

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 Committee on Health Policy

BILL: SB 500

INTRODUCER: Senator Harrell

SUBJECT: Prohibited Acts by Health Care Practitioners

DATE: January 13, 2020

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Rossitto-Van Winkle	Brown	HP	Pre-meeting
2.	_____	_____	AP	_____
3.	_____	_____	RC	_____

I. Summary:

SB 500 prohibits any person from knowingly using certain professional titles that are typically used by allopathic, osteopathic, or podiatric physicians. The bill authorizes the Department of Health (DOH) to take disciplinary action against any person who knowingly uses one of the listed titles. The bill specifies the meaning of the term “anesthesiologist.”

The bill takes effect upon becoming law.

II. Present Situation:

The Department of Health

The Legislature created the DOH to protect and promote the health of all residents and visitors in the state.¹ The DOH is charged with the regulation of health practitioners for the preservation of the health, safety, and welfare of the public. The Division of Medical Quality Assurance (MQA) is responsible for the boards² and professions within the DOH.³ The health care practitioners licensed by the DOH include the following:

- Acupuncturist;⁴
- Allopathic physicians and physician assistants;⁵
- Osteopathic physicians and physician assistants;⁶

¹ Section 20.43, F.S.

² Under s. 456.001(1), F.S., “board” is defined as any board, commission, or other statutorily created entity, to the extent such entity is authorized to exercise regulatory or rulemaking functions within the DOH or, in some cases, within the DOH MQA.

³ Section 20.43, F.S.

⁴ Chapter 457, F.S.

⁵ Chapter 458, F.S.

⁶ Chapter 459, F.S.

- Chiropractic physicians, physician assistants, and registered chiropractic assistants;⁷
- Podiatric physicians;⁸
- Naturopathic physicians;⁹
- Optometrists;¹⁰
- Advanced practice registered nurses, registered nurses, licensed practical nurses and certified nursing assistant;¹¹
- Pharmacists;¹²
- Dentists, dental hygienist and dental laboratories;¹³
- Midwives;¹⁴
- Speech and language pathologists;¹⁵
- Audiologists;¹⁶
- Occupational therapists;¹⁷
- Respiratory therapists;¹⁸
- Dieticians and nutritionists;¹⁹
- Athletic trainers;²⁰
- Orthotists, prosthetists, and pedorthists;²¹
- Electrologists;²²
- Massage therapists;²³
- Clinical laboratory personnel;²⁴
- Medical physicists;²⁵
- Opticians;²⁶
- Hearing aid specialists;²⁷
- Physical therapists;²⁸
- Psychologists and school psychologists;²⁹ and

⁷ Chapter 460, F.S.

⁸ Chapter 461, F.S.

⁹ Chapter 462, F.S.

¹⁰ Chapter 463, F.S.

¹¹ Chapter 464, F.S.

¹² Chapter 465, F.S.

¹³ Chapter 466, F.S.

¹⁴ Chapter 467, F.S.

¹⁵ Part I, ch. 468, F.S.

¹⁶ *Id.*

¹⁷ Part III, ch. 468, F.S.

¹⁸ Part V, ch. 468, F.S.

¹⁹ Part X, ch. 468, F.S.

²⁰ Part XIII, ch. 468, F.S.

²¹ Part XIV, ch. 468, F.S.

²² Chapter 478, F.S.

²³ Chapter 480, F.S.

²⁴ Part II, ch. 483, F.S.

²⁵ Part III, ch. 483, F.S.

²⁶ Part I, ch. 484, F.S.

²⁷ Part II, ch. 484, F.S.

²⁸ Chapter 486, F.S.

²⁹ Chapter 490, F.S.

