

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 393 Treatment Programs for Impaired Practitioners

**SPONSOR(S):** Health & Human Services Quality Subcommittee; Davis

**TIED BILLS:** **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health & Human Services Quality Subcommittee	15 Y, 0 N, As CS	Batchelor	Calamas
2) Health Care Appropriations Subcommittee			
3) Health & Human Services Committee			

### SUMMARY ANALYSIS

CS/HB 393 amends s. 20.165, F.S., relating to the Department of Business and Professional Regulation (DBPR). The bill provides that DBPR may require a person licensed or applying for a license from DBPR to be governed by the provisions of s. 456.076, F.S., as if the person was under the jurisdiction of the Division of Medical Quality Assurance at the Department of Health (DOH), for the purposes of the impaired practitioner program. The bill authorizes DBPR to exercise the same powers granted to DOH related to the professions under its purview.

The bill amends s. 456.076, F.S., relating to treatment programs for impaired practitioners. Specifically, the bill expands on the definition of a "health care practitioner" to include a person licensed under medical transportation services (part III of Chapter 401) and radiological personnel (part IV of Chapter 468). The bill expands persons eligible for the impaired practitioner program to include students enrolled in any school for licensure to be either a health care practitioner under ch. 456 or a veterinarian under ch. 474, if the school makes a request for services.

The bill expands s. 456.074, F.S., specifying that an emergency suspension order is necessary if a licensed health care practitioner is not progressing in a treatment program or if the health care practitioner's impairment constitutes an immediate, serious danger to public health, safety, or welfare. The bill provides that the suspension shall be reviewed within 10 business days by the State Surgeon General and, if warranted, the emergency suspension order shall be issued.

The bill provides greater specificity to the current law requiring the Department of Financial Services to defend impaired practitioner consultants against all lawsuits. The bill expressly includes proceedings for injunctive, affirmative or declaratory relief.

The bill amends s. 456.0635, F.S., allowing persons that were subject to addiction or impairment at the time of a crime, regardless of the disposition of any charges resulting from the crime, be exempt from restrictions on obtaining or renewing a license if they entered and completed, or are enrolled in, an impaired practitioner program.

The Department of Financial Services estimates a recurring fiscal impact for increased court cases of \$1.25 million in the Risk Management Trust Fund.

The bill provides an effective date of July 1, 2011.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Background**

##### *Healthcare Professions*

DOH regulates all health care professions, and each profession has an individual practice act that licensees are required to abide by. Ch. 456 provides general provisions for all health care practitioners.

##### *The Impaired Practitioner Program – Department of Health*

The impaired practitioner treatment program was created to help rehabilitate various health care practitioners regulated by the Division of Medical Quality Assurance (division), within the DOH.<sup>1</sup> Practitioners who are impaired as a result of drugs or alcohol, abuse, or because of mental or physical conditions, which could affect their ability to practice with skill and safety are eligible for the program.<sup>2</sup> By entering and successfully completing the impaired practitioner treatment program, a practitioner may avoid formal disciplinary action, if the only violation of the licensing statute under which the practitioner is regulated is the impairment.<sup>3</sup> If the practitioner is unable to complete the program, DOH has authority to issue an emergency order suspending or restricting the license of the health care practitioner.<sup>4</sup>

DOH is authorized<sup>5</sup> 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>6</sup> There are two impaired practitioner programs, the Intervention Project for Nurses (IPN)<sup>7</sup> and the Professionals Resource Network (PRN) for other health care professions.<sup>8</sup> Practitioners usually enter a PRN or IPN program based on a complaint and subsequent finding of impairment.<sup>9</sup>

Once in the program, the licensee is monitored by an impairment consultant. The consultant is required to monitor the licensee's participation and ensure compliance.<sup>10</sup> 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 DOH regarding a practitioner patient's ability to practice.<sup>11</sup> PRN and IPN consultants provide services in intervention, evaluation, referral and case management of licensed practitioners who may be suffering from mental or physical disability or abuse of chemical substances with dependency liability.<sup>12</sup> Consultants are required by department rules to refer practitioner patients to department-approved treatment programs and providers.<sup>13</sup>

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<sup>1</sup> Section 456.076, (1), F.S.

<sup>2</sup> Section 456.076 (3)(a)

<sup>3</sup> Section 456.076(3)(a), F.S.

