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.)

Prepared By: Health Care Committee

BILL: CS/SB 940

SPONSOR: Health Care Committee and Senator Peaden

SUBJECT: Repeated Medical Malpractice

DATE: March 31, 2005 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Wilson	HE	**Fav/CS**
2.			JU	
3.			WM	
4.				
5.				
6.				

I. Summary:

The Committee Substitute for Senate Bill 940 implements s. 26, Art. X of the State Constitution, which provides that "[n]o person who has been found to have committed three or more incidents of medical malpractice shall be licensed or continue to be licensed by the State of Florida to provide health care services as a medical doctor." The bill applies the constitutional provision to allopathic and osteopathic physicians. Only incidents that occurred on or after November 2, 2004, may be considered for purposes of the prohibition on licensure for repeated medical malpractice. The Board of Medicine and the Board of Osteopathic Medicine, when revoking a license, or granting or denying a license must review the facts supporting an incident of medical malpractice using a clear and convincing standard of evidence. The time for the boards to review physician licensure applications is extended from 90 to 180 days. Acts of medical malpractice, gross medical malpractice, or repeated malpractice, as grounds for which an allopathic or osteopathic physician may be disciplined, are redefined to implement s. 26, Art. X of the State Constitution. Incident is defined to include a single act of medical malpractice, regardless of the number of claimants. Multiple findings of medical malpractice arising from the same act or acts associated with the treatment of the same patient must count as only one incident.

The Department of Health (DOH) must verify physicians' disciplinary history and medical malpractice claims at initial licensure and licensure renewal using the National Practitioner Data Bank. The physician profiles must reflect the disciplinary action and medical malpractice claims as reported by the National Practitioner Data Bank.

This bill creates section 456.50, Florida Statutes.

The bill amends ss. 456.041, 458.331, and 459.015, F.S.

II. Present Situation:

Constitutional Amendment 8

Constitutional Amendment 8, entitled "Public Protection from Repeated Medical Malpractice," was filed with the Secretary of State on April 7, 2003, and proposed through the citizens' initiative process. The amendment was placed on the November 2, 2004 ballot and approved by the voters. The final certification by the Canvassing Commission of the vote for the election of November 2, 2004, was November 14, 2004. The amendment provides that it takes effect on the date it was approved by the electorate.[1]

Amendment 8 is codified in s. 26, Art. X of the State Constitution[2] and states:

> (a) No person who has been found to have committed three or more incidents of medical malpractice shall be licensed or continue to be licensed by the State of Florida to provide health care services as a medical doctor.
> (b) For purposes of this section, the following terms have the following meanings:
> (1) The phrase "medical malpractice" means both the failure to practice medicine in Florida with that level of care, skill, and treatment recognized in general law related to health care providers' licensure, and any similar wrongful act, neglect, or default in other states or countries which, if committed in Florida, would have been considered medical malpractice.
> (2) The phrase "found to have committed" means that the malpractice has been found in a final judgment of a court of law, final administrative agency decision, or decision of binding arbitration.

On October 18, 2004, the Florida Hospital Association (FHA) and other health care entities filed suit (2004 CA 002483) in the 2nd Judicial Circuit in Franklin, Gadsden, Jefferson, Leon, Liberty, and Wakulla Counties for declaratory and injunctive relief relating to Amendment 8. Judge Ferris had a hearing on the FHA's motion for a temporary injunction on November 15, 2004. Judge Ferris ruled in favor of the FHA and issued an oral order granting a temporary injunction against implementation of Amendment 8 until after the 2005 Regular Session of the Legislature. The FHA also has a motion for partial summary judgment and is asking the judge to rule on the question of whether the amendment is self-executing. There has not been a hearing or ruling on that issue yet. On November 18, 2004, Judge Ferris granted a motion by the Floridians for Patient Protection to intervene in the action. The Pediatrix Medical Group filed a motion to appear as amicus curiae and on January 7, 2005, the motion was denied. On December 17, 2004, the FHA moved to add the following additional parties as plaintiffs to the proceedings: All Children's Hospital, Inc.; Bay Medical Center; Bay Medical Center, A Special District of the State of Florida; Holy Cross Hospital, Inc.; Lakeland Regional Hospital; and University Community Hospital, and the motion was granted on December 20, 2004.

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[1] Amendment 8 provides that the "amendment shall be effective on the date it is approved by the electorate. If any portion of this measure is held invalid for any reason, the remaining portion of this measure, to the fullest extent possible, shall be severed from the void portion and given the fullest possible force and application."

