

**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.)

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Prepared By: The Professional Staff of the Appropriations Subcommittee on Health and Human Services

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BILL: CS/SB 1142

INTRODUCER: Health Policy Committee and Senator Rodrigues

SUBJECT: Prohibited Acts by Health Care Practitioners

DATE: April 7, 2021

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Brown</u>	<u>Brown</u>	<u>HP</u>	<u>Fav/CS</u>
2.	<u>Howard</u>	<u>Kidd</u>	<u>AHS</u>	<u>Pre-meeting</u>
3.	_____	_____	<u>AP</u>	_____

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 1142 amends s. 456.072(1)(a), Florida Statutes, that provides grounds for discipline applicable to all licensed health care practitioners, to:

- Add the making of misleading, deceptive, or fraudulent representations related to a practitioner’s specialty designation as grounds for discipline.
- Provide that the term “anesthesiologist” may be used only by a practitioner licensed under chapters 458 or 459, Florida Statutes, or licensed as a dentist under chapter 466, Florida Statutes.
- Provide that the term “dermatologist” may be used only by a practitioner licensed under chapters 458 or 459, Florida Statutes.

The bill requires that when the Department of Health (department) finds that a person has violated section 456.072(1)(a), Florida Statutes, as amended by the bill, the department must issue an emergency cease and desist order and take disciplinary action if the person fails to comply with the order.

The bill also amends section 456.072(1)(t), Florida Statutes, to provide disciplinary action based on a licensed health care practitioner’s failure to identify his or her specialty designation and requiring the department, not a practitioner regulatory board, to enforce section 456.072(1)(t), Florida Statutes.

The department may experience a workload increase associated with additional complaints and nonrecurring costs associated with rule-making; however, these costs can be absorbed within existing resources.

The bill takes effect upon becoming a law.

## II. Present Situation:

### The Department of Health

The Legislature created the Department of Health (department) to protect and promote the health of all residents and visitors in the state.<sup>1</sup> The department 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 boards<sup>2</sup> and professions within the department.<sup>3</sup> Health care practitioners licensed by the department include the following:

- Acupuncturist;<sup>4</sup>
- Allopathic physicians, physician assistants, anesthesiologist assistants, and medical assistants;<sup>5</sup>
- Osteopathic physicians, physician assistants, and anesthesiologist assistants;<sup>6</sup>
- Chiropractic physicians and physician assistants;<sup>7</sup>
- Podiatric physicians;<sup>8</sup>
- Naturopathic physicians;<sup>9</sup>
- Optometrists;<sup>10</sup>
- Autonomous advanced practice registered nurses, advanced practice registered nurses, registered nurses, licensed practical nurses, and certified nursing assistants;<sup>11</sup>
- Pharmacists, pharmacy interns, and pharmacy technicians;<sup>12</sup>
- Dentists, dental hygienists, and dental laboratories;<sup>13</sup>
- Midwives;<sup>14</sup>
- Speech and language pathologists;<sup>15</sup>
- Audiologists;<sup>16</sup>

<sup>1</sup> Section 20.43, F.S.

<sup>2</sup> 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 department or, in some cases, within the MQA.

<sup>3</sup> Section 20.43, F.S.

<sup>4</sup> Chapter 457, F.S.

<sup>5</sup> Chapter 458, F.S.

<sup>6</sup> Chapter 459, F.S.

<sup>7</sup> Chapter 460, F.S.

<sup>8</sup> Chapter 461, F.S.

<sup>9</sup> Chapter 462, F.S.

<sup>10</sup> Chapter 463, F.S.

<sup>11</sup> Chapter 464, F.S.

<sup>12</sup> Chapter 465, F.S.

<sup>13</sup> Chapter 466, F.S.

<sup>14</sup> Chapter 467, F.S.

<sup>15</sup> Part I, Chapter 468, F.S.

<sup>16</sup> *Id.*

- Occupational therapists and occupational therapy assistants;<sup>17</sup>
- Respiratory therapists;<sup>18</sup>
- Dietitians and nutritionists;<sup>19</sup>
- Athletic trainers;<sup>20</sup>
- Orthotists, prosthetists, and pedorthists;<sup>21</sup>
- Electrologists;<sup>22</sup>
- Massage therapists;<sup>23</sup>
- Clinical laboratory personnel;<sup>24</sup>
- Medical physicists;<sup>25</sup>
- Opticians;<sup>26</sup>
- Hearing aid specialists;<sup>27</sup>
- Physical therapists;<sup>28</sup>
- Psychologists and school psychologists;<sup>29</sup> and
- Clinical social workers, mental health counselors, and marriage and family therapists.<sup>30</sup>

For each profession under the jurisdiction of the department, the department appoints the board executive director, subject to board approval.<sup>31</sup> The duties of 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.<sup>32</sup> 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.<sup>33</sup>

### ***Board of Medicine (BOM)***

The BOM was established to ensure that every medical doctor 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.<sup>34</sup>

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<sup>17</sup> Part III, Chapter 468, F.S.

<sup>18</sup> Part V, Chapter 468, F.S.

<sup>19</sup> Part X, Chapter 468, F.S.

<sup>20</sup> Part XIII, Chapter 468, F.S.

<sup>21</sup> Part XIV, Chapter 468, F.S.

<sup>22</sup> Chapter 478, F.S.

<sup>23</sup> Chapter 480, F.S.

<sup>24</sup> Part II, Chapter 483, F.S.

<sup>25</sup> Part III, Chapter 483, F.S.

<sup>26</sup> Part I, Chapter 484, F.S.

<sup>27</sup> Part II, Chapter 484, F.S.

<sup>28</sup> Chapter 486, F.S.