<sup>4</sup> Section 456.074, F.S.

<sup>5</sup> Section 456.076, F.S.

<sup>6</sup> Rules 64B31-10.10.001 and 64B31-10.002, F.A.C.

<sup>7</sup> Department of Health Bill Analysis, Economic Statement and Fiscal Note HB 393 (2011).

<sup>8</sup> Department of Health Bill Analysis, Economic Statement and Fiscal Note HB 393 (2011).

<sup>9</sup> Section 456.076(4), F.S.

<sup>10</sup> Department of Health Contract with PRN 10/2008 (on file with committee staff).

<sup>11</sup> Section 456.076(5)(a), F.S.

<sup>12</sup> Department of Health Contract with PRN 10/2008 (on file with committee staff).

<sup>13</sup> Rules 64B31-10.10.001 F.A.C

Currently, DOH licenses over 40 health care professions<sup>14</sup> and provides impaired practitioner services to the following:<sup>15</sup>

Medical Doctors	Chiropractic Physicians
Physician Assistants	Clinical Social Workers
Osteopathic Physicians	Marriage and Family Therapists
Pharmacists	Mental Health Counselors
Podiatric Physicians	Optometrists
Psychologists	Nursing Home Administrators
Dentists	Medical Physicists
Opticians	Dieticians
Occupational Therapists	Nutritionists
Physical Therapists	Respiratory Therapists
Electrologists	Midwives
Acupuncturists	Speech Language Pathologists
Audiologists	Clinical Laboratory Personnel
Massage Therapists	Athletic Trainers
Orthotists	Orthotists
Prosthetists	Hearing Aid Specialists
Radiologic Technologists,	Pharmacy Technicians
Anesthesia Assistants	

According to DOH there are approximately 2,853 participants enrolled in the programs: 1,784 in the IPN and 1,069 in the PRN.<sup>16</sup>

*Impaired Practitioner Program - Department of Business and Professional Regulation*

The Board of Veterinary Medicine and the Board of Pilot Commissioners, within the Department of Business and Professional Regulation (DBPR), provide impaired practitioner treatment programs for licensees. Section 474.221, F.S., provides that licensed veterinarians shall be governed by the treatment of impaired practitioner provisions as if they were under the jurisdiction of the Division of Medical Quality Assurance at DOH. Currently, DBPR has a contract with PRN to provide consultant services for impaired veterinarians. The contract provides for compensation of \$48,132 per year to PRN. During Fiscal Year 2009-2010, an average of 29 licensees participated in the program.<sup>17</sup>

*Department of Financial Services Sovereign Immunity*

DFS and the Division of Risk Management are required to defend any claim, suit, action or proceeding against an impaired practitioner consultant acting as an agent of DOH, per s. 456.076(7)(a), F.S. Current law requires consultants to indemnify the state for any liabilities incurred up to the sovereign immunity limits.<sup>18</sup>

*Confidentiality*

DOH rule requires that consultants within impaired practitioner programs serve as the official records custodians of the licensees they monitor.<sup>19</sup> An approved treatment provider must provide information regarding the impairment of a licensee and the licensee's participation in a treatment program to a

<sup>14</sup> Department of Health, Medical Quality Assurance, Annual Report, July 2009-June 2010.

<http://www.doh.state.fl.us/Mqa/reports.htm> (last visited on 3/31/2011)

<sup>15</sup> Department of Health Contract with PRN 10/2008 (on file with committee staff).

<sup>16</sup> Intervention Project for Nurses Monthly Report February 2011 & Professionals Resource Network Monthly Report for February 2011.

<sup>17</sup> DBPR Office of Legislative Affairs 2011 Legislative Analysis Form SB 1742 (2011).

<sup>18</sup> Section 768.28, F.S.

