

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Health Regulation Committee

BILL: SB 594

INTRODUCER: Senator Storms

SUBJECT: Medical Care

DATE: January 22, 2012

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Callaghan	Stovall	HR	Pre-meeting
2.	_____	_____	GO	_____
3.	_____	_____	BC	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill amends s. 395.3025, F.S., to authorize disclosure of patient records without the consent of the patient or his or her legal representative to the Department of Health (DOH), rather than the Agency for Health Care (AHCA), upon issuance of a subpoena to investigate, prosecute, or appeal disciplinary proceedings against a health care practitioner. The fee amount authorized to be charged to the DOH for copies of patient records is revised.

This bill amends s. 456.057, F.S., to authorize the DOH to obtain patient records pursuant to a subpoena without attempting to obtain written authorization from the patient, but only if the DOH and the probable cause panel of the appropriate board find reasonable cause to believe that obtaining authorization from the patient would jeopardize an investigation.

This bill amends s. 456.074, F.S., to authorize the DOH to issue an emergency order suspending or restricting the license of a health care practitioner who has committed, or is under investigation or prosecution for, an act that the practitioner could be disciplined for under the applicable practice act or ch. 456, F.S.

This bill substantially amends the following sections of the Florida Statutes: 395.3025, 456.057, and 456.074.

II. Present Situation:

The Department of Health

The DOH, Division of Medical Quality Assurance (MQA), regulates health care practitioners to protect and promote the health of residents and visitors in Florida. Currently, the MQA supports licensure and disciplinary activities for 43 health care professions and 37 types of facilities.¹ The Bureau of Health Care Practitioner Regulation (HCPR), under the MQA, is comprised of a bureau chief and eight offices under the supervision of executive directors. Each of the eight offices represent a different health care profession, including:

- Nursing and Certified Nursing Assistants.
- Chiropractic Medicine, Optometry, Podiatric Medicine, Clinical Laboratory Personnel, Orthotists and Prosthetists, Nursing Home Administrators, and Medical Physicists.
- Certified Master Social Workers, Clinical Social Workers, Marriage & Family Therapy and Mental Health Counseling, Dentists, Dental Hygienists and Dental Laboratories, Opticianry, Hearing Aid Specialists, and Athletic Trainers.
- EMTs, Paramedics, Radiologic Technologists (Certification Unit).
- Electrolysis, Physical Therapy, Dietetics and Nutrition, Occupational Therapy, Respiratory Care, Psychology, and School Psychology.
- Acupuncture, Osteopathic Medicine, Midwifery, Speech-Language Pathology and Audiology, and Massage Therapy.
- Medicine, Physician Assistants, Naturopaths, Anesthesiologist Assistants, Office Surgery Registration, and Pain Management Clinic Registration.
- Pharmacists and Pharmacies.²

The HCPR coordinates with 22 boards and 6 councils to regulate health care professions and facilities.³

A board is a statutorily created entity that is authorized to exercise regulatory or rulemaking functions within the MQA.⁴ Board members share authority with the DOH to develop rules for licensure, establish exams, set fees, establish guidelines for discipline, and reduce the unlicensed practice of health care professions.⁵ Boards are also responsible for approving or denying applications for licensure and making disciplinary decisions on whether a practitioner practices within the authority of their practice act.⁶ The range of disciplinary actions taken by a board includes citations, suspensions, reprimands, probations, and revocations.⁷

¹ Florida Dept. of Health, Division of Medical Quality Assurance, *About MQA*, available at: <http://www.doh.state.fl.us/MQA/wearemqa.htm> (Last visited on January 23, 2012). See also Florida Dept. of Health, Division of Medical Quality Assurance, *2010-2011 Annual Report*, pg. 10, available at: <http://www.doh.state.fl.us/MQA/Publications/10-11mqa-ara.pdf> (Last visited on January 23, 2012).

² Florida Dept. of Health, Division of Medical Quality Assurance, *Bureau of Health Care Practitioner Regulation*, available at: http://www.doh.state.fl.us/MQA/info_hcpr.pdf (Last visited on January 23, 2012).