[2] This section, originally designated section 20 by Amendment No. 8, 2004, was redesignated section 26 in order to avoid confusion with already existing section 20, relating to prohibiting workplace smoking.

On December 6, 2005, Floridians for Patient Protection filed a motion for dismissal of the complaint based on the court's lack of subject-matter jurisdiction. The court has not yet ruled on this motion for dismissal.

Practice of Medicine and Osteopathic Medicine

Chapter 458, F.S., governs the practice of medicine under the Board of Medicine within DOH. Under s. 458.311 and s. 458.313, F.S., DOH must issue a license to any applicant who the Board of Medicine certifies has met the requirements to practice medicine as a physician in Florida. Section 458.331, F.S., provides grounds for which a medical physician may be subject to discipline by his or her board. Medical physicians may be subject to discipline for gross or repeated malpractice or the failure to practice medicine with that level of care, skill, and treatment recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances. "Repeated malpractice" includes, but is not limited to, three or more claims for medical malpractice within the previous 5-year period resulting in indemnities being paid in excess of $50,000 each to the claimant in a judgment or settlement and which incidents involved negligent conduct by the physician.

Chapter 459, F.S., governs the practice of osteopathic medicine under the Board of Osteopathic Medicine within DOH. Section 459.015, F.S., provides grounds for which an osteopathic physician may be subject to discipline by his or her board. Osteopathic physicians may be subject to discipline for gross or repeated malpractice or the failure to practice medicine with that level of care, skill, and treatment recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances. "Repeated malpractice" includes, but is not limited to, three or more claims for medical malpractice within the previous 5-year period resulting in indemnities being paid in excess of $50,000 each to the claimant in a judgment or settlement and which incidents involved negligent conduct by the physician.

Under s. 456.049, F.S., Florida-licensed allopathic and osteopathic physicians must report to the Office of Insurance Regulation any claim or action for damages for personal injury alleged to have been caused by error, omission, or negligence in the performance of such licensee's professional services or based on a claimed performance of professional services without consent pursuant to s. 627.912, F.S. The Office of Insurance Regulation must provide DOH with electronic access to all information it receives and DOH must review each report and determine whether any of the incidents that resulted in the claim potentially involved conduct by the licensee that is subject to disciplinary action, in which case the provisions of s. 456.073, F.S. apply.

Allopathic and osteopathic physicians and other health care practitioners are licensed under the provisions of their practice acts and s. 120.60, F.S. Section 456.013, F.S., outlines general licensing procedures to be used by DOH and appropriate boards to issue an initial license to practice a profession. In considering applications for licensure, the board or DOH may require a personal appearance of the applicant. If the applicant is required to appear, the time period in which the application must be granted or denied must be tolled until such time as the applicant appears.

The licensure application procedures for each board may differ slightly based on the supporting documents required by boards to meet licensure eligibility requirements, such as education transcripts, proof of insurance, proof of bonding, letters of reference, and the reporting of examination results. Licensure applicants whose applications are incomplete are sent a notice indicating the missing information, documents, or fees. The department or appropriate board, as any other state agency, must follow procedures outlined in ch. 120, F.S., to issue a license.[3] Under s. 120.60, F.S., once a licensure application is verified as complete, it must be reviewed by DOH or the appropriate board to determine whether the application has met the licensure qualifications for the profession and the applicant must be notified within 30 days of any errors or omissions. Every application must be approved or denied within 90 days of the department's receipt of the application or request for additional information.

When a state agency or regulatory board acts on a license application it is using discretionary authority that the Legislature has delegated to that agency under the State's police power. A proceeding involving the granting or denying of a licensure application is not penal.[4] The licensure applicant has the burden of persuasion to establish his or her fitness for licensure by a preponderance of evidence.[5] The burden of proof in a hearing on a license application denial is on the applicant to establish entitlement to the license.[6] The Florida Supreme Court has held that the use of the clear and convincing standard of evidence in license application proceedings was inconsistent with the discretionary authority granted by the Legislature under the state's police powers.[7] The Florida Supreme Court has declined to extend the clear and convincing standard required in disciplinary proceedings to license application proceedings even when a violation of a statute relating to discipline was the basis for determining that the license applicant was unfit to practice the profession.[8]

