

Legislative Analysis



REVISE PROCEDURES FOR RECORDS RETENTION AND CERTAIN MEDICAL TREATMENTS ON A MINOR

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<http://www.house.mi.gov/hfa>

House Bill 5783 (reported from committee as substitute H-3)
Sponsor: Rep. Mary Whiteford

Analysis available at
<http://www.legislature.mi.gov>

House Bill 5784 (reported from committee as substitute H-1)
Sponsor: Rep. Roger Hauck

House Bill 5793 (reported from committee as substitute H-1)
Sponsor: Rep. Lana Theis

Committee: Law and Justice
Complete to 5-24-18

BRIEF SUMMARY:

House Bill 5783 would do the following:

- Require performance of a medical service involving vaginal or anal penetration to be included in a patient's medical records, including records maintained by health facilities or agencies.
- Require such records to be maintained for at least 15 years.
- Establish administrative and criminal penalties for noncompliance regarding the required documentation of records.
- Require both physician medical boards and the boards for chiropractors, physical therapists, and athletic trainers to develop a document providing guidance on generally accepted standards of practice for services involving vaginal or anal penetration and require the document to be publicly available.

House Bill 5793 would do the following:

- Require written parental consent before procedures involving vaginal or anal penetration could be performed on a minor.
- Require such procedures to be within the scope of practice of the treating health care professional and require that another health professional be in the room during the procedure.
- Provide exceptions to the bill's requirements.
- Establish criminal penalties for a violation of the bill.
- Require the Department of Licensing and Regulatory Affairs (LARA) to create a standardized consent form for use by health care licensees and registrants.

House Bill 5784 would include the maximum term of imprisonment for felonies established under House Bills 5783 and 5793 in the sentencing guidelines chapter of the Code of Criminal Procedure.

Each bill would take effect 90 days after being enacted.

DETAILED SUMMARY:

House Bill 5783 would amend Part 161 of Article 15 of the Public Health Code, which pertains to licensed and registered occupations. If a medical service provided on or after the bill's effective date involved the vaginal or anal penetration of the patient, the bill would require a licensed health care professional¹ to expressly state in the patient's medical record that vaginal or anal penetration had been performed unless the medical service met any of the following conditions:

- Primarily relates to the patient's urological, gastrointestinal, reproductive, gynecological, or sexual health.
- Is necessary and associated with or incident to a **medical emergency**. As used in this provision and elsewhere in the bill, **medical emergency** would mean a circumstance that, in the licensee's good-faith medical judgment, creates an immediate threat of serious risk to the life or physical health of the patient.
- Is performed for the purpose of rectally administering a drug or medicine.
- Is performed to measure a patient's temperature.

Medical records retention and destruction

Currently, the Code establishes medical record retention and destruction procedures for licensed persons. In general, a medical record must be retained for a period of at least 7 years from the date of the service to which the record pertains.

Under the bill, records for a medical service performed on or after the bill's effective date that involves the vaginal or anal penetration of a patient would have to be kept and retained for a minimum of 15 years from the date of the service to which the record pertains. However, this extended record retention requirement would not apply to a record for medical services that met the conditions listed above.

The bill would also expressly state that records for medical services involving vaginal or anal penetration maintained by a health care licensee (or his or her personal representative if the licensee is deceased) could be destroyed or otherwise disposed of after being maintained for 15 years.

[Note: The requirements for medical records retention and disposal do not apply to persons registered under the Code. Registered professions include acupuncturist, sanitarian, and registered social service technician.]

Guidance by medical boards

The bill would require the Michigan Board of Medicine, which governs doctors of human medicine (M.D.s), the Board of Osteopathic Medicine and Surgery, which governs doctors of

¹ Currently, the following health care professions are licensed under Article 15 of the Public Health Code: athletic trainers, audiologists, behavior analysts, chiropractors, counselors, dental assistants, dental hygienists, dentists, dietitians and nutritionists, marriage and family therapists, massage therapists, midwives, nurses, nursing home administrators, occupational therapists and occupational therapy assistants, optometrists, pharmacists, physical therapists and physical therapy assistants, physician's assistants, physicians (M.D.s and D.O.s), podiatrists, psychologists, respiratory therapists, social workers, speech-language pathologists, and veterinarians and veterinarian technicians.

osteopathic medicine (D.O.s), the Board of Chiropractic, the Board of Physical Therapy, and the Board of Athletic Training to create a document to provide guidance to licensees on generally accepted standards of practice for services involving vaginal or anal penetration (including pelvic floor treatments). For M.D.s and D.O.s, the respective boards would not have to include in the document guidance on medical services that primarily relate to a patient's urological, gastrointestinal, reproductive, gynecological, or sexual health; that are performed to measure a patient's temperature; or that are performed for the purpose of rectally administering a drug or medicine.