³ *Id.*

⁴ Section 456.001(1), F.S.

⁵ *Supra* fn. 2.

⁶ Practice acts refer to the legal authority in state statute that grants a profession the authority to provide services to the public.

⁷ Florida Dept. of Health, Division of Medical Quality Assurance, *2010-2011 Annual Report*, pg. 7, available at: <http://www.doh.state.fl.us/MQA/Publications/10-11mqa-ara.pdf> (Last visited on January 23, 2012).

Section 456.072(2), F.S., provides a board with the authority to take disciplinary action against a licensee. These actions include:

- Refusal to certify, or to certify with restrictions, an application for a license;
- Suspension or permanent revocation of a license;
- Restriction of a practice or a license;
- Imposition of an administrative fine not to exceed \$10,000 per offense, unless the licensee commits fraud for which the board must impose a fine of \$10,000 per offense;
- Issuance of a reprimand or letter of concern;
- Imposition of probationary conditions on the licensee;
- Corrective action.
- Imposition of an administrative fine for a violation pertaining to patient rights;
- Refund of fees billed and collected from the patient or a third party on behalf of the patient; and
- Remedial education.

The board can take action for any legally sufficient, written and signed complaint that is filed before it.⁸ Section 456.073(1), F.S., provides that a complaint is legally sufficient if it contains the ultimate facts that show a violation of ch. 456, F.S., the relevant practice act, or any rule adopted by the DOH or the relevant board. The DOH also has the authority to investigate a complaint when the original complainant withdraws the complaint or when the complainant is anonymous if the alleged violation is substantial. The DOH may initiate an investigation if it has reasonable cause to believe that a licensee has violated a Florida Statute, or a rule of either the board or the DOH.⁹

The subject of an investigation has 20 days to respond in writing to the complaint or document after service.¹⁰ Whatever is submitted is considered by the probable cause panel of the respective board.¹¹ The right to respond does not preclude the State Surgeon General from issuing a summary emergency order, if it is necessary to protect the public.¹²

The DOH has 6 months to complete an investigation and submit it to the appropriate probable cause panel.¹³ A determination as to probable cause is made by a majority vote of the panel.¹⁴ The panel may request additional investigative information from the DOH, and this must be done within 15 days of receiving the investigative report from the department or agency.¹⁵ The panel has 30 days from receiving the final investigative report to make a determination of probable cause.¹⁶ However, the State Surgeon General may grant extensions of these time limits.¹⁷ If the

⁸ Section 456.073(1), F.S.

⁹ Section 456.073, F.S. *See also* s. 456.074(2), F.S.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Section 456.073(2), F.S.

¹⁴ Section 456.073(4), F.S.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

panel does not make a determination within the statutory timeframe, the DOH is directed to do so within 10 days of the expiration of the time limit.¹⁸

The DOH is directed to follow the determination of the probable cause panel, and if probable cause exists, the DOH is directed to file a formal complaint against the subject, and prosecute pursuant to ch. 120, F.S. If the DOH decides not to prosecute, it may refer the issue back to the appropriate board, which may then choose to file a formal complaint and prosecute pursuant to ch. 120, F.S. Referrals to the Division of Administrative Hearings, must occur within 1 year of filing the complaint.¹⁹ Chapter 120, F.S., provides the practitioner with the right to appeal the action.

The DOH is further directed to notify the person who filed the complaint, and if probable cause is not found, provide them with an opportunity 60 days from the determination, to bring additional information to the DOH.²⁰

Emergency Orders

Section 120.60(6), F.S., provides the DOH with broad authority to take disciplinary action in the case of immediate serious danger to the public health, safety, or welfare. A license may be suspended, restricted, or limited on an emergency basis if:

- The procedure provides at least the same procedural protection as is given by other statutes, the state Constitution, or the U.S. Constitution;
- The action is necessary to protect the public interest under the emergency procedure;
- There are specific facts that outline the finding of an immediate danger to public health, safety, or welfare and reasons for concluding the process was fair under the circumstances.