- Clinical social workers, mental health counselors and marriage and family therapists.³⁰

For each profession under the jurisdiction of the DOH, the DOH appoints the board executive director, subject to board approval.³¹ The duties conferred on the boards do not include the enlargement, modification, or contravention of the scope of practice of a profession regulated by each board, unless expressly and specifically granted by statute, but the boards may take disciplinary action against a licensee or issue a declaratory statement.³² Each board member is appointed by the Governor and accountable to the Governor for the proper performance of his or her duties as a member of a board.³³

Board of Medicine (BOM)

The BOM was established to ensure that every physician practicing in this state meets minimum requirements for safe practice. The practice of medicine is a privilege granted by the state. The BOM, through efficient and dedicated organization, is directed to license, monitor, discipline, educate, and, when appropriate, rehabilitate physicians and other practitioners to assure their fitness and competence in the service of the people of Florida.³⁴

Board of Osteopathic Medicine (BOOM)

The BOOM was legislatively established to ensure that every osteopathic physician practicing in this state meets minimum requirements for safe practice. The BOOM is responsible for licensing, monitoring, disciplining, and educating osteopathic physicians to assure competency and safety to practice in Florida.³⁵

Board of Podiatric Medicine (BPM)

The BPM was established to ensure that every podiatric physician practicing in this state meets minimum requirements for safe practice. The BPM is directed to license, monitor, discipline, educate, and, when appropriate, rehabilitate practitioners to assure their competence in the service of the people of Florida.³⁶

Board of Nursing (BON)

The BON licenses, monitors, disciplines, educates, and, when appropriate, rehabilitates its licensees to assure their fitness and competence in providing health care services for the people of Florida. The sole legislative purpose in enacting the Nurse Practice Act is to ensure that every nurse practicing in Florida meets minimum requirements for safe practice. It is the intent of the Legislature that nurses who fall below minimum competency or who otherwise present a danger to the public shall be prohibited from practicing in Florida.³⁷

³⁰ Chapter 491, F.S.

³¹ Section 456.004, F.S.

³² Section 456.003(6), F.S.

³³ Section 456.008, F.S.

³⁴ The Department of Health, *Board of Medicine*, available at: <https://flboardofmedicine.gov/> (last visited Jan. 7, 2020).

³⁵ The Department of Health, *Board of Osteopathic Medicine*, available at: <https://floridasosteopathicmedicine.gov/> (last visited Jan. 7, 2020).

³⁶ The Department of Health, *Board of Podiatric Medicine*, available at: <https://floridaspodiatricmedicine.gov/> (last visited Jan. 7, 2020).

³⁷ The Department of Health, *Board of Nursing*, available at: <https://floridasnursing.gov/> (last visited Jan. 7, 2020).

Section 468.015, F.S., clearly specifies the permissible nursing titles a person may use that holds a valid nursing license in this state, or a multistate license, as follows:

- Licensed Practical Nurse - L.P.N.;
- Registered Nurse - R.N.;
- Clinical Nurse Specialist - C.N.S.;
- Certified Registered Nurse Anesthetist - C.R.N.A. or nurse anesthetist;
- Certified Nurse Midwife - C.N.M. or nurse midwife; and
- Advanced Practice Registered Nurse - A.P.R.N.

A person may not practice or advertise as a registered nurse, licensed practical nurse, clinical nurse specialist, certified registered nurse anesthetist, certified nurse midwife, certified nurse practitioner, or advanced practice registered nurse, or use the abbreviation R.N., L.P.N., C.N.S., C.R.N.A., C.N.M., C.N.P., or A.P.R.N., or take any other action that would lead the public to believe that the person was authorized by law to practice professional nursing, if the person is not licensed as such, and to do so is a first degree misdemeanor.³⁸

On August 8, 2019, at the general BON meeting, the BON considered requests for declaratory statements.³⁹ The second request for a declaratory statement was made by John P. McDonough, A.P.R.N., license number A.P.R.N. 3344982.⁴⁰

McDonough's Petition for Declaratory Statement acknowledged that the type of Florida nursing license he holds is as a *A.P.R.N.*, and that he is a certified registered nurse anesthetist (C.R.N.A.), but requested that he be permitted to use the phrase "nurse anesthesiologist" as a descriptor for him or his practice, and that the BON not subject him to discipline under ss. 456.072 and 464.018, F.S.,⁴¹ based on the following grounds:

- A New Hampshire Board of Nursing's Position Statement that the nomenclature, *Nurse Anesthesiologist* and *Certified Registered Nurse Anesthesiologist*, are not title changes or an expansion of scope of practice, but are optional, accurate descriptors,⁴² and
- Florida law grants no title protection to the words *anesthesiologist* or *anesthetist*.⁴³

³⁸ Section 464.015, F.S.

