HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 739 Treatment Programs for Impaired Practitioners
SPONSOR(S): Healthcare Council and Holder
TIED BILLS: **IDEN./SIM. BILLS:** SB 2096

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Committee on Health Quality	9 Y, 0 N	Guy	Lowell
2) Healthcare Council	13 Y, 0 N, As CS	Guy	Gormley
3) Policy & Budget Council			
4)			
5)			

SUMMARY ANALYSIS

CS/HB 739 revises provisions relating to the impaired practitioner program within the Department of Health. The bill authorizes the Department of Health to contract with impaired practitioner program consultants to provide services to students enrolled in schools that provide training for allopathic and osteopathic physicians licensed under Chapters 458 and 459, F. S., if the school requests such services. The bill provides immunity to the schools from a civil action for the referral of a student to a consultant or for disciplinary actions that adversely affect the status of a student.

The bill grants sovereign immunity to an impaired practitioner consultant, its officers, employees, and persons acting at the direction of the consultant for the limited purpose of an emergency intervention, when the consultant is unable to perform the intervention, for actions taken within the scope of a contract with the Department of Health. The bill specifies contractual conditions that must exist in order for sovereign immunity to be granted.

This bill may implicate Article I, section 21 of the Florida Constitution, the right of access to the courts, by barring a civil recovery against advanced medical schools under specific circumstances.

The bill appears to have an insignificant negative fiscal impact on the Medical Quality Assurance Trust Fund (see fiscal analysis).

The bill provides for an effective date of July 1, 2007.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government – this bill will grant sovereign immunity to contractor consultants for actions taken within the scope of a contract with the Department of Health.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

Impaired Practitioner Programs

Healthcare professions are established within individual practice acts and are further regulated by Chapter 456, Florida Statutes, within the Department of Health ("department") in the Division of Medical Quality Assurance ("division"). Section 456.076, F.S., authorizes the department to contract with impaired practitioner consultants for services relating to intervention, evaluation, referral, and monitoring of impaired practitioners who have voluntarily agreed to treatment through an impaired practitioner program.[1] Impaired practitioner programs are available to licensed healthcare providers under Chapter 456, F.S., or other licensed professionals regulated by the division.

Consultants do not provide medical treatment, nor do they have the authority to render decisions relating to licensure of a particular practitioner. However, the consultant is required to make recommendations to the department regarding a practitioner patient's ability to practice.[2] Consultants are required by department rules to refer practitioner patients to department-approved treatment programs and providers. They have specified case management duties with regards to practitioner patient progress in a treatment program. Further, the consultant acts as the records custodian for all treatment information on the practitioner patients they are contracted to monitor. A typical contract between a consultant and an impaired practitioner under treatment is 5 years.

Currently, the department contracts with two groups for impaired practitioner consulting services: the Intervention Project for Nurses ("IPN") for nurses licensed under Chapter 464, F.S., and the Professionals Resource Network ("PRN") for other health care professionals, including allopathic and osteopathic physicians licensed under Chapters 458 and 459, F.S., respectively. According to the department, there are approximately 2,700 participants enrolled in the programs: 1,500 in the IPN and 1,200 in the PRN.

Sovereign Immunity

Sovereign immunity is the legal doctrine which provides that a government may not be sued for a claim without its consent. However, the federal government and most states have waived their immunity from suit in varying degrees in certain cases. Article X, section 13 of the Florida Constitution establishes that laws may be enacted in the statutes for suits to be brought against the state for its liabilities. Accordingly, s. 768.28(1), F.S., provides that the state "waives sovereign immunity for liability for torts, but only to the extent specified in this act."

Specifically, s. 768.28(5), F.S., provides that the state has limited its financial liability for a tort action by any one person to $100,000 or to $200,000 for additional claims and judgments arising from the same incident or occurrence. If a judgment is rendered by a court in excess of those amounts, the plaintiff may pursue a claim bill in the Legislature for the amount in excess of the statutory limit.

[1] Rules 64B31-10.10.001 and 64B31-10.002, F.A.C.
[2] Section 456.076(5)(a), F.S.