Section 456.074, F.S., provides the DOH with separate authority from s. 120.60(6), F.S., to issue an emergency order suspending the license of certain health care practitioners under very specific circumstances.

An emergency order *must* be issued when a medical doctor, doctor of osteopathy, chiropractor, podiatrist, naturopath, optometrist, nurse, pharmacist, dentist or hypnotist pleads guilty to, is convicted or found guilty of, or who enters a plea of nolo contendere to, regardless of adjudication to:

- A felony under:
 - ch. 409, F.S., relating to social and economic assistance;
 - ch. 817, F.S., relating to fraudulent practices;
 - ch. 893, F.S., relating to drug abuse prevention and control;
 - 21 U.S.C. ss. 801-970, relating to controlled substances; or
 - 42 U.S.C. ss. 1395-1396, relating to Medicaid and Medicare.
- A misdemeanor or felony under:
 - 18 U.S.C. s. 669, ss. 285-287, s. 371, s. 1001, s. 1035, s. 1341, s. 1343, s. 1347, s. 1349, or s. 1518, relating to specified crimes; or
 - 42 U.S.C. ss 1320a-7b, relating to Medicaid.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Section 456.073(9)(c), F.S.

The DOH has discretionary authority pursuant s. 456.074, F.S., to issue an emergency order suspending or restricting the license of certain health care practitioners when:

- The board has found a physician or osteopathic physician in violation of s. 458.331(1)(t), F.S., or s. 459.015(1)(x), F.S., relating to medical malpractice, in regard to treatment of three or more patients and there is probable cause to find an additional violation of these sections.
- A healthcare practitioner, as defined in s. 456.001(4), F.S., tests positive for a pre-employment or employer-ordered drug test, when the practitioner does not have a lawful prescription and a legitimate medical reason for using such a drug.

The DOH must suspend the license of a health care practitioner who has defaulted on state or federally guaranteed student loans after 45 days of providing notice to a practitioner of the impending suspension, unless the practitioner provides proof within the 45 days that new payment terms have been agreed upon by all parties to the loan.²¹

While Florida law does not specify the interaction between these two sections, courts have interpreted s. 456.074, F.S., to operate independently of s. 120.60(6), F.S. Courts appear to interpret s. 456.074(1), F.S., in a way that is analogous to strict liability, such that the due process requirements of s. 120.60(6), F.S., including proof of immediate danger to public safety, do not apply. Courts that have interpreted that s. 456.074(1), F.S., mandates an emergency suspension and leaves the DOH with no discretion.²² In contrast, s. 456.074(3), F.S., provides the DOH with discretion as to an emergency suspension.

Following the issuance of an emergency suspension, the person has an immediate right of appeal.²³ An emergency suspension order is effective until it is overturned by an appellate court, vacated by the State Surgeon General or superseded by a final order. The DOH is required to initiate non-emergency administrative proceedings within 20 days of the emergency suspension.²⁴ The DOH issued 326 emergency suspensions in fiscal year 2010-11.²⁵

Access to Patient Records without Consent

In Florida, patients have a constitutional right to privacy under Article I, Section 23 of the State Constitution. The Florida Supreme court has recognized patients' right to privacy of their medical records. However, the right to privacy of medical records must be balanced with and yields to any compelling state interest.²⁶ Section 395.3025(4), F.S., relating to patient records in hospitals, and s. 456.057, F.S., relating to patient records held by health care practitioners, authorize the release of patient records without consent of the person to whom they pertain under certain circumstances.

²¹ Section 456.074, F.S.

²² See *Mendelsohn v. Department of Health*, 68 So.3d 965 (Fla 1st DCA, 2011) (The DOH could not issue emergency suspension because petitioner did not commit enumerated violation of s. 456.074(1), F.S.); *Bethencourt-Miranda v. Department of Health*, 910 So.2d 927, (Fla 1st DCA, 2005) (No findings were necessary for an emergency suspension for violation of 21 U.S.C. s. 846).

²³ Section 120.569(2)(n), F.S.

²⁴ Rule 28-106.501, F.A.C.

²⁵ Florida Department of Health analysis for SB 594 (2012). On file with Senate Committee on Health Regulation.