<sup>19</sup> Rules 64B31-10.10.004, F.A.C.

consultant on request. The information obtained by the consultant is confidential and exempt from public records requirements.<sup>20</sup> If a treatment provider fails to provide such information to the consultant, the treatment provider may no longer provide services under the program.<sup>21</sup> Recently, there was litigation in the Sixth Circuit, in which a medical doctor sued PRN for the production of the investigative file relation to the practitioner's participation in a treatment program.<sup>22</sup> The court held that because there was not a disciplinary proceeding by the board against the practitioner, the release of information was prohibited and the claim was dismissed with prejudice in October, 2010.<sup>23</sup>

### **Effect of Proposed Changes**

The bill amends s. 456.076, F.S., relating to treatment programs for impaired practitioners. Specifically, the bill expands on the definition of a "health care practitioner" to include a person licensed under medical transportation services (part III of Chapter 401)<sup>24</sup> and radiological personnel (part IV of Chapter 468).<sup>25</sup> The expansion of this definition will make all of ch. 456 applicable to all licensees, not just the impaired practitioner program. For example, ch. 456 contains provisions relating to examinations for licensure,<sup>26</sup> licensure fees and collection methods,<sup>27</sup> prosecution of criminal violations,<sup>28</sup> and disciplinary guidelines.<sup>29</sup> Some of the provisions of ch. 456, may not be consistent with the practice acts for emergency medical personnel<sup>30</sup> or radiological personnel<sup>31</sup>

This section also clarifies that a licensee that provides consultant services for DOH's impaired practitioner program does not need to be registered as a substance abuse or mental health provider pursuant to chapters 394, 395, or 397, as consultants do not provide medical treatment.

The bill provides that any student enrolled in any school for licensure to be either a health care practitioner under ch. 456 or a veterinarian under ch. 474 be eligible for the impaired practitioner program if the school makes a request for services. All complaint information that is received by DOH relating to the impairment of a student that is preparing for licensure must be reported to the impaired practitioner consultant.

Further, the bill expands s. 456.074, F.S., specifying that an emergency suspension order is necessary if a licensed health care practitioner is not progressing in a treatment program or if the health care practitioner's impairment constitutes an immediate, serious danger to public health, safety, or welfare. The bill provides that the suspension shall be reviewed within 10 business days by the State Surgeon General and, if warranted, the emergency suspension order shall be issued.

The bill clarifies that impaired practitioner consultants shall serve as record custodians for any licensee they monitor, and any records they maintain shall not be shared with the impaired licensee or a designee unless a disciplinary proceeding is pending.

The bill provides greater specificity to the current law requiring the Department of Financial Services to defend impaired practitioner consultants against all lawsuits. The bill expressly includes proceedings for injunctive, affirmative or declaratory relief.

The bill amends s. 456.0635, F.S., allowing persons that were subject to addiction or impairment at the time of a crime in which the person was either convicted, entered a plea of not guilty, or plead nolo

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<sup>20</sup> Section 456.076(5)(a), F.S.

<sup>21</sup> *Id*

<sup>22</sup> *Doe, MD v. Rivernbark*, 10-6495-CI-21 (6th Cir., Oct. 2010)

<sup>23</sup> *Id.*

<sup>24</sup> See Section 401.23, F.S., (ambulance drivers, emergency medical technicians, paramedics).

<sup>25</sup> See Section 468.301, F.S., (basic X-ray machine operator, general radiographer, radiological technologist, radiologist, radiologist assistant).

<sup>26</sup> Section 456.017, F.S.

<sup>27</sup> Section 456.025, F.S.

<sup>28</sup> Section 456.066, F.S.

<sup>29</sup> Section 456.079, F.S.

<sup>30</sup> Section 401.25, F.S.

<sup>31</sup> Section 468.304, F.S.

contendere to, regardless of adjudication, a felony under ch. 893, F.S., to be exempt from restrictions on obtaining a license, or renewing a license if they entered and completed or are enrolled in an impaired practitioner program. The bill also provides that an exemption from disqualification does not prohibit or permit DOH from taking action against a license, certificate or registration for disciplinary purposes.

The bill amends s. 20.165, F.S., providing that DBPR may require a person that is licensed or applying for a license from DBPR be governed by the provisions of s. 456.076, F.S., as if the person was under the jurisdiction of the Division of Medical Quality Assurance for the purposes of the impaired practitioner program. The bill does not specify a specific type of license that a person must hold or seek in order to be eligible for the impaired practitioner program. Further, the bill permits DBPR to use its discretion in determining which persons falling under its licensing purview are eligible for the impaired practitioner program.<sup>32</sup>

#### B. SECTION DIRECTORY:

**Section 1:** Amends s. 456.076, F.S., relating to treatment programs for impaired practitioners

**Section 2:** Amends s. 456.0635, F.S., relating to Medicaid fraud, disqualification for license, certificate, or registration.

