SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 1496

SPONSOR: Health, Aging and Long-Term Care Committee and Senator Campbell

SUBJECT: Nursing Training Programs

DATE: February 5, 2002 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Wilson	HC	Favorable/CS
2.			AHS	
3.			AP	
4.				
5.				
6.				

I. Summary:

The bill revises the authority of the Board of Nursing to adopt rules regarding nursing training programs by limiting the scope of its authority to rules for initial program approval regarding educational objectives, faculty qualifications, required curriculum guidelines, administrative procedures, and clinical training. The statutory authority of the Board of Nursing to investigate a nursing program that no longer meets the required standards, to place such program on a probationary status, and to rescind its approval of that nursing program under certain conditions, is eliminated. The bill prohibits the Board of Nursing from adopting a rule that would prohibit any qualified institution from placing a student in a facility for clinical experience, regardless of whether more than one nursing program is using the same facility for clinical experience.

The bill provides an exemption from Board of Nursing review for any fully approved nursing program that maintains accreditation through an accrediting body recognized by the United States Department of Education, or any nursing program located within a regionally accredited institution of higher education if it maintains a student pass rate on the National Clinical Licensure Exam of not less than 10 percentage points below the national average pass rate, as reported annually by the National Council of State Boards of Nursing. If an institution's rate drops below the standard established in the bill for 3 consecutive years, the program must be reviewed by the Board of Nursing. The Board of Nursing may take necessary action to assist the program to return to compliance.

The Board of Nursing and the Florida Board of Education must jointly adopt rules, in accordance with the negotiated rulemaking procedures in s. 120.54(2)(d), F.S., regarding educational objectives to ensure that approved programs graduate nurses capable of competent practice.

This bill substantially amends section 464.019, Florida Statutes.

II. Present Situation:

Regulation of Nursing Practice

Part I, chapter 464, F.S., provides for the regulation of nursing practice by the Board of Nursing within the Department of Health. The part provides licensure requirements for licensed practical nurses and registered nurses, and certification requirements for advanced registered nurse practitioners. The part requires any institution wishing to conduct an approved nursing program in Florida to apply to the Department of Health and to show compliance with the requirements of the part and any applicable administrative rules adopted by the board (Section 464.019, F.S.). The part requires professional or practical nursing licensure applicants to graduate from an approved nursing program as a prerequisite to being allowed to sit for the nursing licensure examination (Section 464.008, F.S.). The part grants the board authority to adopt rules regarding educational objectives, faculty qualifications, curriculum guidelines, administrative procedures, and clinical training as are necessary to ensure that approved nursing programs graduate nurses capable of competent practice (64B9-2, *Florida Administrative Code*).[1]

Department of Health's Standing to Challenge Board Rules

Chapter 456, F.S., provides the general regulatory provisions for health care professions within the Department of Health. The Secretary of the Department of Health has standing to challenge any rule or proposed rule of a board under its jurisdiction pursuant to s. 120.56, F.S.[2] In addition to challenges for any invalid exercise of delegated legislative authority, the administrative law judge, upon such challenge by the secretary, may declare all or part of a rule invalid if it: (a) does not protect the public from any significant and discernible harm or damages; (b) unreasonably restricts competition or the availability of professional services in the state or in a significant part of the state; or (c) unnecessarily increases the cost of professional services without a corresponding or equivalent public benefit. The Secretary of the Department of Health or the board shall be a substantially interested party for purposes of s. 120.54(7), F.S. The board may, as an adversely affected party, initiate and maintain an action pursuant to s. 120.68, F.S., challenging the final agency action.

The State Board of Education does not have the authority to adopt or approve administrative rules for nursing programs in Florida.

Proposed Rule Change Relating to Faculty/Student Clinical Ratios

In rule 64B9-2.008, F.A.C., the Board of Nursing establishes the clinical student/teacher ratio as "no more than twelve students . . . to a faculty member." In September, 2000, the board proposed

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[1] Rule 64B9-2.004, F.A.C., requires faculty of nursing programs to formulate and adopt educational objectives that ensure that Board of Nursing-approved curriculum guideline requirements will be met. Rule 64B9-2.015, F.A.C., provides standards of nursing education, including program evaluation. Under that rule the minimum acceptable level of performance as required by the Board of Nursing on the National Council of State Boards of Nursing licensing examination for graduates of a nursing education program during the fiscal year of the Department of Health shall be 10 percent below the national or state average, whichever is lowest, as published by the contract testing service of the National Council of State Boards of Nursing.