³⁹ Section 120.565, F.S., provides that, "[a]ny substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision as it applies to the petitioner's particular set of circumstances. The agency must give notice of the filing of a petition in the Florida Administrative Register, provide copies of the petition to the board, and issue a declaratory statement or deny the petition within 90 days after the filing. The declaratory statement or denial of the petition is then noticed in the next Florida Administrative Register, and disposition of a petition is a final agency action."

⁴⁰ The Florida Board of Nursing, Meeting Minutes, Disciplinary Hearings & General Business, Section I. Other, E. *Declaratory Statements*, No. 2, Aug. 8, 2019, available at <https://www10.doh.state.fl.us/pub/bon/Board%20Meetings/August%207-9%202019/Minutes/August%202019%20Full%20Board%20Minutes.pdf> pp. 32-33 (last visited Jan. 3, 2020).

⁴¹ *Petition for Declaratory Statement Before the Board of Nursing, In re: John P. McDonough, A.P.R.N., C.R.N.A., Ed.D.*, filed at the Department of Health, July 10, 2019, (on file with the Senate Committee on Health Policy).

⁴² New Hampshire Board of Nursing, *Petition Statement Regarding the use of Nurse Anesthesiologist as a communication tool and Optional [D]escriptor for Certified Registered Nurse Anesthetists (CRNAs)*, Nov. 20, 2018, available at <https://www.oplc.nh.gov/nursing/documents/nh-bon-nurse-anesthesiologist.pdf> (last visited Nov. 6, 2019).

⁴³ *Id.*

The Florida Association of Nurse Anesthetists (FANA) and the Florida Medical Association, Inc. (FMA), Florida Society of Anesthesiologists, Inc. (FSA), and Florida Osteopathic Medical Association, Inc. (FOMA), filed timely and legally sufficient⁴⁴ motions to intervene⁴⁵ pursuant to Florida Administrative Code Rule 28-106.205.⁴⁶ The FANA's petition⁴⁷ was in support of petitioner's Declaratory Statement while the motion filed jointly by the FMA, FSA, and FOMA was in opposition.

The FMA, FSA, and FOMA argued they were entitled to participate in the proceedings, on behalf of their members, as the substantial interests of their members, some 32,300, would be adversely affected by the proceeding.^{48, 49} Specifically, the FMA, FSA and FOMA argued that the substantial interests of their respective members would be adversely affected by the issuance of a Declaratory Statement that petitioner could use the term "nurse anesthesiologist," without violating ss. 456.072 and 464.018, F.S., on the grounds that:

- A substantial number of their members use the term "anesthesiologist" with the intent and understanding that patients, and potential patients, would recognize the term to refer to them as physicians licensed under chs. 458 or 459, F.S., not "nurse anesthetists";
- Sections 458.3475(1)(a) and 459.023(1)(a), F.S., both define the term "anesthesiologist" as a licensed allopathic or osteopathic physician and do not include in those definitions a "nurse anesthetist";
- The Merriam-Webster Dictionary defines an "anesthesiologist" as a "physician specializing in anesthesiology," not as a nurse specializing in anesthesia; and
- The Legislature clearly intended a distinction between the titles to be used by physicians practicing anesthesiology and nurses delivering anesthesia, to avoid confusion, as s. 464.015(6), F.S., specifically states that:
 - Only persons who hold valid certificates to practice as certified registered nurse anesthetists in this state may use the title "Certified Registered Nurse Anesthetist" and the abbreviations "C.R.N.A." or "nurse anesthetist"; and

⁴⁴ Fla. Adm. Code R. 28-105.0027(2) and 28.106.205(2) (2019), both of which state that to be legally sufficient, a motion to intervene in a proceeding on a petition for a declaratory statement must contain the following information: (a) The name, address, the e-mail address, and facsimile number, if any, of the intervenor; if the intervenor is not represented by an attorney or qualified representative; (b) The name, address, e-mail address, telephone number, and any facsimile number of the intervenor's attorney or qualified representative, if any; (c) Allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to agency rule, or *that the substantial interests of the intervenor are subject to determination or will be affected by the declaratory statement*; (d) The signature of the intervenor or intervenor's attorney or qualified representative; and (e) The date.

