

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 Judiciary

BILL: CS/SB 1184

INTRODUCER: Health Policy Committee and Senator Broxson

SUBJECT: Free Speech of Health Care Practitioners

DATE: February 4, 2022

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Smith</u>	<u>Brown</u>	<u>HP</u>	<u>Fav/CS</u>
2.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	<u>Pre-meeting</u>
3.	_____	_____	<u>AP</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1184 seeks to ensure that a health care practitioner is not penalized in a professional capacity for exercising his or her First Amendment constitutional right of free speech.

The bill prohibits regulatory boards within the Department of Health (DOH), or the DOH if there is no applicable board, from reprimanding, sanctioning, revoking or threatening to revoke a license, certificate, or registration of a health care practitioner for exercising his or her constitutional right of free speech, including speech through the use of a social media platform.

The bill requires a regulatory board, or the DOH if there is no applicable board, to prove beyond a reasonable doubt that the use of free speech by a health care practitioner led to the direct physical harm of a person with whom the health care practitioner had a practitioner-patient relationship within the 3 years immediately preceding the incident of physical harm in order to reprimand, sanction, or revoke or threaten to revoke, a license, certificate, or registration of the health care practitioner for his or her speech. The bill specifies that if the board or the DOH fails to meet the burden of proof and reprimands, sanctions, or revokes or threatens to revoke, a license, certificate, or registration of the health care practitioner for his or her speech, the board or the DOH is liable for a sum of up to \$1.5 million per occurrence for direct or indirect damages to the health care practitioner.

The bill requires the regulatory board, or the DOH if there is no applicable board, to provide the health care practitioner with any complaint it has received that may result in revocation of

licensure, certification, or registration, within 7 days after receiving the complaint. If the board or the DOH fails to provide the complaint, it must pay the practitioner an administrative penalty of \$500 for each day the complaint is not provided to the practitioner.

The bill provides an effective date of July 1, 2022.

II. Present Situation:

Department of Health Regulation

The Florida Department of Health (DOH) is responsible to regulate health practitioners for the preservation of the health, safety, and welfare of the public.¹ Chapter 456 of the Florida Statutes governs health professions and occupation regulated by the DOH. For purposes of ch. 456, F.S. the term “health care practitioner” includes any person licensed under:

- Chapter 457 (Acupuncturists);
- Chapter 458 (Physicians);
- Chapter 459 (Osteopathic Physicians);
- Chapter 460 (Chiropractors);
- Chapter 461 (Podiatrists);
- Chapter 462 (Naturopathic Physicians);
- Chapter 463 (Optometrists);
- Chapter 464 (Nurses);
- Chapter 465 (Pharmacists);
- Chapter 466; (Dentists, Dental Hygienists);
- Chapter 467 (Midwives);
- Part I of chapter 468 (Speech Language Pathologists, Audiologists);
- Part II of chapter 468 (Nursing Home Administrators);
- Part III of chapter 468 (Occupational Therapists);
- Part V of chapter 468 (Respiratory Therapists);
- Part X of chapter 468 (Dietitian/nutritionists, Nutrition Counselor);
- Part XIII of chapter 468 (Athletic Trainers);
- Part XIV of chapter 468 (Orthotists, Pedorthists, Prosthetists);
- Chapter 478 (Electrologists);
- Chapter 480 (Massage Therapists);
- Part I of chapter 483 (Clinical Laboratory Personnel);
- Part II of chapter 483 (Medical Physicists);
- Part III of chapter 483 (Genetic Counselors);
- Chapter 484 (Opticians and Hearing Aid Specialists);
- Chapter 486 (Physical Therapists);
- Chapter 490 (Psychologists); and
- Chapter 491 (Psychotherapists, Clinical Social Workers, Marriage and Family Therapists, Mental Health Counselors).

¹ Section 20.42(1)(g), F.S.

Due to the diverse practices and differences between these health care professions, various licensing Boards exist within the DOH to ensure that health care practitioners are meeting the minimum requirements for safe practice in each practice area. The Division of Medical Quality Assurance within the DOH serves as the principle administrative support unit for the Boards.² The Boards are supported by a full-time professional staff based in Tallahassee. Board members are appointed by the governor and are subject to confirmation by the Senate. The following Boards exist within the DOH:

- Board of Acupuncture.
- Board of Occupational Therapy.
- Board of Athletic Trainers.
- Board of Opticianry.
- Board of Chiropractic Medicine.
- Board of Optometry.
- Board of Clinical Laboratory Personnel.
- Board of Orthotists and Prosthetists.
- Board of Clinical Social Work, Marriage & Family Therapy, and Mental Health Counseling.
- Board of Osteopathic Medicine.
- Board of Dentistry.
- Board of Pharmacy.
- Board of Hearing Aid Specialists.
- Board of Physical Therapy.
- Board of Massage.
- Board of Podiatric Medicine.
- Board of Medicine.
- Board of Psychology.
- Board of Nursing.
- Board of Respiratory Care.
- Board of Nursing Home Administrators.
- Board of Speech-Language Pathology and Audiology.³

Grounds for Discipline and Penalties

Section 456.072(1), F.S., sets out 45 separate grounds for discipline for health care practitioners. These grounds address criminal activity, fraud, sexual misconduct, practicing under the influence, making misleading, deceptive, untrue or fraudulent representations in or related to the practice of the licensee's profession, and many other situations.