<sup>29</sup> Chapter 490, F.S.

<sup>30</sup> Chapter 491, F.S.

<sup>31</sup> Section 456.004, F.S.

<sup>32</sup> Section 456.003(6), F.S.

<sup>33</sup> Section 456.008, F.S.

<sup>34</sup> The Department of Health, *Board of Medicine*, available at <https://flboardofmedicine.gov/> (last visited Mar. 9, 2021).

***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.<sup>35</sup>

***Board of Dentistry (BOD)***

The BOD was established to ensure that every dentist and dental hygienist practicing in this state meets minimum requirements for safe practice. The practice of the profession is a privilege granted by the state. The BOD is responsible for licensure, monitoring and ensuring the safe practice of dentists and dental hygienists.<sup>36</sup>

***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 must be prohibited from practicing in Florida.<sup>37</sup>

Section 464.015, 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 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.<sup>38</sup>

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<sup>35</sup> The Department of Health, *Board of Osteopathic Medicine*, available at <https://floridasosteopathicmedicine.gov/> (last visited Mar. 9, 2021).

<sup>36</sup> The Department of Health, *Board of Dentistry*, available at <https://floridasdentistry.gov/> (last visited Mar. 9, 2021).

<sup>37</sup> The Department of Health, *Board of Nursing*, available at <https://floridasnursing.gov/> (last visited Mar. 9, 2021).

<sup>38</sup> Section 464.015, F.S.

**Disciplinary Proceedings under Chapter 456, F.S.**

Section 456.072, F.S., sets out grounds for discipline and due process that are applicable to all licensed health care practitioners, in addition to the grounds set out in each practice act, and includes:

- Making misleading, deceptive, or fraudulent representations in or related to the practice of the licensee's profession;
- Intentionally violating any board or the department rule;
- Being convicted or found guilty of, or entering a plea of guilty or nolo contendere to, regardless of adjudication, and failing to report the violation within 30 days, including a crime:
  - Relating to practice, or ability to practice, a profession;
  - Relating to Medicaid fraud; and
  - Relating to health care fraud.
- Using a Class III or Class IV laser device without having complied with registration rules for the devices;
- Failing to comply with the continuing education (CE) requirements for:
  - HIV/AIDS; and
  - Domestic violence.
- Having a license revoked, suspended, or acted against, including denial, or by relinquishment, stipulation, consent order, or settlement, in any jurisdiction;
- Having been found civilly liable for knowingly filing a false report or complaint with the department against another licensee;
- Attempting to obtain, or renewing a license by bribery, fraudulent misrepresentation, or through the department error;
- Failing to report to the department any person who the licensee knows is in violation of ch. 456, F.S., or the chapter and rules regulating the practitioner;
- Aiding, assisting, procuring, employing, or advising a person to practice a profession without a license;
- Failing to perform a statutory or legal obligation;
- Knowingly making or filing a false report;
- Making deceptive, untrue, or fraudulent representations in the licensee's practice;
- Exercising undue influence on the patient for financial gain;
- Knowingly practicing beyond his or her scope of practice or is not competent to perform;
- Delegating professional responsibilities to person licensee knows is not qualified to perform;
- Violating a lawful order of the department or a board, or failing to comply with a lawfully issued subpoena of the department;
- Improperly interfering with an investigation, inspection, or disciplinary proceeding;
- Failing to identify through written notice, that may include the wearing of a name tag, or orally to a patient, the type of license under which the practitioner is practicing, including in advertisements;<sup>39</sup>
- Failing to provide patients information about their rights and how to file a complaint;
- Engaging or attempting to engage in sexual misconduct;

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<sup>39</sup> This ground does not apply to a practitioner while the practitioner is providing services in a facility licensed under chs. 394, 395, 400, or 429, F.S.

- Failing to comply with the requirements for profiling and credentialing;
- Failing to report within 30 days that the licensee has been convicted or found guilty of, or entered a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction;
- Using information from police reports, newspapers, other publications, or through a radio or television, for commercial purposes or solicitation;
- Being unable to practice with reasonable skill and safety because of illness or use of alcohol, drugs, narcotics, chemicals, or as a result of a mental or physical condition;
- Testing positive for any illegal drug on any pre-employment or employer-ordered screening when the practitioner does not have a prescription;
- Performing or attempting to perform health care services on the wrong patient, wrong-site, or an unauthorized procedure or medically unnecessary procedure;
- Leaving a foreign body in a patient;
- Violating any provision of the applicable practice act or rules;
- Intentionally submitting a Personal Injury Protection (PIP) claim, that has been “upcoded;”
- Intentionally submitting a PIP claim for services not rendered;
- Engaging in a pattern of practice when prescribing medicinal drugs or controlled substances that demonstrates a lack of reasonable skill or safety to patients;
- Being terminated from an impaired practitioner program for failing to comply;
- Failure to comply with controlled substance prescribing requirements;
- Intentionally entering any information concerning firearm ownership into the patient’s medical record; and
- Willfully failing to authorize emergency care or services with such frequency as to indicate a general business practice.

The department, on behalf of the boards, investigates any complaint that is filed against a health care practitioner if the complaint is:<sup>40</sup>

- In writing;
- Signed by the complainant;<sup>41</sup> and
- Legally sufficient.

A complaint is legally sufficient if it contains allegations of ultimate facts that, if true, show that a regulated practitioner has violated:

- Chapter 456, F.S.;
- His or her practice act; or
- A rule of his or her board or the department.<sup>42</sup>

The Consumer Services Unit receives the complaints and refers them to the closest Investigative Services Unit (ISU) office. The ISU investigates complaints against health care practitioners. Complaints that present an immediate threat to public safety are given priority; however, all complaints are investigated as timely as possible. When the complaint is assigned to an

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<sup>40</sup> Section 456.073(1), F.S.