**Section 3:** Provides an effective date of July 1, 2011.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

None.

#### 2. Expenditures:

DFS would be required to defend lawsuits against impaired practitioner consultants seeking injunctive, affirmative, or declaratory relief. DFS estimates that an increase of 50 cases per year could be expected at \$25,000 per case, or \$1.25 million per year.<sup>33</sup> DFS estimates that the funds will be needed for defense attorney fees and the actual cost of trying the case in court.<sup>34</sup> DFS has existing staff to absorb the increase in workload.<sup>35</sup>

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

None.

#### 2. Expenditures:

None.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

### D. FISCAL COMMENTS:

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<sup>32</sup> See s. 20.165(4)(a), F.S. (Board of Architecture and Interior Design, Florida Board of Auctioneers, Barber's Board, Florida Building Code Administrators and Inspectors Board, Construction Industry Licensing Board, Board of Cosmetology, Electrical Contractor's Licensing Board, Board of Employee Leasing Companies, Board of Landscape Architecture, Board of Pilot Commissioners, Board of Professional Engineers, Board of Professional Geologists, Board of Veterinary Medicine, Home Inspection Services Licensing Program, Mold-related Services Licensing Program.)

<sup>33</sup> Department of Financial Services Bill Analysis HB 393 (2011)

<sup>34</sup> Email from Ashley Mayer, DFS, HB 393, 4/4/2011, on file with committee staff.

<sup>35</sup> *Id*

None.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

##### 2. Other:

The bill may implicate Article II, Section 36, of the Florida Constitution, as an unlawful delegation of legislative authority. This section of the Florida Constitution “prohibits the delegation of legislative powers absent ascertainable minimal standards and guidelines.”<sup>36</sup> Two exceptions to this non-delegation doctrine are generally recognized where “it is impracticable to lay down a definite comprehensive rule, (1) when the subject of the statute relates to licensing and the determination of the fitness of the applicant to be licensed, and (2) when the statute regulates businesses operated as a privilege rather than as a right which are potentially dangerous to the public.”<sup>37</sup>

The bill provides that DBPR may require a person that is licensed or applying for a license from DBPR be governed by the provisions of s. 456.076, F.S., as if the person was under the jurisdiction of the Division of Medical Quality Assurance, within DOH, for the purposes of the impaired practitioner program. The bill does not specify a specific type of license that a person must hold or seek in order to be eligible for the impaired practitioner program, and gives full discretion to DBPR to determine which licensure categories, and individuals, will be subject to s. 456.076, F.S. The bill provides no guidance to DBPR to make this decision. It is unclear whether the fitness or privilege exceptions to the non-delegation rule apply.

#### B. RULE-MAKING AUTHORITY:

None.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On April 6, 2011, the Health and Human Services Quality Subcommittee adopted one amendment to House Bill 393. The amendment provides that:

- DBPR may require a person licensed or applying for a license from DBPR to be governed by the provisions of s. 456.076, F.S., as if the person was under the jurisdiction of the Division of Medical Quality Assurance at the Department of Health (DOH), for the purposes of the impaired practitioner program.
- DBPR may exercise the same powers granted to DOH related to the professions under its purview;
- The definition of a “health care practitioner” in ch. 456 includes a person licensed under medical transportation services (part III of Chapter 401) and Radiological personnel (part IV of Chapter 468);
- An emergency suspension order is necessary if a licensed health care practitioner is not progressing in a treatment program or if the health care practitioner’s impairment constitutes an immediate, serious danger to public health, safety, or welfare. The bill provides that the suspension shall be reviewed within 10 business days by the State Surgeon General and, if warranted, the emergency suspension order shall be issued.

The bill was reported favorably as a Committee Substitute. This analysis reflects the Committee Substitute.

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<sup>36</sup> Dept. of Business Reg., Div. of Alcoholic Beverages and Tobacco v. Jones, 474 So.2d 359, 361 (Fla. 1<sup>st</sup> DCA 1985)

<sup>37</sup> FL Waterworks Assn. v. FL Public Service Comm’n, 473 So.2d 231, 245 (Fla. 1<sup>st</sup> DCA)