When the board, or the department when there is no board, regulating the applicable health care profession, finds a health care practitioner guilty of any of the grounds set forth in the health care practitioner's applicable practice act or rules adopted thereunder, of violating any of the 45 separate grounds for discipline listed in s. 456.072(1), F.S., or of substantially violating the grounds for discipline within that subsection prior to obtaining a license, the board or department may issue an order:

² Florida Department of Health, *Boards and Councils* (last modified December 26, 2021) available at <http://www.floridahealth.gov/licensing-and-regulation/boards-and-councils.html> (last visited Feb. 2, 2022).

³ *Id.*

- Refusing to license the individual.
- Suspending or permanently revoking a license.
- Restricting the practice or license, including, but not limited to, restricting the licensee from practicing in certain settings, restricting the licensee to work only under designated conditions or in certain settings, restricting the licensee from performing or providing designated clinical and administrative services, restricting the licensee from practicing more than a designated number of hours, or any other restriction found to be necessary for the protection of the public health, safety, and welfare.
- Imposing an administrative fine not to exceed \$10,000 for each count or separate offense. If the violation is for fraud or making a false or fraudulent representation, the board, or the department if there is no board, must impose a fine of \$10,000 per count or offense.
- Issuing of a reprimand or letter of concern.
- Putting the licensee on probation, subject to conditions which may include, but are not limited to, requiring the licensee to undergo treatment, attend continuing education courses, submit to be reexamined, work under the supervision of another licensee, or satisfy any terms which are reasonably tailored to the violations found.
- Issuing corrective action.
- When the health care provider fails to make available to patients a summary of their rights, imposing an administrative fine of up to \$100 for nonwillful violations and up to \$500 for willful violations.⁴
- Requiring the refund of fees billed and collected from the patient or a third party on behalf of the patient.
- Requiring remedial education.⁵

In determining what action is appropriate, the board, or the DOH if there is no board, must first consider what sanctions are necessary to protect the public or to compensate the patient. After those sanctions are considered, the board or department may consider rehabilitating the practitioner. The health care practitioner is responsible for all costs associated with the compliance of such orders.⁶

If the ground for disciplinary action is the first-time violation of a practice act for unprofessional conduct and no actual harm to the patient occurred, the board or department, as applicable, shall issue a citation and assess a penalty as determined by rule of the board or department.⁷

Freedom of Speech

“Congress shall make no law ... abridging the freedom of speech.”⁸

The First Amendment of the United States Constitution protects the right to freedom of expression from government interference. The First Amendment is applicable to the states

⁴ Section 381.0261(4), F.S.

⁵ Section 456.072(2), F.S.

⁶ *Id.*

⁷ Section 456.072(3)(b), F.S.

⁸ U.S. CONST. amend. I.

through the Due Process Clause of the Fourteenth Amendment.⁹ “[T]he First Amendment assures the broadest tolerable exercise of free speech, free press, and free assembly, not merely for religious purposes, but for political, economic, scientific, news, or informational ends as well.”¹⁰

It is well established that a government regulation based on the content of speech is presumptively invalid and will be upheld only if it is necessary to advance a compelling governmental interest, precisely tailored to serve that interest, and is the least restrictive means available for establishing that interest.¹¹ The government bears the burden of demonstrating the constitutionality of any such content-based regulation.¹² The U.S. Supreme Court has noted that

Even when considering some instances of defamation and fraud, moreover, the Court has been careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood.¹³

With regard to speech made on internet platforms, the Supreme Court has stated, “We agree with [the District Court’s] conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.”¹⁴

Professional Speech

In 2018, the U.S. Supreme Court issued an opinion underscoring the concept that professional speech is not a separate category of speech that falls outside the protection of First Amendment freedom of speech. The Court stated that the professional speech of individuals who perform personalized services that require a professional license from the state is not exempt from the rule that content-based regulations of speech are subject to strict scrutiny.¹⁵ Justice Thomas delivered the opinion of the court, writing

The dangers associated with content-based regulations of speech are also present in the context of professional speech. As with other kinds of speech, regulating the content of professionals’ speech poses the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information. ... When the government polices the content of professional speech, it can fail to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.¹⁶

⁹ See *De Jonge v. Oregon*, 299 U.S. 353, 364–65 (1937) (incorporating right of assembly); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating right of freedom of speech).

¹⁰ *Douglas v. City of Jeannette (Pennsylvania)*, 319 U.S. 157, 179, (1943) (Jackson, J., concurring in result).

¹¹ *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 665–66 (2004).

¹² *Id.* at 660.

¹³ See *U.S. v. Alvarez*, 567 U.S. 709, 719 and *New York Times v. Sullivan*, 376 U.S. 254 (1964).