<sup>41</sup> *Id.* The department may also investigate an anonymous complaint, or that of a confidential informant, if the complaint is in writing and is legally sufficient, if the alleged violation of law or rules is substantial, and if the department has reason to believe, after preliminary inquiry, that the violations alleged in the complaint are true.

<sup>42</sup> *Supra* note 40.

investigator, the complainant will be contacted and given the opportunity to provide additional information. A thorough investigation will be conducted. The steps taken in the investigation are determined by the specifics of the allegations, but generally include the following:

- Obtaining medical records, documents, and evidence;
- Locating and interviewing the complainant, the patient, the subject, and any witnesses; and
- Drafting and serving subpoenas for necessary information.

The ISU includes a staff of professional investigators and senior pharmacists who conduct interviews, collect documents and evidence, prepare investigative reports for the Prosecution Services Unit (PSU), and serve subpoenas and official orders for the department.<sup>43</sup>

The PSU is responsible for providing legal services to the department in the regulation of all health care boards and councils. The PSU will review the investigative file and report from ISU and recommend a course of action to the State Surgeon General (when an immediate threat to the health, safety, and welfare of the people of Florida exists), the appropriate board's probable cause panel, or the department, if there is no board, that may include:

- Having the file reviewed by an expert;
- Issuing a closing order (CO);
- Filing an administrative complaint (AC); or
- Issuing an emergency order (ERO or ESO).<sup>44</sup>

If the ISU investigative file received by PSU does not pose an immediate threat to the health, safety, and welfare of the people of Florida, then the PSU attorneys review the file and determine, first, whether expert review is required and, then, whether to recommend to the board's probable cause panel:

- A CO;
- An AC; or
- A Letter of guidance.<sup>45,46</sup>

A CO is recommended if the investigation and/or the expert opinion does not support the allegation(s). The subject and the complainant are notified of the results. The complainant may appeal the decision within 60 days of notification by providing additional information for consideration. Cases closed with no finding of probable cause are confidential and are not available through a public records request.<sup>47</sup>

An AC is recommended when the investigation and/or the expert opinion supports the allegation(s). The subject is entitled to a copy of the complete case file prior to the probable

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<sup>43</sup> Department of Health, Licensing and Regulation, Enforcement, Administrative Complaint Process, *Investigative Services*, available at <http://www.floridahealth.gov/licensing-and-regulation/enforcement/admin-complaint-process/isu.html> (last visited Mar. 9, 2021).

<sup>44</sup> Department of Health, Licensing and Regulation, Enforcement, Administrative Complaint Process, *Prosecution Services*, available at <http://www.floridahealth.gov/licensing-and-regulation/enforcement/admin-complaint-process/psu.html> (last visited Mar. 9, 2021).

<sup>45</sup> Section 456.073(2), F.S. The department may recommend a letter of guidance in lieu of finding probable cause if the subject has not previously been issued a letter of guidance for a related offense.

<sup>46</sup> *Id.*

<sup>47</sup> *Supra* note 45.

cause panel meeting. When an AC is filed with the agency clerk, the subject has the right to choose one of the following options:

- *An Administrative Hearing Involving Disputed Issues of Material Fact* – The subject disputes the facts in the AC and elects to have a hearing before the Division of Administrative Hearings (DOAH).<sup>48</sup> If this occurs, all parties may be asked to testify and the administrative law judge will issue a recommended order that will then go to the board, or the department if there is no board, for final agency action.
- *A Settlement/Stipulation/Consent Agreement* – The subject enters into an agreement to be presented before the board or the department if there is no board. Terms of this agreement may impose penalties negotiated between the subject or the subject’s attorney and the department’s attorney.
- *A Hearing Not Involving Disputed Issues of Material Fact* – The subject of the AC does not dispute the facts. The subject elects to be heard before the board or the department if there is no board. At that time, the subject will be permitted to give oral and/or written evidence in mitigation or in opposition to the recommended action by the department.
- *Voluntary Relinquishment of License* – The subject of the AC may elect to surrender his or her license and to cease practice.<sup>49</sup>

Final department action, including all of the above, as well as cases where the subject has failed to respond to an AC, are presented before the applicable board, or the department if there is no board. The subject may be required to appear. The complainant is notified of the date and location of the hearing and may attend. If the subject is entitled to, and does appeal the final decision, PSU defends the final order before the appropriate appellate court.<sup>50</sup>

If the ISU investigative file received by the PSU presents evidence of an immediate threat to the health, safety, and welfare of the people of Florida, then PSU will present the file to the State Surgeon General and recommend one of two types of emergency orders – ESO or ERO – that are exclusively issued by the State Surgeon General against licensees who pose such a threat to the people of Florida.<sup>51</sup>

Whether the State Surgeon General issues an ERO or an ESO depends on the level of danger the licensee presents because the department is permitted to use only the “least restrictive means” to stop the danger.<sup>52</sup> The distinction between the two orders is:

- ESOs – Licensees are deemed to be a threat to the public at large; or
- EROs – Licensees are considered a threat to a segment of the population.<sup>53</sup>

The emergency order process is carried out without a hearing, restricting someone’s right to work, and when the order is served on the licensee, it must contain a notice to the licensee of his

<sup>48</sup> See ss. 120.569 and 120.57, F.S.

<sup>49</sup> *Id.*

<sup>50</sup> *Supra* note 43.

<sup>51</sup> Section 456.073(8) and 120.60(6), F.S.

<sup>52</sup> Section 120.60(6)(b), F.S.

