section.

Section 4.

Amends § 120.541(1)(a), F.S. (1996 Supp.), to provide an additional 21 days to the 90 day period for filing a rule where a proposal for a lower cost regulatory alternative is submitted.

Section 5.

Amends § 120.542, F.S. (1996 Supp.), concerning variances and waivers:

1. amends § 120.542(1), F.S. (1996 Supp.), to provide:
 - (a) that a public employee is not a person subject to regulation under this section for purposes of petitioning for a variance or waiver to a rule that affects that public employee in his or her official capacity;
 - (b) that an agency can limit the duration or impose conditions to limit the extent of a variance or waiver; and
 - (c) that an agency can only provide a variance or waiver to a federally delegated or approved program where that program provides for a variance or waiver;
2. amends § 120.542(3), F.S. (1996 Supp.), to require that the Administration Commission shall adopt uniform rules relating to the granting, denial, or revocation of emergency waivers and variances;
3. amends § 120.542(5), F.S. (1996 Supp.), to provide that a person filing a petition for a waiver or variance must file a copy with JAPC;
4. amends § 120.542(6), F.S. (1996 Supp.), to specify the content of a notice for a variance or waiver;
5. creates § 120.452(7), F.S. (1996 Supp.), which requires an agency to review and request additional information within 30 days of receipt of the petition for a variance or waiver, and within 30 days of receipt of that additional information, directs the agency to review the petition and ask for only such information to clarify the additional information or to answer new questions relating to the additional information, and provides that the petitioner may assert that a request for additional information is unauthorized by law or rule and upon written request of the petitioner, may direct the agency to process the petition; and
6. renumbers the old §120.542 (7), F.S. (1996 Supp.), to subsection (8), clarifies timing requirements related to the new subsection 7, directs the Department of State to publish the petition notice in the next available issue of Florida Administrative Weekly and specifies the content of the notice.

Section 6.

Amends § 120.56(4)(f), F.S. (1996 Supp.), to provide that a proceeding under this subsection (concerning rule challenges) may be consolidated with a proceeding under any other section of the Administrative Procedures Act.

Section 7.

Amends § 120.569 (2)(a), F.S. (1996 Supp.), with a technical change to strike the word "formal" and insert a reference to § 120.57(1).

Section 8.

Amends § 120.57, F.S. (1996 Supp.), concerning additional procedures for particular cases:

1. amends § 120.57(1), F.S. (1996 Supp.), to correct grammatical errors;

2. amends § 120.57(2)(a), F.S. (1996 Supp.), to include any decision, opinion, order, or report by the presiding officer of the agency as part of the record to be used in a hearing not involving disputed issues of material fact;
3. amends § 120.57(3), F.S. (1996 Supp.), to require agencies to utilize the uniform rules in resolving protests arising from the contract bidding process; and
4. inserts in § 120.57(3)(b), F.S. (1996 Supp.), language that provides that Saturdays, Sundays, and legal holidays are excluded from the computation of the 72 hour time periods to be used in the section.

Section 9.

Amends § 120.573, F.S. (1996 Supp.), relating to mediation of disputes under the APA, requires agreement in writing within 10 days after the time period stated in the announcement for election of an administrative remedy under s. 120.569 and s. 120.57, F.S., 1996 Supp. The language inserted in 1996 creates third party intervenor problems. The problem can be resolved by requiring the agreement soon after the original 21 days. A 10-day period should provide adequate time to enter into the agreement and still allow the remainder of the provisions to operate as intended.

Section 10.

Amends § 120.574, F.S. (1996 Supp.), to state that intervenors will be governed by the original parties' decision regarding whether the case will proceed in accordance with the summary hearing process.

Section 11.

Modifies § 120.595(4), F.S. (1996 Supp.), by providing that if an agency statement violates s. 120.54(1)(a), F.S., 1996 Supp., which requires agencies to adopt their statements or policies as rules as soon as feasible and practicable, then attorney's fees and costs do not have to be awarded if the agency can demonstrate that the statement is required by the federal government to implement or retain a delegated or approved program or to meet a condition to receive federal funds.

Section 12.

Amends § 120.60, F.S. (1996 Supp.):

1. amends s. 120.60(3), F.S. (1996 Supp.), to require that a notice granting or denying a license must state with particularity the grounds or basis for the issuance or denial of the license; and
2. amends s. 120.60(6), F.S. (1996 Supp.), to provide for procedures and criteria for agency emergency action against a license where the agency finds that an immediate serious danger to the public health, safety, or welfare exists.

Section 13.

Amends § 120.65, F.S. (1996 Supp.), to state that the director of DOAH will also serve as chief administrative law judge, and that the chief administrative law judge and any deputy administrative law judge must possess the same minimum qualifications as DOAH administrative law judges.

Section 14.

Amends § 120.66 (2), F.S. (1996 Supp.), to clarify that an agency head or designee, when involved in the decisional process, may not receive ex parte communications and where it is necessary to eliminate the effect of an ex parte communication, the entity appointing the presiding officer shall appoint a successor presiding officer.