²⁶ *State v. Johnson*, 814 So.2d 390 (Fla. 2002).

III. Effect of Proposed Changes:

Section 1 amends s. 395.3025, F.S., to authorize the DOH, rather than the AHCA, to obtain patient records without consent of the patient or his or her legal representative, upon the issuance of a subpoena if for the purpose of investigating, prosecuting, or appealing a disciplinary proceeding. This change reflects the current statutory authority for the DOH to regulate health care practitioners.

This section revises the fee amount to be charged to the department for requests for copies of patient records. The facility providing the copies may charge a fee no to exceed \$1 per page, including sales tax and postage, and a fee not to exceed \$2 for nonpaper records. Currently the AHCA is charged no more than the facility's actual copying costs, including reasonable staff time.

This section also makes conforming changes, to require the existing public records exemption for the copied patient records to apply to the records obtained by the DOH and require the DOH make such records available to a practitioner when he or she makes a written request for the copied records.

Section 2 amends s. 456.057, F.S., to authorize the DOH to obtain patient records pursuant to a subpoena without attempting to obtain written authorization from the patient, if the probable cause panel of the appropriate board finds reasonable cause to believe that obtaining authorization from the patient would jeopardize an investigation.

Section 3 amends s. 456.074, F.S., to authorize the DOH to issue an emergency order suspending or restricting the license of any health care practitioner as defined in s. 456.001(4), F.S., who has committed, or is under investigation for, any act that would constitute the basis for discipline under the applicable practice act or ch. 456, F.S. Section 456.001(4), F.S., defines "health care practitioner" as any person licensed under:

- Chapter 457 (acupuncture);
- Chapter 458 (medical practice);
- Chapter 459 (osteopathic medicine);
- Chapter 460 (chiropractic medicine);
- Chapter 461 (podiatric medicine);
- Chapter 462 (naturopathy);
- Chapter 463 (optometry);
- Chapter 464 (nursing);
- Chapter 465 (pharmacy);
- Chapter 466 (dentistry);
- Chapter 467 (midwifery);
- Part I, part II, part III, part V, part X, part XIII, or part XIV of chapter 468 (speech-language pathology and audiology; nursing home administration; occupational therapy; respiratory therapy; dietetics and nutrition practice; athletic trainers; and orthotics, prosthetics, and pedorthics);
- Chapter 478 (electrolysis);
- Chapter 480 (massage practice);

- Part III or part IV of chapter 483 (clinical laboratory personnel and medical physicists);
- Chapter 484 (dispensing of optical devices and hearing aids);
- Chapter 486 (physical therapy practice);
- Chapter 490 (psychological services); or
- Chapter 491 (clinical, counseling, and psychotherapy services).

Section 456.072, F.S., lists acts that are grounds for disciplinary action applicable to all health care practitioners. In addition, each practice act includes additional grounds for disciplinary action for the specific practitioner.

Section 4 provides an effective date of July 1, 2012.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities or 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 Article I, Section 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.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill reduces the amount that may be collected by a facility for making copies of patient's medical records because the facility may no longer charge for reasonable staff time.

C. Government Sector Impact:

The bill reduces the amount that the DOH will have to pay for copies of patient's medical records because the facility will no longer be able to charge for reasonable staff time.

Because the proposed bill specifies that the DOH may obtain patient records, this change will likely reduce subpoena challenges and the costs associated with such challenges.²⁷

The bill would allow the DOH to expedite the process of obtaining patient records, thereby saving the DOH time and money.²⁸

VI. Technical Deficiencies:

None.

VII. Related Issues:

According to the DOH, although the bill appears to grant the DOH, rather than the AHCA, authority to obtain patient records, the DOH currently obtains patient records pursuant to subpoena under s. 395.3025, F.S.²⁹ The DOH claims that they obtained the authority to request such records when the prosecution of ch. 456, F.S., licensees was transferred from the AHCA to the DOH.

VIII. Additional Information:

A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. **Amendments:**

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

²⁷ *Supra* fn. 25.

²⁸ *Id.*

²⁹ *Id.*