<sup>53</sup> Department of Health, Licensing and Regulation, Enforcement, Administrative Complaint Process, Prosecution Services, *A Quick Guide to the MQA Disciplinary Process Discretionary Emergency Orders – 3 Things to Know*, available at <http://www.floridahealth.gov/licensing-and-regulation/enforcement/admin-complaint-process/documents/a-quick-guide-to-the-mqa-disciplinary-process-discretionary-emergency-orders.pdf> (last visited Mar. 9, 2021).



or her right to an immediate appeal of the emergency order.<sup>54</sup> An ESO or ERO is not considered final agency action, and the department must file an AC on the underlying facts supporting the ESO or ERO within 20 days of its issuance.<sup>55</sup> The appeal of the emergency order and the normal disciplinary process under the AC, and regular prosecution can run simultaneously.<sup>56</sup>

### ***Mandatory EROs and ESOs***

Section 456.074, F.S., directs that in certain cases, the department must issue an ESO or ERO to certain license practitioners under certain circumstances, specifically:

- If any of the following practitioners have plead guilty to, been convicted of, found guilty of, or have entered a plea of *nolo contendere* to, regardless of adjudication, Medicare fraud, Medicaid fraud, health care fraud, or reproductive battery, they are subject to an ESO by the State Surgeon General:
  - Allopathic physician, physician assistants, anesthesiologist assistants, medical assistants;
  - Osteopathic physician, physician assistants, and anesthesiologist assistants;
  - Chiropractic physician and physician assistants;
  - Podiatric physicians;
  - Naturopathic physicians;
  - Optometrists - licensed and certified;
  - Autonomous advanced practice registered nurses, advanced practice registered nurses, registered nurses, licensed practical nurses and certified nursing assistants;
  - Pharmacists and pharmacy technicians;
  - Dentists, dental hygienist and dental laboratories; and
  - Opticians<sup>57</sup>
- The department may issue an ESO or ERO if the Board of Medicine (BOM) or Board of Osteopathic Medicine (BOOM) has previously found one of its physicians has committed medical malpractice,<sup>58</sup> gross medical malpractice, or repeated medical malpractice,<sup>59</sup> and the probable cause panel again finds probable of cause for another malpractice violation. In such cases, the State Surgeon General must review the matter to determine if an ESO or ERO is warranted,<sup>60</sup>
- The department may issue an ESO or ERO if any practitioner governed by ch. 456, F.S., tests positive for any drug on any government or private sector pre-employment or employer-ordered confirmed drug test,<sup>61</sup> when the practitioner does not have a lawful prescription and legitimate medical reason for using such drug;<sup>62</sup>

<sup>54</sup> See Fla. Admin. Code R. 28-106.501(3) (2020), and ss. 120.569(2)(n) or 120.60(6), F.S.

<sup>55</sup> Fla. Admin. Code R. 28-106.501(3) (2020).

<sup>56</sup> Section 120.60(6)(c), F.S.

<sup>57</sup> Section 456.073(1), F.S.

<sup>58</sup> Section 456.50(1)(g), F.S., “Medical malpractice” which is defined to mean the failure to practice medicine in accordance with the level of care, skill, and treatment recognized in law related to health care licensure.

<sup>59</sup> *Id.* “Repeated medical malpractice” is medical malpractice, and any similar wrongful act, neglect, or default committed in another state or country that, if committed in this state, would have been considered medical malpractice, and will be considered medical malpractice, if the standard of care and burden of proof applied in the other state or country equaled or exceeded that used in this state.

<sup>60</sup> Section 456.074(2), F.S.

<sup>61</sup> See s. 112.0445, F.S.

<sup>62</sup> Section 456.074(3), F.S. The practitioner must be given 48 hours from the time of notification of the confirmed test results to produce a lawful prescription for the drug before an emergency order is issued.

- The department must issue an ESO if it receives information that a massage therapist, a person with an ownership interest in the establishment, or a massage corporate establishment corporation whose owners, officers, or individual are directly involved in the management of the establishment, has been convicted of, found guilty of, or has entered a guilty or *nolo contendere* plea to, regardless of adjudication, a felony under any of the following crimes anywhere:<sup>63</sup>
  - Prostitution;<sup>64</sup>
  - Kidnapping;<sup>65</sup>
  - False imprisonment;<sup>66</sup>
  - Luring or enticing a child;<sup>67</sup>
  - Human trafficking;<sup>68</sup>
  - Human smuggling;<sup>69</sup>
  - Sexual battery;<sup>70</sup>
  - Female genital mutilation;<sup>71</sup>
  - Procuring a person under 18 for prostitution;<sup>72</sup>
  - Selling or buying of minors into prostitution;<sup>73</sup>
  - Forcing, compelling, or coercing another to become a prostitute;<sup>74</sup>
  - Deriving support from the proceeds of prostitution;<sup>75</sup>
  - Prohibiting prostitution and related acts;<sup>76</sup>
  - Lewd or lascivious offenses committed upon or in the presence of persons under 16;<sup>77</sup>
  - Lewd or lascivious offenses committed upon or in the presence of an elderly or disabled person;<sup>78</sup>
  - Sexual performance by a child;<sup>79</sup>
  - Protection of minors;<sup>80</sup>
  - Computer pornography;<sup>81</sup>
  - Transmission of material harmful to minors, to a minor by electronic device or equipment;<sup>82</sup> and

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<sup>63</sup> 456.074(4), F.S.

<sup>64</sup> Section 796.07(1)(a), F.S., “Prostitution” which is defined to mean the giving or receiving of the body for sexual activity for hire, but excludes sexual activity between spouses. Prostitution that took place at massage establishment is reclassified to the next higher degree. *See s. 796.07(2)(a)*, F.S., that is reclassified under *s. 796.07(7)*, F.S.