Health Care Practitioner Disciplinary Procedures

Section 456.073, F.S., sets forth procedures DOH and regulatory boards must follow in order to conduct disciplinary proceedings against practitioners under its jurisdiction. The department, for the boards under its jurisdiction, must investigate all written complaints filed with it that are legally sufficient. Complaints are legally sufficient if they contain facts, which, if true, show that a licensee has violated any applicable regulations governing the licensee's profession or occupation. Even if the original complainant withdraws or otherwise indicates a desire that the complaint not be investigated or prosecuted to its completion, the department at its discretion may continue its investigation of the complaint. The department may investigate anonymous, written complaints or complaints filed by confidential informants if the complaints are legally sufficient and the department has reason to believe after a preliminary inquiry that the alleged

[3] See s. 120.60, F.S. Section 120.57(1)(j), F.S., provides that in administrative hearings findings of fact must be based upon a preponderance of evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute, and shall be based exclusively on the evidence of record and on matters officially recognized.
[4] See *Hevilla v. Department of Professional Regulation, Board of Medicine,* 11 FALR 1730 (Division of Adm. Hearings 1989).
[5] See *Florida Department of Transportation v. J.W.C. Co.*, 396 So.2d 778 (Fla. 1st DCA 1981).
[6] See *Florida Department of Transportation v. J.W.C. Co.*, 396 So.2d 778 (Fla. 1st DCA 1981).
[7] *See Osborne Stern & Co. v Department of Banking and Finance,* 647 So. 2d 245 (Fla. 1st D.C.A. 1994), rev'd and remanded, 670 So. 2d 932 (Fla. 1996).
[8] See *Osborne Stern & Co. v Department of Banking and Finance,* 647 So. 2d 245 (Fla. 1st D.C.A. 1994), rev'd and remanded, 670 So. 2d 932 at 934 (Fla. 1996).

violations are true. If the department has reasonable cause to believe that a licensee has violated any applicable regulations governing the licensee's profession, it may initiate an investigation on its own.

When investigations of licensees within the department's jurisdiction are determined to be complete and legally sufficient, the department is required to prepare, and submit to a probable cause panel of the appropriate board, if there is a board, an investigative report along with a recommendation of the department regarding the existence of probable cause. A board has discretion over whether to delegate the responsibility of determining probable cause to the department or to retain the responsibility to do so by appointing a probable cause panel for the board. The determination as to whether probable cause exists must be made by majority vote of a probable cause panel of the appropriate board, or by the department if there is no board or if the board has delegated the probable cause determination to the department.

The subject of the complaint must be notified regarding the department's investigation of alleged violations that may subject the licensee to disciplinary action. When the department investigates a complaint, it must provide the subject of the complaint or her or his attorney a copy of the complaint or document that resulted in the initiation of the investigation. Except for cases involving physicians, within 20 days after the service of the complaint, the subject of the complaint may submit a written response to the information contained in the complaint. The department may conduct an investigation without notification to the subject if the act under investigation is a criminal offense. If the department's secretary or her or his designee and the chair of its probable cause panel agree, in writing, that notification to the subject of the investigation would be detrimental to the investigation, then the department may withhold notification of the subject.

If the subject of the complaint makes a written request and agrees to maintain the confidentiality of the information, the subject may review the department's complete investigative file. The licensee may respond within 20 days of the licensee's review of the investigative file to information in the file before it is considered by the probable cause panel. Complaints and information obtained by the department during its investigations are exempt from the Public Records Law until 10 days after probable cause has been found to exist by the probable cause panel or the department, or until the subject of the investigation waives confidentiality. If no probable cause is found to exist, the complaints and information remain confidential in perpetuity.

When the department presents its recommendations regarding the existence of probable cause to the probable cause panel of the appropriate board, the panel may find that probable cause exists or does not exist, or it may find that additional investigative information is necessary in order to make its findings regarding probable cause. Probable cause proceedings are exempt from the noticing requirements of ch. 120, F.S. After the panel convenes and receives the department's final investigative report, the panel may make additional requests for investigative information. Section 456.073(4), F.S., specifies time limits within which the probable cause panel may request additional investigative information from the department and within which the probable cause panel must make a determination regarding the existence of probable cause. Within 30 days of receiving the final investigative report, the department or the appropriate probable cause panel must make a determination regarding the existence of probable cause. The secretary

of the department may grant an extension of the 15-day and 30-day time limits outlined in s. 456.073(4), F.S. If the panel does not issue a letter of guidance or find probable cause within the 30-day time limit as extended, the department must make a determination regarding the existence of probable cause within 10 days after the time limit has elapsed.