[2] Section 456.012, Florida Statutes

decreasing the ratio to eight to one or 10 to one. The proposal was announced after the divisions within the Department of Education had already submitted their budget requests. According to an electronic mail survey, decreasing the ratio to eight to one would have increased the training costs borne by community college nursing programs by $4 to $5 million.

Section 100, chapter 2001-203, Laws of Florida, provided that the Board of Nursing within the Department of Health must hold in abeyance until July 1, 2002, the development of any administrative rule pursuant to s. 464.019, F.S., which relates to the establishment of faculty/student clinical ratios. The Board of Nursing and the Department of Education must submit to the President of the Senate and the Speaker of the House of Representatives by December 31, 2001, an implementation plan that details both the impact and the cost of any such proposed rule change.

Pursuant to ch. 2001-203, L.O.F., the Department of Education/Board of Nursing Task Force on Clinical Ratios in Florida Nursing Programs submitted a report in December, 2001 and recommended:

- "No change in the faculty:student clinical ratios for a period of two years (July, 2004)[sic];
- "That a study be conducted to examine the issues of the relationship of clinical ratios to patient safety and quality of education. The study should be conducted by the Florida Center for Nursing or by the Council for Educational Policy Research and Improvement. Data from this proposed study should be presented to a future task force composed of representative of the Board of Nursing and the Department of Education in order to investigate possible alteration of rules affecting clinical ratios."[3]

Administrative Procedure Act

The Administrative Procedure Act (APA), contained in ch. 120, F.S., sets forth the general standards and procedures that all agencies must follow when adopting administrative rules. Agencies do not have inherent rulemaking authority.[4] Shaping public policy through lawmaking is the exclusive power of the Legislature.[5] The Legislature, however, may delegate to agencies the authority to adopt rules[6] that implement, enforce, and interpret a statute.[7] An enabling statute that delegates rulemaking authority to an agency cannot provide unbridled authority to an agency

[3] Report to the Legislature by the Department of Education/Board of Nursing Task Force on Clinical Ratios in Florida Nursing Programs (December, 2001).

[4]Grove Isle, Ltd. v. State Dept. of Envtl. Reg., 454 So.2d 571, 573 (Fla. 1st DCA 1984).

5Jones v. Department of Rev., 523 So.2d 1211, 1214 (Fla. 1st DCA 1988).

[6]A rule is defined by s. 120.52(15), F.S., to mean, ". . . each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule. . . ."

[7]*State v. Atlantic C.L.R. Co*., 47 So. 969 (1909).

to decide what the law is,[8] but must be complete,[9] must declare the legislative policy or standard,[10] and must operate to limit the delegated power.[11]
Agencies are not authorized to determine whether or not they want to adopt rules.[12] They are required by law to adopt as a rule each agency statement that meets the definition of a rule as soon as feasible and practicable. Rulemaking is presumed to be feasible and practicable unless the agency proves certain statutory standards. Whenever an act of the Legislature requires implementation by rule, an agency has 180 days after the effective date of the act to do so, unless the act provides otherwise.[13]

Any person substantially affected by a rule or a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.[14] Any substantially affected person may seek an administrative determination of the invalidity of any proposed rule by filing a petition seeking such a determination with the Division of Administrative Hearings within 21 days after the date of publication of the notice required by s. 120.54(3)(a), F.S., within 10 days after the final public hearing is held on the proposed rule as provided by s. 120.54(3)(c), F.S., within 20 days after the preparation of a statement of estimated regulatory costs required by s. 120.541, F.S., if applicable, or within 20 days after the date of publication of the notice required by s. 120.54(3)(d), F.S.