<sup>65</sup> Section 787.01, F.S.

<sup>66</sup> Section 787.02, F.S.

<sup>67</sup> Section 787.025, F.S.

<sup>68</sup> Section 787.06, F.S.

<sup>69</sup> Section 787.07, F.S.

<sup>70</sup> Section 794.011, F.S.

<sup>71</sup> Section 794.08, F.S.

<sup>72</sup> Former s. 796.03, F.S.

<sup>73</sup> Former s. 796.035, F.S.

<sup>74</sup> Section 796.04, F.S.

<sup>75</sup> Section 796.05, F.S.

<sup>76</sup> Section 796.07(4)(a)3., F.S., relating to a felony of the third degree for a third or subsequent violation of *s. 796.07*, F.S.

<sup>77</sup> Section 800.04, F.S.

<sup>78</sup> Section 825.1025(2)(b), F.S.

<sup>79</sup> Section 827.071, F.S.

<sup>80</sup> Section 847.0133, F.S.

<sup>81</sup> Section 847.0135, F.S.

<sup>82</sup> Section 847.0138, F.S.

- Selling or buying of minors.<sup>83</sup>
- The department must issue an ESO if a BOM or BOOM probable cause panel determines that the following constitutes a violation of the practice act and there exists an immediate danger to the public:
  - The registered surgery office where office surgery liposuction, or Level II or Level III office surgeries are being performed, or the physician practicing in the office, are not in compliance with the standards of practice for office surgery set by statute and board rule;<sup>84</sup> or
  - The physician is practicing beyond the scope of his or her education, training, and experience and is performing procedures the licensee knows, or has reason to know, that he or she is not competent to perform.<sup>85,86</sup>

### **Due Process Under Chapter 120, F.S.**

Chapter 120, F.S., known as the Administrative Procedure Act, provides uniform procedures for the exercise of specified authority. Section 120.60, F.S., pertains to licensing and provides for due process for persons seeking government-issued licensure or who have been granted such licensure. Section 120.60(5), F.S., provides that:

- No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the entry of a final order, the governmental agency has served, by personal service or certified mail, an administrative complaint that affords reasonable notice to the licensee of facts or conduct that warrant the intended action and unless the licensee has been given an adequate opportunity to request a hearing under ss. 120.569 and 120.57, F.S.
- When personal service cannot be made and the certified mail notice is returned undelivered, the agency must cause a short, plain notice to the licensee to be published once each week for four consecutive weeks in a newspaper published in the county of the licensee's last known address as it appears on the records of the agency, or, if no newspaper is published in that county, the notice may be published in a newspaper of general circulation in that county.

Section 120.60(6), F.S., provides a process for cases that a governmental agency finds that immediate serious danger to the public health, safety, or welfare requires emergency suspension, restriction, or limitation of a license. In such cases, the agency may take such action by any procedure that is fair under the circumstances 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 agency takes only that action necessary to protect the public interest under the emergency procedure; and
- The agency states in writing at the time of, or prior to, its action the specific facts and reasons for finding an immediate danger to the public health, safety, or welfare and its reasons for concluding that the procedure used is fair under the circumstances. The agency's findings of immediate danger, necessity, and procedural fairness are judicially reviewable. Summary suspension, restriction, or limitation may be ordered, but a suspension or revocation

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<sup>83</sup> Section 847.0145, F.S.

<sup>84</sup> *Id.* and Fla. Admin. Code Rs. 64B-9.009 and 64B15-14.007 (2020).

<sup>85</sup> Sections 458.331(1)(v) and 459.015(1)(z), F.S.

<sup>86</sup> Section 456.074(5), F.S.

proceeding pursuant to ss. 120.569 and 120.57, F.S., must also be promptly instituted and acted upon.

### **Anesthesiology**

Under chs. 458 and 459, F.S., “anesthesiology” is defined as the practice of medicine that specializes in the relief of pain during and after surgical procedures and childbirth, during certain chronic disease processes, and during resuscitation and critical care of patients in the operating room and intensive care environments.<sup>87</sup>

The term “anesthesiologist” is defined as an allopathic or osteopathic physician who holds an active, unrestricted license; who has successfully completed an anesthesiology training program approved by the Accreditation Council on Graduate Medical Education or its equivalent; and who is certified by the American Board of Anesthesiology, is eligible to take that board’s examination, or is certified by the Board of Certification in Anesthesiology affiliated with the American Association of Physician Specialists.<sup>88</sup>

### ***Anesthesiologist Assistants***

“Anesthesiologist assistant” which is defined to mean a graduate of an approved program who is licensed by the BOM or BOOM to perform medical services delegated and directly supervised by a supervising anesthesiologist, under a written protocol with an anesthesiologist or group of anesthesiologists.<sup>89</sup>

“Direct supervision” which is defined to mean the onsite, personal supervision by an anesthesiologist who is present in the office when the procedure is being performed in that office, or is present in the surgical or obstetrical suite when the procedure is being performed in that surgical or obstetrical suite and who is in all instances immediately available to provide assistance and direction to the anesthesiologist assistant while anesthesia services are being performed.<sup>90</sup>

An anesthesiologist assistant may assist an anesthesiologist in developing and implementing an anesthesia care plan for a patient. In providing assistance to an anesthesiologist, an anesthesiologist assistant may perform duties established by rule by the BOM or BOOM in any of various functions that are included in the anesthesiologist assistant’s protocol while under the direct supervision of an anesthesiologist, including:<sup>91</sup>

- Obtain a comprehensive patient history and present the history to the supervising anesthesiologist.
- Pretest and calibrate anesthesia delivery systems and monitor, obtain, and interpret information from the systems and monitors.
- Assist the supervising anesthesiologist with the implementation of medically accepted monitoring techniques.