⁴⁵ The Florida Medical Association, Inc., Florida Society of Anesthesiologists, Inc., and Florida Osteopathic Medical Association, Inc., *Motion to Intervene In Florida Board of Nursing's Consideration of the Petition for Declaratory Statement in Opposition of Petitioner John P. McDonough, A.P.R.N., C.R.N.A., Ed.D.*, filed at the Department of Health, Aug. 1, 2019, (available in the Office of Senate Health Policy Committee).

⁴⁶ Fla. Adm. Code. R. 28-106.205 (2019), in pertinent part, provides, "Persons other than the original parties to a pending proceeding whose substantial interest will be affected by the proceeding and who desire to become parties may move the presiding officer for leave to intervene."

⁴⁷ *Florida Association of Nurse Anesthetists Motion to Intervene*, filed at the Department of Health, July 31, 2019, (on file with the Senate Committee on Health Policy).

⁴⁸ *Supra* note 45.

⁴⁹ *See also Florida Home Builders Association, et al., Petitioners, v. Department of Labor And Employment Security, Respondent*, 412 S.2d 351 (Fla. 1982), holding that a trade association does have standing under section 120.56(1) to challenge the validity of an agency ruling on behalf of its members when that association fairly represents members who have been substantially affected by the ruling.

- Petitioner is licensed as a “registered nurse anesthetist” under s. 464.012(1)(a), F.S., and the term “nurse anesthesiologist” is not found in statute.

At the hearing, the attorney for the BON advised the BON that, “[t]he first thing the Board need[ed] to do [was] determine whether or not the organizations that [had] filed petitions to intervene have standing in order to participate in the discussion of the Declaratory Statement”⁵⁰ and that:

“Basically in order to make a determination of whether an organization has standing, they have to show that the members of their organization would have an actual injury in fact, or suffer an immediate harm of some sort of immediacy were the Board to issue this particular Declaratory Statement, and then the Board also has to make a determination of whether the nature of the injury would be within the zone of interest that the statute is addressing.”⁵¹

However, the above special injury standard,⁵² provided by board counsel to the BON to apply to determine the organizations’ standing to intervene, based on their members’ substantial interests being affected by the declaratory statement, was held inapplicable to trade associations in *Florida Home Builders Ass’n. v. Department of Labor and Employment Security*, 412 So.2d 351 (Fla. 1982). The Florida Supreme Court, in *Florida Home Builders, Ass’n.*, held that a trade or professional association is able to challenge an agency action on behalf of its members, even though each member could individually challenge the agency action, if the organization could demonstrate that:

- A substantial number of the association members, though not necessarily a majority, would be “substantially affected” by the challenged action;
- The subject matter of the challenged action is within the association’s scope of interest and activity; and
- The relief requested is appropriate for the association’s members.⁵³

Thus, the FANA’s motion to intervene was granted, based on the application of an incorrect standard, without the BON making the findings required by *Florida Home Builders, Ass’n.* The motion to intervene filed by the FMA, FSA, and FOMA was denied, also based on the application of an incorrect standard, on the grounds that:

- Their members are regulated by the Board of Medicine, not the Board of Nursing;
- Nursing disciplinary guidelines were being discussed;
- Their members licenses and discipline would not be affected by an interpretation of nursing discipline;⁵⁴and
- Their members are not regulated by the Nurse Practice Act.

⁵⁰ Record at p. 3, ll. 13-17. Declaratory Statement, Dr. John P. McDonough, Before the Board of Nurses, State of Florida, Department of Health, Sanibel Harbor Marriott. (on file with the Senate Committee on Health Policy).

⁵¹ *Id.* p. 3-4, ll. 22- 25, 1-6.

⁵² *United States Steel Corp. v. Save Sand Key, Inc.*, 303 So.2d 9 (Fla. 1974).

⁵³ *Florida Home Builders Ass’n. v. Department of Labor and Employment Security*, 412 So.2d 351 (Fla. 1982), pp. 353-354.