Section 768.28(9)(a) F.S., further provides that the exclusive remedy for injury or damage suffered as a result of an act, event, or omission of an officer, employee, or agent of the state is an action against the governmental entity, the head of such entity in his or her official capacity, or the constitutional officer of which the officer, employee, or agent is an employee, unless the act or omission was committed in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. In addition, an officer, employee, or agent of the state or any of its subdivisions may not be held personally liable or named as a defendant for an injury or damage if the act occurred in the scope of his or her employment unless the officer, employee, or agent acted in bad faith, with malicious purpose, or in a manner that exhibited a wanton and willful disregard of human rights, safety, or property. "Officer, employee or agent" is defined in s. 768.28(9), F.S., to include any health care provider providing services pursuant to s. 766.1115, F.S.,[3] any member of the Florida Health Services Corps, as defined in s. 381.0302, F.S., who provides uncompensated care to medically indigent persons referred by the department, and any public defender or his or her employee or agent, including among others, an assistant public defender and an investigator.

Among other things, the Bureau of State Liability Claims ("bureau") within the Department of Financial Services was established to provide general liability claims investigations and coverage through the State Risk Management Trust Fund as established in s. 284.30, F.S. The bureau provides protection against general liability claims and suits filed pursuant to Section 768.28, Florida Statutes.[4]

Effect of Proposed Changes

The bill requires all impaired practitioner program consultants to be a practitioner or recovered practitioner licensed under chapters 458, 459, or Part I of 464, or an entity that employs a medical director who is a practitioner or recovered practitioner licensed as an allopathic or osteopathic physician or nurse under chapters 458, 459 or part I of 464, F.S., respectively.

The bill authorizes the department to contract with impaired practitioner program consultants to provide services to students enrolled in schools that provide training for allopathic and osteopathic physicians licensed under Chapters 458 and 459, F.S., if the school requests such services. The bill provides civil immunity to the schools for the referral of a medical student to a consultant or for disciplinary actions that adversely affect the status of a student, provided the school adheres to due process procedures adopted by the applicable accreditation entities and does not act with intentional fraud.

The bill grants sovereign immunity to an impaired practitioner consultant, its officers, employees, and persons acting at the direction of the consultant for the limited purpose of an emergency intervention, when the consultant is unable to perform the intervention, for actions taken within the scope of a contract with the Department of Health. The bill specifies contractual conditions that must exist in order for sovereign immunity to be granted.

The bill requires the Department of Financial Services to defend the consultant, its officers, employees, and persons acting at the direction of the consultant for the limited purpose of an emergency intervention, when the consultant is unable to perform the intervention, from any legal action brought as a result of contracted program activities.

C. SECTION DIRECTORY:

Section 1. Amends s. 456.076, F.S., revising provisions relating to treatment for impaired practitioners.

Section 2. Provides an effective date of July 1, 2007.

[3] Otherwise known as the "Access to Health Care Act."
[4] http://www.fldfs.com/Risk/SLC/index.htm

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

Estimated Expenditures	1st Year	2nd Year	3rd Year
Medical Quality Assurance Trust Fund	$9,800	$9,800	$9,800

Currently, medical students are not required to pay fees that are collected by the Medical Quality Assurance (or MQA) Trust Fund until they are licensed. However, the MQA Trust Fund will pay for the consultant/vendor fees associated with providing treatment services to eligible students. As of February 2007, there were 4 medical students currently receiving treatment services provided by PRN.[5]

The number of medical doctors regulated by the department and under contract with PRN is approximately 1 percent. In 2003-2004, there are approximately 996 students enrolled in medical schools located in Florida,[6] excluding 1,336 students that are enrolled at Nova Southeastern University (NSU) and the University of Miami (UM), both of these schools already offer impairment programs to their students. If the assumption is made, similar to regulated medical doctors, approximately 1 percent of the medical student population would seek treatment services provided by PRN. This will increase enrollment in the PRN program by approximately 10 participants per year. The current contracted cost is approximately $980 per participant annually.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Approved treatment providers may experience an increase in demand for services with the addition of medical profession students in impaired practitioner programs.

Medical students who are found impaired are eligible to enter into a contract to receive services offered by the PRN program. Based on impairment contracts for licensed practitioners, a student may be required to enter into a contract for up to 5-years. While in the impairment program a medical student would be required to pay for all treatment services such as initial evaluations, urinalysis testing and ongoing psychotherapy. Initial evaluations can range from $300-$500 and up to $1000 if chronic pain evaluation is required. The average cost is $42 per urinalysis, the number per month varies depending

[5] *Impaired Practitioners Program of Florida: Professional Resource Network, Inc.,* Monthly Report prepared for the Department of Health (February 2007).

[6] *Medical Education Needs Analysis*, Council for Education Policy, Research and Improvement (CEPRI), November 2004.

upon the recovery process. The cost of four group therapy meetings per month can range from $50-$150 per month. If the impairment is found to be physical, then the cost may be nominal. All participants are required to have a primary care physician, but no visits are required. The PRN program offers a loan forgiveness option to eligible participants. All treatment services are paid directly to the provider or third party administrator and not through the PRN program.