Instead of making a finding of probable cause, the probable cause panel may issue a letter of guidance to the subject of a disciplinary complaint. Letters of guidance do not constitute discipline. If the panel finds that probable cause exists, it must direct the department to file a formal administrative complaint against the licensee under the provisions of ch. 120, F.S. The department has the option of not prosecuting the complaint if it finds that probable cause has been improvidently found by the probable cause panel. In the event the department does not prosecute the complaint on the grounds that probable cause was improvidently found, it must refer the complaint back to the board that then may independently prosecute the complaint. The department must report to the appropriate board any investigation or disciplinary proceeding not before the Division of Administrative Hearings under ch. 120, F.S., or otherwise not completed within 1 year of the filing of the complaint. The appropriate probable cause panel then has the option to retain independent legal counsel, employ investigators, and continue the investigation, as it deems necessary.

When an administrative complaint is filed against a subject based on an alleged disciplinary violation, the subject of the complaint is informed of her or his right to request an informal hearing if there are no disputed issues of material fact, or a formal hearing if there are disputed issues of material fact or the subject disputes the allegations of the complaint. The subject may waive her or his rights to object to the allegations of the complaint, which allows the department to proceed with the prosecution of the case without the licensee's involvement. Once the administrative complaint has been filed, the licensee has 21 days to respond to the department. If the subject of the complaint and the department do not agree in writing that there are no disputed issues of material fact, s. 456.073(5), F.S., requires a formal hearing before a hearing officer of the Division of Administrative Hearings under ch. 120, F.S. The hearing provides a forum for the licensee to dispute the allegations of the administrative complaint. At any point before an administrative hearing is held, the licensee and the department may reach a settlement. The settlement is prepared by the prosecuting attorney and sent to the appropriate board. The board may accept, reject, or modify the settlement offer. If accepted, the board may issue a final order to dispose of the complaint. If rejected or modified by the board, the licensee and department may renegotiate a settlement or the licensee may request a formal hearing. If a hearing is held, the hearing officer makes findings of fact and conclusions of law that are placed in a recommended order. The licensee and the department's prosecuting attorney may file exceptions to the hearing officer's findings of facts. The boards resolve the exceptions to the hearing officer's findings of facts when they issue a final order for the disciplinary action.

The boards within DOH have the status of an agency for certain administrative actions, including licensee discipline. A board may issue an order imposing discipline on any licensee under its jurisdiction as authorized by the profession's practice act and the provisions of ch. 456, F.S. Typically, boards are authorized to impose the following disciplinary penalties against licensees: refusal to certify, or to certify with restrictions, an application for a license; suspension or permanent revocation of a license; restriction of practice or license; imposition of an administrative fine for each count or separate offense; issuance of a reprimand or letter of

concern; placement of the licensee on probation for a specified period of time and subject to specified conditions; or corrective action.

Emergency Suspension of a License

Section 120.60(6), F.S., authorizes an agency to take emergency action against a license if the agency finds that immediate serious danger to the public health, safety, or welfare requires emergency suspension, restriction, or limitation of a license.[9] 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 United States 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.[10] Summary suspension, restriction, or limitation may be ordered, but a suspension or revocation proceeding under ss. 120.569 and 120.57, F.S., must also be promptly instituted and acted upon.

Standard of Evidence

The "burden of proof" is the necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised between the parties in a cause.[11] The state agency prosecuting a licensure disciplinary complaint has the burden of proof to establish that a violation of the applicable licensing regulations has occurred. Clear and convincing evidence is an intermediate standard of proof, which is more than a preponderance of evidence required in civil litigation and less than the beyond the reasonable doubt required in criminal prosecutions.[12]

Sections 458.331(3) and 459.015(3), F.S., provide that in any administrative action against an allopathic or osteopathic physician which does not involve revocation or suspension of license, the Division of Medical Quality Assurance within DOH shall have the burden, by the greater weight of the evidence, to establish the existence of grounds for disciplinary action.[13] DOH must establish grounds for revocation or suspension of license by clear and convincing evidence. The Florida Supreme Court has held that the standard for meeting the burden of proof in professional license revocation proceedings is "clear and convincing evidence" and suggests that it is also the correct standard of proof when a license is subject to suspension.[14] For discipline other than