An "invalid exercise of delegated legislative authority" is defined to mean agency action beyond the powers, functions, and duties delegated by the legislature.[15] A proposed or existing rule is an invalid exercise of delegated authority if any one or more of the following criteria are satisfied: (1) there is a material failure to follow rulemaking procedures required by s. 120.54, F.S.; (2) the action is in excess of statutorily conferred rulemaking authority; (3) the rule enlarges, modifies, or contravenes the provision of law it implements; (4) the rule is vague, does not establish adequate standards, or vests unbridled discretion in the agency; or (5) the rule is arbitrary or capricious.

Section 120.54(2)(d), F.S., provides a procedure for an agency to use negotiated rulemaking when complex rules are being drafted or strong opposition to the rules is anticipated. The

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[8] *State ex rel. Davis v. Fowler*, 114 So. 435, 437 (Fla. 1927).

[9] *Spencer v. Hunt*, 147 So. 282, 286 (Fla. 1933); accord *Florida Beverage Corp. V. Wynne*, 306 So.2d 200, 202 (Fla. 1st DCA 1975).

[10] *Chiles v. Children A, B, C, D, E, & F*, 589 So.2d 260, 268 (Fla. 1991).

[11] *Palm Beach Jockey Club, Inc. v. Florida State Racing Comm'n.*, 28 So.2d 330 (Fla. 1946).

[12] Section 120.54(1)(a), F.S.

[13] Section 120.54(1)(b), F.S.

[14] Section 120.56(1)(a), F.S.

[15] Section 120.52(8), F.S.

agency, among other procedures specified, should consider whether a balanced committee of interested persons who will negotiate in good faith can be assembled and whether the agency is willing to support the work of the committee and whether the agency may use the group consensus as the basis for the proposed rule. Applicable case law provides that if an agency fails to comply with statutory joint rulemaking prerequisites, any developed rule is unenforceable. See *University of South Florida, Florida Board of Regents v. Department of Children and Family Services*, 787 So.2d 223 (2001).

III. Effect of Proposed Changes:

The bill revises the authority of the Board of Nursing to adopt rules regarding nursing training programs by limiting the scope of its authority to rules for initial program approval regarding educational objectives, faculty qualifications, required curriculum guidelines, administrative procedures, and clinical training. A program may not be fully approved or exempted from these requirements before the graduation of its first class. The Board of Nursing must be notified of any substantial changes to an approved program, but may not review or disapprove such changes unless the program has fallen below the pass rate for students specified in the bill. The board may not adopt a rule that would prohibit any qualified institution from placing a student in a facility for clinical experience, regardless of whether more than one nursing program is using the facility for clinical experience.

The bill provides an exemption from Board of Nursing review for any fully approved nursing program that maintains accreditation through an accrediting body recognized by the United States Department of Education, or any nursing program located within a regionally accredited institution of higher education if it maintains a student pass rate on the National Clinical Licensure Exam of not less than 10 percentage points below the national average pass rate, as reported annually by the National Council of State Boards of Nursing. If the an institution's rate drops below the standard established in the bill for 3 consecutive years, the program must be reviewed by the Board of Nursing. The Board of Nursing may take necessary action to assist the program to return to compliance.

The Board of Nursing and the Florida Board of Education must jointly adopt rules, in accordance with the negotiated rulemaking procedures in s. 120.54(2)(d), F.S., regarding educational objectives to ensure that approved programs graduate nurses capable of competent practice. The rules must consider student attrition rate standards and retention of qualified faculty and must establish thresholds to serve as indicators of successful program performance.

The statutory authority of the Board of Nursing to investigate a nursing program that no longer meets the required standards, to place such program on a probationary status, and to rescind its approval of that nursing program under certain conditions, is eliminated.

The effective date of the bill is July 1, 2002.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Art. VII, s. 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Art. I, s. 24(a) and (b) of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Art. III, s. 19(f) of the Florida Constitution.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

To the extent the bill revises the authority of the Board of Nursing to approve nursing programs, it is unclear what effect this will have on the workload of the staff of the Board of Nursing who currently approves such programs.

VI. Technical Deficiencies:

None.

VII. Related Issues:

On page 1, line 20, the Board of Nursing is required to adopt rules regarding educational objectives for initial nursing program approval. It is unclear how this authority, in the event of conflict, will be reconciled with the joint rulemaking by the Board of Nursing and the Florida Board of Education.

VIII. Amendments:

None.