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<sup>87</sup> Sections 458.3475(1)(c) and 459.023(1)(c), F.S.

<sup>88</sup> Sections 458.3475(1)(a) and 459.023(1)(a), F.S.

<sup>89</sup> Sections 458.3475(1)(b) and 459.023(1)(b), F.S.

<sup>90</sup> Sections 458.3475(1)(g) and 459.023(1)(g), F.S.

<sup>91</sup> Sections 458.3475(3)(a) and 459.023(3)(a), F.S.

- Establish basic and advanced airway interventions, including intubation of the trachea and performing ventilatory support.
- Administer intermittent vasoactive drugs and start and adjust vasoactive infusions.
- Administer anesthetic drugs, adjuvant drugs, and accessory drugs.
- Assist the supervising anesthesiologist with the performance of epidural anesthetic procedures and spinal anesthetic procedures.
- Administer blood, blood products, and supportive fluids.
- Support life functions during anesthesia health care, including induction and intubation procedures, the use of appropriate mechanical supportive devices, and the management of fluid, electrolyte, and blood component balances.
- Recognize and take appropriate corrective action for abnormal patient responses to anesthesia, adjunctive medication, or other forms of therapy.
- Participate in management of the patient while in the post-anesthesia recovery area, including the administration of any supporting fluids or drugs.
- Place special peripheral and central venous and arterial lines for blood sampling and monitoring as appropriate.

### *Nurse Anesthetists*

A certified registered nurse anesthetist (CRNA) is an advance practice registered nurse (APRN), licensed by the BON, who specializes in anesthetic services.

APRNs are regulated under part I of ch. 464, F.S., the Nurse Practice Act. The BON provides, by rule, the eligibility criteria for applicants to be licensed as APRNs and the applicable regulatory standards for APRN nursing practices.<sup>92</sup> Additionally, the BON is responsible for administratively disciplining an APRN who commits prohibited acts.<sup>93</sup>

In Florida “advanced or specialized nursing practice” includes, in addition to practices of professional nursing that registered nurses are authorized to perform, advanced-level nursing acts approved by the BON as appropriate for APRNs to perform by virtue of their post-basic specialized education, training, and experience.<sup>94</sup> Advanced or specialized nursing acts may only be performed if authorized under a supervising physician’s protocol.<sup>95</sup> In addition to advanced or specialized nursing practices, APRNs are authorized to practice certain medical acts, as opposed to nursing acts, as authorized within the framework of an established supervisory physician’s protocol.<sup>96</sup>

A CRNA may, to the extent authorized by established protocol approved by the medical staff of the facility that the anesthetic service is performed, perform any or all of the following:

- Determine the health status of the patient as it relates to the risk factors and to the anesthetic management of the patient through the performance of the general functions.

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<sup>92</sup> See s. 464.004, F.S., and Fla. Admin. Code R. 64B9-3 (2020).

<sup>93</sup> See ss. 464.018 and 456.072, F.S.

<sup>94</sup> Section 464.003(2), F.S.

<sup>95</sup> Section 464.012(3)-(4), F.S.

<sup>96</sup> *Id.*

- Based on history, physical assessment, and supplemental laboratory results, determine, with the consent of the responsible physician, the appropriate type of anesthesia within the framework of the protocol.
- Order pre-anesthetic medication under the protocol.
- Perform under the protocol procedures commonly used to render the patient insensible to pain during the performance of surgical, obstetrical, therapeutic, or diagnostic clinical procedures. These procedures include ordering and administering regional, spinal, and general anesthesia; inhalation agents and techniques; intravenous agents and techniques; and techniques of hypnosis.
- Order or perform monitoring procedures indicated as pertinent to the anesthetic health care management of the patient.
- Support life functions during anesthesia health care, including induction and intubation procedures, the use of appropriate mechanical supportive devices, and the management of fluid, electrolyte, and blood component balances.
- Recognize and take appropriate corrective action for abnormal patient responses to anesthesia, adjunctive medication, or other forms of therapy.
- Recognize and treat a cardiac arrhythmia while the patient is under anesthetic care.
- Participate in management of the patient while in the post-anesthesia recovery area, including ordering the administration of fluids and drugs.
- Place special peripheral and central venous and arterial lines for blood sampling and monitoring as appropriate.

### ***“Nurse Anesthesiologist”***

On August 8, 2019, at the general BON meeting, the BON considered requests for declaratory statements.<sup>97</sup> The second request for a declaratory statement was made by John P. McDonough, A.P.R.N., C.R.N.A., license number 3344982.<sup>98</sup>

For the meeting, McDonough’s Petition for Declaratory Statement acknowledged that the type of Florida nursing license he held was as an *A.P.R.N.*, and that he was 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.,<sup>99</sup> based on the following grounds:

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<sup>97</sup> 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.”

<sup>98</sup> The Florida Board of Nursing, Meeting Minutes, Disciplinary Hearings & General Business, *Declaratory Statements*, No. 2, Aug. 8, 2019, available at <https://floridasnursing.gov/meetings/minutes/2019/08-august/08072019-minutes.pdf> p. 28 (last visited Mar. 12, 2021).

<sup>99</sup> *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).