[9] Similar procedures are required for emergency rulemaking under the Administrative Procedure Act. See s. 120.54(4)(a), F.S.
[10] See also s. 120.68, F.S., which provides for immediate judicial review of final agency action.
[11] See *Black's Law Dictionary, Abridged Fifth Edition* (1983).
[12] See *Smith v. Department of Health & Rehabilitative Services*, 522 So.2d 956 (Fla 1st DCA 1988). See also *Black's Law Dictionary, Abridged Fifth Edition*.
[13] See also *Nguyen v. State of Washington Department of Health*, 144 Wash.2d 516, 29 P.3d 689 (2001) in which the Washington State Supreme Court held that the Due Process Clause of the United States Constitution requires proof by clear and convincing evidence in a medical disciplinary proceeding.
[14] See *Ferris v. Turlington*, 510 So.2d 292 (Fla. 1987), *Hoover v. Agency for Health Care Administration*, 676 So.2d 1380 (Fla. 3rd DCA 1996).

suspension or revocation of a license to practice a profession the applicable case law suggests that the appropriate standard of proof is by a preponderance of the evidence.[15]

The Board of Medicine has applied the "clear and convincing" standard of proof to revoke a medical physician's license to practice in Florida based on the revocation of the physician's license in another state which used a lower standard of proof.[16] On appeal, the First District Court of Appeal found that s. 458.331, F.S., permits the Board of Medicine to revoke a physician's license upon clear and convincing evidence that the physician's license has been revoked by the licensing authority of any jurisdiction.[17] The court acknowledged that although a lesser standard was used, Vermont did have a substantial burden of proof.[18] The Board of Medicine's action to revoke the physician's license was upheld on appeal by the First District Court of Appeal.[19]

Standard of Care in Medical Malpractice

Section 766.102(1), F.S., provides that in any action for recovery of damages based on the death or personal injury of any person in which it is alleged that such death or injury resulted from the negligence of a health care provider as defined in s 766.202(4), F.S., the claimant must have the burden of proving by the greater weight of evidence that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care for that provider. The prevailing professional standard of care for a given health care provider shall be that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers. Section 766.202(4), F.S., defines "health care provider" to mean any Florida-licensed hospital, ambulatory surgical center, or mobile surgical facility, birth center, any person licensed as a medical physician, physician assistant, anesthesiology assistant, osteopathic physician, chiropractic physician, podiatric physician, naturopathic physician, optometrist, nurse, dentist, dental hygienist, midwife, or physical therapist, clinical laboratory, health maintenance organization, blood bank, plasma center, industrial clinic, renal dialysis facility, or a professional association partnership, corporation, joint venture, or other association for professional activity by health care providers.

Practitioner Profiles

Section 456.039, F.S., requires each licensed medical physician, osteopathic physician, chiropractic physician, and podiatric physician to submit specified information which, beginning July 1, 1999, has been compiled into practitioner profiles to be made available to the public. The information must include: graduate medical education; hospitals at which the physician has privileges; the address at which the physician will primarily conduct his or her practice; specialty certification; year the physician began practice; faculty appointments; a description of any criminal offense committed; a description of any final disciplinary action taken within the most recent 10 years; and professional liability closed claims reported to the Office of Insurance

[15] Id.
[16] See *Rife v. Department of Professional Regulation*, 638 So.2d 542 (Fla. 2nd DCA 1994).
[17] Id.
[18] Id. at 543.
[19] Id.

Regulation. The professional liability claims to be published in the practitioner profiles are limited to paid claims reported within the previous 10 years that exceed specified amounts under s. 456.041(4), F.S.[20] In addition, the physician may submit: professional awards and publications; languages, other than English, used by the physician to communicate with patients; an indication of whether the physician participates in the Medicaid program; and relevant professional qualifications, as defined by the applicable board of the physician. Each person who applies for initial licensure as a medical physician, osteopathic physician, chiropractic physician, or podiatric physician must, at the time of application, and each medical physician, osteopathic physician, chiropractic physician, or podiatric physician must, in conjunction with the renewal of the license, submit the information required for practitioner profiles.

Section 456.042, F.S., requires each person who has submitted information under the practitioner profiling requirements to update that information in writing by notifying DOH within 15 days after the occurrence of an event or the attainment of a status that requires reporting as part of the profiling requirements.[21] Persons who register to practice medicine as an intern, resident, or fellow and who apply for physician licensure are exempt from the practitioner profiling requirements. DOH must compile the information submitted by a physician licensure applicant into a practitioner profile.