⁵⁴ Record at p. 7, ll. 1-13. Declaratory Statement, Dr. John P. McDonough, Before the Board of Nurses, State of Florida, Department of Health, Sanibel Harbor Marriott. (on file with the Senate Committee on Health Policy).

A motion was made to approve McDonough’s Petition for Declaratory Statement, and it passed unanimously. Accordingly, McDonough may now use of the term “nurse anesthiologist” as a descriptor, and such use is not grounds for discipline against his nursing license. However, while s. 120.565, F.S., provides that any person may seek a declaratory statement regarding the potential impact of a statute, rule or agency opinion on a petitioner’s particular situation, approval or denial of the petition only applies to the petitioner. It is not a method of obtaining a policy statement from a board of general applicability.⁵⁵

News media have reported that the BON’s Declaratory Statement in favor of McDonough has created significant concern for patient safety, and the potential for confusion in the use of the moniker “anesthiologist” among Florida’s medical professionals.^{56, 57, 58}

III. Effect of Proposed Changes:

The bill prohibits any person from knowingly using certain professional titles that are typically used by allopathic, osteopathic, or podiatric physicians licensed under chs. 458, 459, or 461, F.S. The DOH may take disciplinary action against any person who knowingly uses one of the following titles to indicate or imply that he or she is authorized by those chapters to practice as such:

Physician; surgeon; medical doctor; doctor of osteopathy; M.D.; anesthiologist; cardiologist; dermatologist; endocrinologist; gastroenterologist; general practitioner; gynecologist; hematologist; hospitalist; internist; interventional pain medicine physician; laryngologist; nephrologist; neurologist; obstetrician; oncologist; ophthalmologist; orthopedic surgeon; orthopedist; osteopath; otologist; otolaryngologist; otorhinolaryngologist; pathologist; pediatrician; podiatrist; primary care physician; proctologist; psychiatrist; radiologist; rheumatologist; rhinologist; urologist; and any other words, letters, abbreviations, or insignia indicating or implying that he or she is authorized to practice by chs. 458, 459, or 461, F.S.

The bill specifies that the term “anesthiologist” has the same meaning as in ss. 458.3475 or 459.023, F.S.

The bill takes effect upon becoming law.

⁵⁵ Florida Department of Health, Board of Nursing, *What is a Declaratory Statement?*, available at: <https://floridasnursing.gov/help-center/what-is-a-declaratory-statement/> (last visited Dec. 13, 2019).

⁵⁶ Christine Sexton, The News Service of Florida, “Nursing Board Signs Off On ‘Anesthiologist’ Title,” August 16, 2019, The Gainesville Sun, available at: <https://www.gainesville.com/news/20190816/nursing-board-signs-off-on-anesthiologist-title> (last visited Dec. 13, 2019).

⁵⁷ Christine Sexton, The News Service of Florida, “Florida Lawmaker Takes Aim At Health Care Titles,” October 10, 2019, Health News Florida, available at: <https://health.wusf.usf.edu/post/florida-lawmaker-takes-aim-health-care-titles> (last visited Dec. 13, 2019).

⁵⁸ Christine Section, The News Service of Florida, “What’s In A Name? Health Panel Seeks Clarity on Health Care Providers,” November 14, 2019, available at: <https://health.wusf.usf.edu/post/what-s-name-health-panel-seeks-clarity-health-care-providers> (last visited Dec. 13, 2019).

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

The bill's list of professions that use the title "physician" appears to be incomplete and does not include monikers such as dentist, chiropractic physician, doctor of chiropractic medicine, physiatrist, and board-certified optometrist, who are identified as physicians under Medicaid rules and regulations. The bill, as written, would preclude dentists, chiropractors, doctors of chiropractic medicine, physiatrists and board certified optometrists from using the moniker physician, even though they are currently authorized to do so.

The bill's prohibition against using the bill's list of titles appears to apply to physicians licensed under chs. 458, 459, or 461, in addition to persons who are not so licensed.

VII. Related Issues:

The bill, as written, requires proof that the practitioner “knowingly” used one of the listed monikers, which may make it difficult for the DOH to discipline those practitioners who claim to have used the monikers unintentionally.

VIII. Statutes Affected:

This bill substantially amends section 456.072 of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.