- 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;<sup>100</sup> and
- Florida law grants no title protection to the words *anesthesiologist* or *anesthetist*.<sup>101</sup>

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 sufficient<sup>102</sup> motions to intervene<sup>103</sup> pursuant to Florida Administrative Code Rule 28-106.205.<sup>104</sup> The FANA’s petition<sup>105</sup> 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 – could be adversely affected by the proceeding.<sup>106, 107</sup> 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 a 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;”

<sup>100</sup> New Hampshire Board of Nursing, *Position Statement Regarding the use of Nurse Anesthesiologist as a communication tool and optional descriptor for Certified Registered Nurse Anesthetists (CRNAs)*, Nov. 20, 2018, available at <https://static1.squarespace.com/static/5bf069ef3e2d09d0f4e0a54f/t/5f6f8a708d2cb23bb10f50a0/1601145457231/NH+BON+NURSE+ANESTHESIOLOGIST.pdf> (last visited Mar. 12, 2021).

<sup>101</sup> *Id.*

<sup>102</sup> 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.

<sup>103</sup> 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, (on file with the Senate Health Policy Committee).

<sup>104</sup> 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.”

<sup>105</sup> *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).

<sup>106</sup> *Supra* note 104.

<sup>107</sup> *See 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 s. 120.56(1), F.S., 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.

- 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
  - 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”<sup>108</sup> 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.”<sup>109</sup>

However, the above special injury standard,<sup>110</sup> 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.<sup>111</sup>

<sup>108</sup> 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).

<sup>109</sup> *Id.* p. 3-4, ll. 22- 25, 1-6.

<sup>110</sup> *United States Steel Corp. v. Save Sand Key, Inc.*, 303 So.2d 9 (Fla. 1974).

<sup>111</sup> *Florida Home Builders Ass’n. v. Department of Labor and Employment Security*, 412 So.2d 351 (Fla. 1982), pp. 353-354.



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;<sup>112</sup> and
- Their members are not regulated by the Nurse Practice Act.

A motion was made to approve McDonough's Petition for Declaratory Statement, and it passed unanimously. According to the BON's approval, McDonough may now use of the term "nurse anesthesiologist" 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.<sup>113</sup> 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 "anesthesiologist" among Florida's medical professionals.<sup>114,115,116</sup>

### III. Effect of Proposed Changes:

CS/SB 1142 amends s. 456.072(1)(a), F.S., that provides grounds for discipline applicable to all licensed health care practitioners, to:

- Add the making of misleading, deceptive, or fraudulent representations related to a practitioner's "specialty designation" as grounds for discipline, in addition to such representations related to the practice of practitioner's profession as under current law.
- Provide that the term "anesthesiologist" may be used only by a practitioner licensed under chs. 458 or 459, F.S., or licensed as a dentist under ch. 466, F.S.
- Provide that the term "dermatologist" may be used only by a practitioner licensed under chs. 458 or 459, F.S.

The bill requires that when the Department of Health (department) finds that a person has violated s. 456.072(1)(a), F.S., as amended by the bill, the department must issue an emergency

<sup>112</sup> 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).

<sup>113</sup> 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 Mar. 9, 2021).

<sup>114</sup> Christine Sexton, The News Service of Florida, "Nursing Board Signs Off On 'Anesthesiologist' Title," August 16, 2019, The Gainesville Sun, available at: <https://www.gainesville.com/news/20190816/nursing-board-signs-off-on-anesthesiologist-title> (last visited Mar. 9, 2021).

<sup>115</sup> 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 Mar. 9, 2021).

<sup>116</sup> Christine Section, The News Service of Florida, "What's In A Name? Health Panel Seeks Clarity on Health Care Providers," Nov. 14, 2019, available at <https://health.wusf.usf.edu/post/what-s-name-health-panel-seeks-clarity-health-care-providers> (last visited Mar. 9, 2021).

order to the person to cease and desist from using the name or title, or any other words, letters, abbreviations, or insignia indicating that he or she may practice under the specialty designation. The bill requires the department to send the emergency cease and desist order to the person by certified mail to the person's physical address and to the email address of record on file with the department and to any other mailing address or email address that the department believes the person may be reached.

If the person does not cease and desist his or her actions in violation of s. 456.072(1)(a), F.S., as amended by the bill, immediately upon receipt of the emergency cease and desist order, the bill requires the department to enter an order imposing any of the following penalties, or a combination thereof, until the person complies with the cease and desist order:

- A citation and a daily fine.
- A reprimand or a letter of concern.
- Suspension of license.

The bill also amends s. 456.072(1)(t), F.S., to provide that a licensed practitioner's failure to identify the specialty designation under which he or she is practicing – through written notice, that may include the wearing of a name tag, or orally to a patient – is grounds for disciplinary action. Under current law, such failure applies only to the type of license under which the practitioner is practicing. The bill also provides that the department, not a practitioner regulatory board, must enforce s. 456.072(1)(t), F.S., as amended by the bill.

The bill takes effect upon becoming a law.

#### **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:**

The bill's requirement for the Department of Health (department) to enter an order imposing penalties if a person does not immediately comply with an emergency cease and desist order – in a manner that differs from procedures that provide due process

under current law – may subject those provisions of the bill to challenge as a violation of the licensee’s due process rights under the Florida Constitution and the U.S. Constitution.

Both the fifth and fourteenth amendments to the U.S. Constitution prohibit arbitrary deprivation of life, liberty, or property by the government except as authorized by law. The U.S. Supreme Court has interpreted these provisions broadly, ruling that they provide for procedural due process in civil and criminal proceedings and substantive due process, or a prohibition against vague laws. Article I, Section 9, of the Florida Constitution provides that no person must be deprived of life, liberty, or property without due process of law.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

A licensed health care practitioner found to be in violation of s. 456.072(1)(a), F.S., as amended by the bill, may be subject to a daily fine imposed by the Department of Health if he or she fails to comply with a cease and desist order issued under the bill.