Voluntary Binding Arbitration in a Medical Malpractice Action

Section 766.207, F.S., provides for voluntary binding arbitration of medical negligence claims. Upon completion of presuit investigation with preliminary reasonable grounds for a medical negligence claim intact, either party may elect to have damages determined by an arbitration panel. The opposing party may accept the offer of voluntary binding arbitration and the acceptance is a binding commitment to comply with the decision of the arbitration panel. Arbitration precludes recourse to any other remedy by the claimant against any participating defendant. Section 766.207, F.S., also specifies that the arbitration panel is composed of three arbitrators, one selected by the claimant, one selected by the defendant, and one an administrative law judge furnished by the Division of Administrative Hearings who shall serve as the chief arbitrator. This section specifies how arbitrators are to be selected if there are multiple plaintiffs or multiple defendants, requires independence of arbitrators, specifies the rate of compensation for arbitrators, and authorizes the Division of Administrative Hearings to adopt rules for voluntary binding arbitration.

III. Effect of Proposed Changes:

Section 1. Amends s. 456.041, F.S., relating to practitioner profiles, to provide that, beginning July 1, 2005, the Department of Health must verify the information submitted by an applicant subject to practitioner profiling requirements (allopathic physicians, osteopathic physicians, chiropractic physicians, and podiatric physicians) concerning disciplinary history and medical malpractice claims at the time of initial licensure and licensure renewal using the National

[20]Section 456.051(1), F.S., requires DOH to make all reports of claims or actions for damages for personal injury available as a part of the practitioner's profile within 30 calendar days without any specified limitation on the amount of the claim or the time that the claim was incurred.

[21]Sections 456.039 and 456.0391, F.S., require that the written update be provided within 45 days of the occurrence of an event or the attainment of a status that requires reporting as part of the profiling requirements.

Practitioner Data Bank. The physician profiles must reflect the disciplinary action and medical malpractice claims as reported by the National Practitioner Data Bank.[22]

Section 2. Creates s. 456.50 within ch. 456, F.S., relating to general regulatory provisions for health care practitioners under the Department of Health, for purposes of implementing s. 26, Art. X of the State Constitution which provides that "[n]o person who has been found to have committed three or more incidents of medical malpractice shall be licensed or continue to be licensed by the State of Florida to provide health care services as a medical doctor."

Section 456.50, F.S., sets forth definitions. "Board" is defined to mean the Board of Medicine, in the case of an allopathic physician or the Board of Osteopathic Medicine, in the case of an osteopathic physician. "Final administrative agency decision" is defined to mean a final order of the licensing board, following an administrative hearing, finding that the licensed physician has violated s. 458.331(1)(t), F.S., or s. 459.015(1)(x), F.S., relating to medical malpractice. "Found to have committed" is defined to mean the malpractice has been found in a final judgment of a court of law, final administrative agency decision, or decision of binding arbitration. "Incident" is defined to mean the wrongful act or occurrence from which the medical malpractice arises, regardless of the number of claimants or findings. A single act of medical malpractice, regardless of the number of claimants, must count as only one incident. Multiple findings of medical malpractice arising from the same wrongful act or series of wrongful acts associated with the treatment of the same patient must count as only one incident. "Level of care, skill, and treatment recognized in general law related to health care licensure" is defined to mean the standard of care specified in s. 766.102, F.S. "Medical doctor" is defined to mean a Florida-licensed allopathic or osteopathic physician.

Under s. 456.50, F.S., "medical malpractice" means the failure to practice medicine in accordance with the level of care, skill, and treatment recognized in general law related to health care licensure. Only for the purpose of finding repeated medical malpractice under s. 456.50, F.S., any similar wrongful act, neglect, or default committed in another state or country which, if committed in Florida, would have been considered medical malpractice, must be considered medical malpractice if the standard of care and burden of proof applied in the other state or country equaled or exceeded that used in Florida. "Repeated medical malpractice" means three or more incidents of medical malpractice found to have been committed by a medical doctor. Only an incident occurring on or after November 2, 2004, must be considered an incident for purposes of finding repeated medical malpractice under s. 456.50, F.S.