Section 15.

This section amends s. 120.68, F.S. (1996 Supp.), which relates to judicial review under the APA. The amendment reinserts the language that was in the act in 1995. Specifically, it provides that filing of a petition does not itself stay enforcement of an agency decision. If, however, the agency decision has the effect of suspending or revoking a license, supersedeas must be granted as a matter of right upon such conditions as are reasonable, unless the court, upon petition by the agency, determines that supersedeas would constitute a probable danger to the health, safety, or welfare of the state. The amendment also permits the agency to grant a stay upon appropriate terms, but a petition to the agency for a stay is not a prerequisite to a petition to the court for supersedeas.

Section 16.

Amends § 120.74, F.S. (1996 Supp.), as a technical change by striking a reference to an annual review when that review is now every two years.

Section 17.

Amends §120.81, F.S. (1996 Supp.), concerning exceptions to the APA:

1. amends §120.81(1), F.S. (1996 Supp.), to insert language that provides educational units with an exception to the publishing requirements in the Florida Administrative Weekly. This change re-establishes an exception that existed prior to the 1996 revisions to the APA;
2. creates § 120.81(1)(j), that students are not persons subject to regulation for the purposes of petitioning for a variance or waiver to rules of educational units under § 120.542; and
3. inserts in § 120.81(2)(b), F.S. (1996 Supp.), language that provides units of local government with an exception to the publishing requirements in the Florida Administrative Weekly.

Section 18

Provides that the act shall take effect upon becoming law.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

4. Total Revenues and Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

Reduces the costs of publishing notices relating to rules development and other related notices by local school boards.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None.

2. Direct Private Sector Benefits:

Clarification of the APA should result in a more effective process thereby reducing or eliminating costs associated with actions to clarify such ambiguities through the legal process.

3. Effects on Competition, Private Enterprise and Employment Markets:

N/A

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require the counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenue in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the authority that municipalities or counties have to raise revenue in the aggregate.

V. COMMENTS:

Supersedeas is “. . . the name of a writ containing a command to stay the proceedings at law. A suspension of the power of a trial court to issue an execution on judgment appealed from, or, if a writ of execution has issued, it is a prohibition emanating from court of appeal against execution of writ. . . . Originally, it was a writ directed to an officer, commanding him to desist from enforcing the execution of another writ which he was about to execute, or which might come in his hands. In modern times the term is often used synonymously with a “stay of proceedings,” and is employed to designate the effect of an act or proceeding which of itself suspends the enforcement of a judgment.” *Black’s Law Dictionary*, page 1289 (1979 edition).

AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

There were seven amendments offered in the Committee on Governmental Rules and Regulations. All seven passed without objection.

Amendment One, page 3, lines 30-1, By Representative Wallace:

- inserts “local school districts” into the definition of agency as an entity controlled by the APA when acting pursuant to statutory authority derived from the Legislature. This

amendment clarifies that local school districts are controlled by the APA in certain circumstances.

Amendment Two, page 4, line 1, By Representative Wallace:

- deletes "educational units" from the definition of agency. The first amendment addresses the local school district concern in a more clear manner.

NOTE: Amendments 1 and 2 work in tandem. The amendments address a concern of local school districts that they are only controlled by the APA when acting pursuant to statutory authority.

Amendment Three, page 14, line 31, By Representative Wallace:

- **Technical Amendment** to insert a cross-reference that controls the filing time frame described in this subsection.

Amendment Four, page 23, line 19, By Representative Wallace:

- **Technical Amendment** to include in the notice of an agency's decision on a waiver or variance petition under s. 120.542 F.S., the name of the petitioner and the rule number and nature of the rule to which a waiver or variance is sought.

Amendment Five, page 31, line 5, By Representative Wallace:

- **Technical Amendment** revises the language to clarify the intent of the section that it is the petitioner who has the option whether, in an agency decision not involving a disputed issue of material fact, to present at a hearing or through a written statement evidence in opposition to the action or inaction of an agency

Amendment Six, page 37, lines 2-4, by Representative Martinez:

- Revises proposed language in the section relating to attorney's fees. Tightens language in the bill relating to an agency's demonstration to the court that it does not have to pay attorney's fees and costs awarded in violation of s. 120.54(1)(a), F.S. (concerning rule making). The agency must demonstrate by clear and convincing evidence that the agency statement challenged is required by the Federal government as part of operating a delegated program or as a condition to receipt of federal funds, and therefore, the award of attorney's fees and costs in a petition under s. 120.54(1)(a), F.S., is invalid.

Amendment Seven, page 44, page 5, By Representative Wallace:

- **Technical Amendment** to revise language that would allow local governments the option of publishing in the Florida Administrative Weekly

VI. SIGNATURES:

COMMITTEE ON GOVERNMENTAL RULES AND REGULATIONS:

Prepared by:

Legislative Research Director:

David M. Greenbaum

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