C. Government Sector Impact:

According to the Department of Health (department), the department will incur nonrecurring costs for rulemaking and they may experience a recurring increase in workload associated with additional complaints, investigations, and prosecutions resulting from the bill; however, it is anticipated that these can be absorbed within existing resources.<sup>117</sup>

**VI. Technical Deficiencies:**

Lines 101-106 of the bill provide that when the Department of Health (department) finds that a person has violated s. 456.072(1)(a), F.S., the department must issue an emergency order to the person to cease and desist his or her behavior that indicates to patients that he or she may practice “under the specialty designation.” However, violations relating to specialty designation are not the only violations included in paragraph (1)(a). Under current law and the bill, s. 456.072(1)(a), F.S., includes misrepresentations relating to “the practice of the licensee’s profession,” but, under the bill, such violations would technically trigger the bill’s actions required of the department relating to specialty designations, even if the violations are unrelated to a specialty designation. To address this issue, an amendment to line 102 should be considered to change “paragraph (1)(a)” to “paragraph (1)(a) relating to a specialty designation.”

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<sup>117</sup> Department of Health, *Senate Bill 1142 Fiscal Analysis* (Mar. 31, 2021) (on file with the Senate Appropriations Subcommittee on Health and Human Services).

Lines 106-120 direct the department to send emergency cease and desist orders to a person's physical and email address "of record," on file with the department. Those lines also provide actions the department must take if a person, upon receipt of an emergency cease and desist order, fails to immediately cease and desist, and such actions by the department include entering an order imposing one or more penalties on that person. However, if the person is not a licensed health care practitioner, the department is not likely to have a physical or email address "of record" on file for that person. Also, some of the penalties that the department may impose for such violations under the bill do not directly pertain to a person who is not a licensed health care practitioner, i.e. a reprimand, a letter of concern, or suspension of license. To address this issue, those lines of the bill could be amended to account for a person's status as a licensed health care practitioner or lack thereof.

## VII. Related Issues:

The Department of Health (department) advises that while the bill focuses on a practitioner's misuse of a specialty designation as grounds for discipline, the term "specialty designation" is not defined in the bill or in existing statute and is not a term used in the ordinary course of health care practitioner regulation. Absent a definition or guidelines about what constitutes a misrepresentation, the bill's new grounds for discipline are so vague as to be unenforceable, according to the department. While some physicians hold board certifications in their specialty areas from the American Board of Medical Specialties or the American Osteopathic Association, not all specialists hold or maintain such credentials. Health care providers who participate in Medicare typically have a specialty designation that they bill for payment. It is unclear to the department what credentials a practitioner must hold to use a "specialty designation" under the bill and when the use of such designation would be considered misleading or fraudulent.<sup>118</sup>

The department also advises that, because the bill requires the department, not the applicable regulatory board, to impose discipline for violations of ss. 456.072(1)(a) and (t), F.S., the bill will require the creation of a new disciplinary process. The department will need to create a unique procedure and tracking system for these specific charges. For all other disciplinary grounds, it is the board that issued the license that takes disciplinary action against that license. The bill would authorize the department to suspend a practitioner's license without the involvement or input of the board that issued the license, that could be interpreted to conflict with current law regarding practitioner discipline.<sup>119,120</sup>

The department further advises that, under the bill's requirement for the department to issue an emergency order to cease and desist, the procedures for issuing such an order are unclear. Currently, when the department issues an emergency order, it must show that allowing the practitioner to continue to practice would constitute an immediate serious danger to the health,

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<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> Sections 456.073(1) and (2), F.S., provide that the department investigates complaints and violations of the grounds for discipline and provides the completed investigative report to the probable cause panel of the appropriate regulatory board. The statute provides for the report to be sent to the department only when there is no board for the profession in question. Section 456.073(4), F.S., provides that the determination of the existence of probable cause is made by the probable cause panel and that the department determines probable cause only if there is no board. And, s. 456.073(6), F.S., provides that the appropriate board issues the final order in each health care professional disciplinary case, unless there is no board, in that case the department would issue the final order.

safety, or welfare of the citizens of Florida and that nothing short of the emergency action would protect citizens from that danger, as required under s. 120.60(6), F.S. It is unclear to the department how these requirements would be met under the circumstances specified in the bill.<sup>121</sup>

The department further advises that the bill's requirement for the department to enter an order imposing penalties if a person does not immediately comply with an emergency cease and desist order may conflict with s. 456.073(5), F.S., that provides that a formal hearing must be held before an administrative law judge in disciplinary matters if there are material issues of disputed fact. This portion of the bill may also conflict with s. 120.60(5), F.S., that provides that no revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the entry of the order, the governmental agency has served, by personal service or certified mail, an administrative complaint that affords reasonable notice to the licensee of facts or conduct that warrant the intended action and the licensee has been given an adequate opportunity to request a proceeding pursuant to ss. 120.569 and 120.57, F.S.<sup>122</sup>

#### **VIII. Statutes Affected:**

This bill substantially amends section 456.072 of the Florida Statutes.

#### **IX. Additional Information:**

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

**CS by Health Policy on March 17, 2021:**

The CS changes the underlying bill's amendment to s. 456.072(1)(a), F.S., to remove the requirement for practitioners licensed under chs. 458 or 459, F.S., to be physicians in order to use the terms "anesthesiologist" or "dermatologist." This addresses a technical deficiency in the underlying bill that would have prevented anesthesiologist assistants, who are non-physicians licensed under chs. 458 or 459, from using the term "anesthesiologist," even though the term appears in their license.

- B. **Amendments:**

None.

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

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<sup>121</sup> *Supra*, note 117.

<sup>122</sup> *Id.*