For purposes of implementing s. 26, Art. X of the Florida Constitution, the Board of Medicine or the Board of Osteopathic Medicine must not license or continue to license an allopathic or osteopathic physician, as applicable, who has been found to have committed repeated medical malpractice, if the finding was based upon clear and convincing evidence. To rely on an incident

[22] Under 45 CFR 60.13(a) information reported to the National Practitioner Data Bank (NPDB) is considered confidential and shall not be disclosed outside the United States Department of Health and Human Services, with specified exceptions. Persons and entities which receive information from the NPDB either directly or from another party must use it solely with respect to the purpose for which it was provided. Section 45 CFR 60.13(a) provides nothing in this paragraph shall prevent the disclosure of information by a party which is authorized under applicable state law to make such disclosure. Section 45 CFR 60.13(b) provides that any person who violates the confidentiality provisions of 45 CFR 60.13(a) is subject to a civil money penalty of up to $10,000 for each violation.

of medical malpractice to determine whether a license must be denied or revoked under s. 456.50, F.S., if the facts supporting the finding of the incident of medical malpractice were determined on a standard less stringent than clear and convincing evidence, the Board of Medicine or the Board of Osteopathic Medicine, as applicable, must review the record of the case and determine whether the finding would be supported under a standard of clear and convincing evidence. Section 456.073, F.S., relating disciplinary procedures used by the boards and the Department of Health, applies. The Board of Medicine or the Board of Osteopathic Medicine may verify on a biennial basis an out-of-state licensee's medical malpractice history using federal, state, or other databases. The Board of Medicine or the Board of Osteopathic Medicine, as applicable, may require licensees and applicants for licensure to provide a copy of the record of the trial of any medical malpractice judgment, which may be required to be in an electronic format, involving an incident that occurred on or after November 2, 2004. For purposes of implementing s. 26, Art. X of the State Constitution, the 90-day requirement for granting or denying a complete allopathic or osteopathic licensure application in s. 120.60(1), F.S., is extended to 180 days.

Sections 3 and 4. Amend ss. 458.331 and 459.015, F.S., to revise existing grounds under which an allopathic physician or osteopathic physician may disciplined for repeated malpractice or gross malpractice. An allopathic or osteopathic physician may be disciplined, notwithstanding s. 456.072(2), F.S., but as specified in s. 456.50(2), F.S., for:

- Committing medical malpractice as defined in s. 456.50, F.S.,
- Committing gross medical malpractice; and
- Committing repeated medical malpractice as defined in s. 456.50, F.S.

A person found by the board to have committed repeated medical malpractice based on s. 456.50, F.S., may not be licensed or continue to be licensed in Florida to provide health care services as a medical doctor. The Board of Medicine or the Board of Osteopathic Medicine, as applicable, must give great weight to the provisions of s. 766.102, F.S., when enforcing this provision. Medical malpractice may not be construed to require more than one instance, event, or act. The Board of Medicine or the Board of Osteopathic Medicine, as applicable, may not issue a license to, or reinstate the license of any medical doctor who has been found by the board to have committed repeated medical malpractice based on s. 456.50, F.S. Procedures outlining the requirements for a recommended order by an administrative law judge or a final order of the Board of Medicine or the Board of Osteopathic Medicine, as applicable, regarding gross malpractice, repeated malpractice, or the failure to practice medicine with that level of care, skill, and treatment recognized as being acceptable under similar conditions are deleted.

Section 5. Provides an effective date of upon becoming a law.

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 Article VII, Section 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 Article III, Subsection 19(f) of the Florida Constitution.

D. Other Constitutional Issues:

The bill implements s. 26, Art. X of the State Constitution. A constitutional provision may be self-executing and require no legislative action to put its terms into operation or it may not be self executing and require legislative action to make it operative. The test for determining whether a constitutional provision should be construed to be self-executing or not self-executing is whether the provision lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment. See *Gray v. Bryant*, 125 So.2d 846 (Fla. 1960). Committee staff is not aware of any binding appellate decisions regarding whether s. 26, Art X of the State Constitution is self-executing or not self-executing.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Department of Health will incur costs for the Board of Medicine and the Board of Osteopathic Medicine to implement the procedures to review the underlying facts surrounding an incident of medical malpractice committed by a Florida-licensed allopathic or osteopathic physician or an applicant for physician licensure to practice medicine or osteopathic medicine in Florida.