D. FISCAL COMMENTS:

Currently, impaired practitioner consultants are not statutorily designated as agents of the department; rather, they are considered vendors/consultants. Generally, if a cause of action (litigation) is brought against a vendor it is currently the responsibility of the vendor/consultant to pay for all costs associated with defending any claim, suit, or proceeding.

The bill will require the Department of Financial Services to defend claims against a vendor/consultant, its officers, employees, and persons acting at the direction of the consultant for the limited purpose of an emergency intervention by making them agents of the department. The potential fiscal impact is indeterminate. The department would be liable for a maximum of $200,000 per incident unless the Legislature approves a claims bill for the incident. The department has stated that the MQA Trust Fund would have to reimburse the Department of Financial Services for all costs associated with defending any claim, suit, or proceeding against an impaired practitioner consultant. The MQA Trust Fund is funded by fees collected from all licensed practitioners under chapter 456, F.S.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or take action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that municipalities have to raise revenues.

2. Other:

This bill may implicate Article I, section 21 of the Florida Constitution, which states that the courts "shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay." The test for ensuring the right of access to the courts was declared in *Kluger v. White*, 281 So.2d 1 (Fla. 1973), in which the Florida Supreme Court held that the Legislature is without power to abolish or otherwise restrict a statutory law right that predated the adoption of the constitution or a common law right without providing a reasonable alternative remedy, unless there is a showing of an overpowering public necessity to limit or abolish such right and no alternative remedy of meeting such public necessity exists.

The Florida Supreme Court refined the *Kluger* test in *Smith v. Department of Ins.*, 507 So.2d 1080 (Fla. 1986). There, comprehensive tort reform legislation capping non-economic damages at $450,000 was challenged on the basis that it denied claimants access to the courts. In that case, the Court noted the *Kluger* test requires either (1) providing a reasonable alternative remedy or commensurate benefit, or (2) a legislative showing of overpowering public necessity for the abolishment of the right *and* no alternative method of meeting such public necessity. The Court noted that the right to sue and recover non-economic damages of any amount existed at the time the Florida Constitution was adopted. Consequently, the Court found the cap on non-economic damages unconstitutional as the Legislature did not provide an alternative remedy or commensurate benefit and the parties did not assert the existence of an overpowering public necessity..

B. RULE-MAKING AUTHORITY:

No additional rule-making authority is required as a result of this bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

It appears that the bill may be overbroad with respect to the extension of sovereign immunity to impaired practitioner consultants' officers, employees, and persons acting at the direction of the consultant for the limited purpose of an emergency intervention, when the consultant is unable to perform the intervention. Extension of sovereign immunity to this degree places the state at risk for the actions of individuals that the state does not necessarily have control over, such as persons other than a contracted consultant performing emergency interventions.

D. STATEMENT OF THE SPONSOR

No statement submitted.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

On March 20, 2007, the Health Quality Committee adopted one amendment to the bill. The amendment clarifies that the department is authorized, rather than required, to contract with a consultant for impaired practitioner services for students enrolled in schools for licensure under Chapter 456, F.S. The amendment provides immunity to the school from civil action for the referral of a student to a consultant. The amendment narrows the scope of sovereign immunity to the consultant, its officers, and employees and specifies contractual conditions under which sovereign immunity is granted. The amendment clarifies that the Department of Financial Services, not the Department of Legal Affairs, will defend any claims against the consultant, its officers and employees while acting under the scope of a contract with the department.

The bill was reported favorably with a Recommended Council Substitute.

On April 4, 2007, the Healthcare Council adopted five amendments to the bill. Several amendments were adopted that revise provisions relating to treatment of students enrolled in schools for health care professions listed in Chapter 456, Florida Statutes: The amendments:

- Narrow the department's authority to contract with a consultant to provide services to students enrolled for physician licensure under Chapters 458 or 459, F.S.
- Narrow the civil immunity to schools whose students are enrolled for physician licensure under Chapters 458 or 459, F.S.
- Limit civil immunity for schools who refer students for treatment to schools that adhere to due process procedures adopted by the applicable accreditation entities.

In addition, one amendment was adopted that extends sovereign immunity to persons acting at the direction of the consultant for the limited purpose of an emergency intervention, when the consultant is unable to perform the intervention.

The bill was reported favorably as a Council Substitute.