



# 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.<sup>1</sup> 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.<sup>2</sup> 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.

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

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<sup>1</sup> Rules 64B31-10.10.001 and 64B31-10.002, F.A.C.

<sup>2</sup> Section 456.076(5)(a), F.S.

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.,<sup>3</sup> 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.<sup>4</sup>

### 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 requires the department to contract with impaired practitioner program consultants to provide services to students enrolled in schools that provide training for professions licensed under Chapter 456, F.S.

The bill grants sovereign immunity for actions taken by an impaired practitioner consultant, its officers, employees, and agents, within the scope of a contract with the department. The bill directs the Department of Legal Affairs to defend the consultant, its officers, employees or agents from any legal action brought as a result of contracted program activities.

### C. SECTION DIRECTORY:

Section 1. Amends s. 456.076, F.S., requiring impaired practitioner programs for students and extending sovereign immunity for impaired practitioner program consultants, their officers, employees and agents, for actions performed under contract with the department.

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

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

None.

#### 2. Expenditures:

The department estimates that approximately \$25,000 will be spent per year for the first two years in marketing efforts and additional programmatic startup costs. The start-up costs of the programs

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<sup>3</sup> Otherwise known as the "Access to Health Care Act."

<sup>4</sup> <http://www.fldfs.com/Risk/SLC/index.htm>

may include consultant expenses, staff training, meeting and travel expenses, additional equipment, and printing and postage costs. Costs are allocated in the following manner: 25% to OPS; 75% to Contracted Services.

According to the department, contracts between the department and impaired practitioner consultants in FY 2006-2007 total \$2,644,311. This amount is paid out of the Medical Quality Assurance Trust Fund which is funded by the fees of all licensed practitioners under chapter 456, F.S. Given the current annual contracted cost of the program, the approximate per participant cost is \$980 annually.

Estimated expenditures by the department are based on an increased enrollment of 5% or 135 participants per year.

<b>Estimated Expenditures</b>	<b>1st Year</b>	<b>2nd Year</b> (Annualized/Recurr.)
<b>Salaries</b>	-	-
<b>Other Personal Services</b>	\$ 39,325	\$ 39,325
<b>Contracted Services</b>	\$ 117,975	\$ 117,975
<b>Operating Capital Outlay</b>		
<b>Total Estimated Expenditures</b>	<b>\$ 157,300</b>	<b>\$ 157,300</b>

**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.

**D. FISCAL COMMENTS:**

According to the department, the fiscal impact of this bill is ultimately indeterminate as it is not possible to predict how many students would use the services of the impaired practitioners program. In addition, according to the department, the increase in costs related to the defense of impaired practitioner consultants is unknown, but could be significant.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to affect municipal or county government.

2. Other:

None.

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 agents. 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 agents of the consultant).

The bill requires the Department of Legal Affairs to defend any legal actions brought against an impaired practitioner consultant, or its officers, employees or agents, as a result of actions taken while acting under a contract with the department. This may conflict with current law which allows the Department of Financial Services to "assign or reassign the claim to counsel."<sup>5</sup>

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.

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<sup>5</sup> Section 284.385, F.S.