The Department of Health will incur costs to verify information submitted at initial licensure and licensure renewal by physician applicants subject to practitioner profiling requirements concerning disciplinary history and medical malpractice claims using the National Practitioner Data Bank.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Under s. 456.039, F.S., physician applicants (medical physicians, osteopathic physicians, podiatric physicians, and chiropractic physicians) subject to practitioner profiling must provide specified information which includes a description of any final disciplinary action taken within the *most recent 10 years*; and professional liability closed claims reported to the Office of Insurance Regulation. The professional liability claims to be published in the practitioner profiles are limited to paid claims reported within the *previous 10 years* that exceed specified amounts under s. 456.041(4), F.S. On page 2, lines 15-22, the bill requires DOH to verify, beginning July 1, 2005, the information submitted by an applicant subject to practitioner profiling requirements concerning disciplinary history and medical malpractice claims at the time of initial licensure and licensure renewal using the National Practitioner Data Bank. The bill also requires the physician profiles to reflect the disciplinary action and medical malpractice claims as reported by the National Practitioner Data Bank. If such information concerning disciplinary history and medical malpractice claims must be published in the practitioner profiles, it is inconsistent with the information that, by current law, must be reported by practitioners, which is limited to the *most recent 10 years* and the information that DOH must publish as part of the practitioners' professional liability claims which *is limited to claims that exceed specified amounts*.

The bill defines "final administrative agency decision" to be a final order of the licensing board following an administrative hearing as provided by s. 120.57(1) or (2), F.S., or s. 120.547, F.S., finding that the licensee has violated s. 458.331(1)(t), F.S., or s. 459.015(1)(x), F.S. The definition of final administrative agency decision appears to limit administrative final orders to those issued by the Florida Board of Medicine or the Florida Board of Osteopathic Medicine. For purposes of s. 26, Art. X of the State Constitution, this definition would, in effect, exclude an administrative agency decision from any other state which has found a medical doctor to have committed medical malpractice.

The definition of "medical malpractice" in the bill provides that, for the purpose of finding repeated medical malpractice, any similar wrongful act, neglect, or default committed in another state or country which, if committed in Florida would have been considered medical malpractice must be considered medical malpractice if the standard of care and burden of proof applied in the other state or country equaled or exceeded that used in Florida. The bill provides that, for purposes of implementing s. 26, Art. X of the State Constitution, the Florida Board of Medicine or the Florida Board of Osteopathic Medicine may not license or continue to license a medical doctor found to have committed repeated medical malpractice, the finding of which was based upon clear and convincing evidence. The definition of medical malpractice would appear to exclude orders from courts in other states which involved medical malpractice litigation where the evidentiary burden of proof was by a preponderance of evidence. The definition of medical malpractice would also appear to conflict with the provision on page 4, lines 19-26, which states "In order to rely on an incident of medical malpractice to determine whether a license must be denied or revoked under this section, if the facts supporting the finding of the incident of medical malpractice were determined on a standard less stringent than clear and convincing evidence, the board shall review the record of the case and determine whether the finding would be supported under a standard of clear and convincing evidence."

The bill provides that, for purposes of implementing s. 26, Art. X of the State Constitution, the Florida Board of Medicine or the Florida Board of Osteopathic Medicine may not license or continue to license a medical doctor found to have committed repeated medical malpractice, the finding of which was based upon clear and convincing evidence. This appears to shift the burden of proof for the denial of a license application to the Florida Board of Medicine or the Florida Board of Osteopathic Medicine, as applicable, from a preponderance of evidence to a clear and convincing standard for a denial based on a statutory violation of the applicable practice act for physicians and ch. 456, F.S. For example, s. 456.063, F.S., provides a disqualification on the granting of a license to a physician who has committed any act in any other state or any territory or possession of the United States which if committed in Florida would constitute sexual misconduct. The bill would, in effect, require the Florida Board of Medicine or the Florida Board of Osteopathic Medicine to find by clear and convincing evidence rather than a preponderance of evidence to deny a license application for a violation of s. 456.063, F.S., relating to sexual misconduct. The Florida Supreme Court has held that the use of the clear and convincing standard of evidence in license application proceedings was inconsistent with the discretionary authority granted by the Legislature under the state's police powers.[23] The Florida Supreme Court has declined to extend the clear and convincing standard required in disciplinary proceedings to license application proceedings even when a violation of a statute relating to discipline was the basis for determining that the license applicant was unfit to practice the profession.[24]

[23] *See Osborne Stern & Co. v Department of Banking and Finance*, 647 So. 2d 245 (Fla. 1st D.C.A. 1994), rev'd and remanded, 670 So. 2d 932 (Fla. 1996).
[24] See *Osborne Stern & Co. v Department of Banking and Finance*, 647 So. 2d 245 (Fla. 1st D.C.A. 1994), rev'd and remanded, 670 So. 2d 932 at 934 (Fla. 1996).

VIII. Summary of Amendments:

None.