¹⁴ *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997).

¹⁵ *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2365 (2018).

¹⁶ *Id.* at 234.

III. Effect of Proposed Changes:

The Exercise of Free Speech by a Health Care Practitioner

Prohibition Against Punishing a Practitioner's Exercise of Free Speech

The bill creates s. 456.61, F.S., which prohibits regulatory boards within the DOH, or the DOH if there is no applicable board, from reprimanding, sanctioning, revoking or threatening to revoke a license, certificate, or registration of a health care practitioner for exercising his or her constitutional right of free speech, including speech through the use of a social media platform.¹⁷

Charges Must Be Proved Beyond a Reasonable Doubt; Direct Physical Harm

In order for a regulatory board, or the DOH if there is no applicable board, to reprimand, sanction, or revoke or threaten to revoke, a license, certificate, or registration of the health care practitioner for his or her speech it must prove beyond a reasonable doubt that the health care practitioner's speech led to the direct physical harm of a person with whom he or she had a practitioner-patient relationship within the 3 years immediately preceding the incident of physical harm.

Penalties for Failing to Prove Allegations Beyond a Reasonable Doubt

The bill specifies that if the board or the DOH fails to meet such burden of proof and reprimands, sanctions, or revokes or threatens to revoke, a license, certificate, or registration of the health care practitioner for his or her speech, the board or the DOH is liable for a sum of up to \$1.5 million per occurrence for any direct or indirect damages to the health care practitioner.

Duty to Provide Complaints to a Practitioner; Penalties

The bill requires the regulatory board, or the DOH if there is no applicable board, to provide a health care practitioner with any complaints it has received which may result in the revocation of licensure, certification, or registration, within 7 days after receiving the complaint. If the board or the DOH fails to timely provide a complaint, it must pay the practitioner an administrative penalty of \$500 for each day the complaint is not provided to the practitioner after the specified 7 days.

The bill provides an effective date of July 1, 2022.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

¹⁷ See s. 501.2041(1)(g), F.S.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Subsection (2) of s. 456.61, F.S., as created in the bill, establishes a civil cause of action that authorizes a court to award a sum of up to \$1.5 million per occurrence to a health care practitioner when the DOH or a board within its jurisdiction fails to meet the required burden of proof. It is probable that CS/SB 1184 would have a negative fiscal impact resulting from increased litigation for the DOH and its boards.

VI. Technical Deficiencies:

None.

VII. Related Issues:

It is possible that this bill may be interpreted to conflict with authorizations in s. 456.072(1)(a) and (m), F.S., and other similar grounds for discipline in a health care practitioner's applicable practice act or rules adopted thereunder.

Section 456.072(1)(a), F.S., authorizes discipline for a practitioner making misleading, deceptive, or fraudulent representations in or related to the practice of the licensee's profession.

Section 456.072(1)(m), F.S., authorizes discipline for a practitioner making deceptive, untrue, or fraudulent representations in or related to the practice of a profession or employing a trick or scheme in or related to the practice of a profession.

On July 29, 2021, the Federation of State Medical Boards, issued the following statement:

Physicians who generate and spread COVID-19 vaccine misinformation or disinformation are risking disciplinary action by state medical boards, including the suspension or revocation of their medical license. Due to their specialized knowledge and training, licensed physicians possess a high degree of public trust and therefore have a powerful platform in society, whether they recognize it or not. They also have an ethical and professional responsibility to practice medicine in the best interests of their patients and must share information that is factual, scientifically grounded and consensus-driven for the betterment of public health. Spreading inaccurate COVID-19 vaccine information contradicts that responsibility, threatens to further erode public trust in the medical profession and puts all patients at risk.¹⁸

Ultimately, the DOH and the boards established within it are responsible to regulate health practitioners for the preservation of the health, safety, and welfare of the public. This bill does not protect speech that is not already protected under the U.S. and Florida constitutions. Rather, it prohibits the DOH and its boards from administratively penalizing a person exercising free speech unless it meets a specific burden of proof. The \$1.5 million liability established in the bill may deter the DOH and the boards from taking action against health care practitioners in their efforts to preserve the health, safety, and welfare of the public.

VIII. Statutes Affected:

This bill creates section 456.61 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 January 26, 2022:

The CS clarifies that the provisions of the bill apply to all speech made by a health care practitioner and not solely to speech conveyed through the use of social media. It also clarifies that any cause of action established in the bill must be related to the health care practitioner’s speech. The CS deletes the reference to recognizing agencies approved by the Board of Osteopathic Medicine so that the provisions of the bill would no longer apply to those recognizing agencies.

- B. **Amendments:**

None.

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

¹⁸ Federation of State Medical Boards, FSMB: *Spreading COVID-19 Vaccine Misinformation May Put Medical License at Risk* (July 29, 2021) available at <https://www.fsmb.org/advocacy/news-releases/fsmb-spreading-covid-19-vaccine-misinformation-may-put-medical-license-at-risk/> (last visited Feb. 3, 2022).