In creating the required document, the boards would be required to consult with appropriate professional associations and other interested stakeholders. The boards would have to make the required document publicly available within one year after the bill becomes law.

Health facilities and agencies: records documentation, retention, and destruction

If a medical service provided to a patient on or after the bill's effective date involves the vaginal or anal penetration of the patient, the bill would require a **health facility or agency**² to ensure that the patient's medical record expressly states that vaginal or anal penetration had been performed unless the medical service met any of the following conditions:

- Primarily relates to the patient's urological, gastrointestinal, reproductive, gynecological, or sexual health.
- Is necessary and associated with or incident to a medical emergency.
- Is performed for the purpose of rectally administering a drug or medicine.
- Is performed to measure a patient's temperature.

In general, the Code requires a health facility or agency to maintain records for a minimum of 7 years. The bill would require a minimum retention period of 15 years if the service was performed on or after the bill's effective date and either of the following applies:

- The record includes a medical service involving the vaginal or anal penetration of a patient. This would not apply to a record for a medical service meeting any of the exclusionary criteria described above for documentation.
- The patient has filed a complaint with the health facility or agency alleging **sexual misconduct** by an individual who is employed by, under contract to, or granted privileges by the health facility or agency. **Sexual misconduct** would mean sexual contact or penetration under the pretext of medical treatment; female genital mutilation of a child; accosting, enticing, or soliciting a child for an immoral purpose; child pornography; or criminal sexual conduct in the first, second, third, or fourth degree or assault with intent to commit criminal sexual conduct in the first, second, or third degree, regardless of whether the conduct resulted in a criminal conviction.

Specifically, a health facility or agency could only destroy or dispose of a medical record for a medical service involving vaginal or anal penetration after having retained it for 15 years.

² **Health facility or agency** means an ambulance operation, aircraft transport operation, nontransport prehospital life support operation, or medical first response service; a county medical care facility; a freestanding surgical outpatient facility; a health maintenance organization; a home for the aged; a hospital; a nursing home; a facility or agency previously listed that is located in a university, college, or other educational institution; a hospice; or a hospice residence.

Penalties for noncompliance

The bill would add the following administrative and criminal penalties for a violation of the requirement to document a medical service involving vaginal or anal penetration in a patient's medical record:

Person (individual licensee):

- For a first violation: administrative fine of up to \$1,000.
- For a second violation: administrative fine of up to \$2,500.
- For a third or subsequent violation, *or* if the violation was a result of gross negligence: misdemeanor punishable by imprisonment for up to 180 days or a fine of up to \$5,000, or both.
- For a violation that is the result of gross negligence: misdemeanor punishable by imprisonment for up to 180 days or a fine of \$5,000, or both.
- For an intentional violation: felony punishable by imprisonment for up to 2 years or a fine of up to \$7,500, or both.

The addition of these penalties would not limit any other sanction or additional action a disciplinary subcommittee is authorized to impose or take.

In addition, the Code currently establishes a misdemeanor penalty for a person who violates Article 15 (Occupations) or aids or abets another to do so. The bill would specify that those misdemeanor penalties would not apply to a violation of Article 15 for which another criminal penalty is specifically prescribed.

[Note: Because the medical records retention and destruction provisions do not appear to apply to persons registered under the Public Health Code, the penalties added by the bill would also not apply to registrants.]

Licensed health facility or agency

- For a first violation: administrative fine of up to \$2,500.
- For a second violation: administrative fine of up to \$5,000.
- For a third or subsequent violation: misdemeanor punishable by imprisonment for up to 180 days or a fine of up to \$7,500, or both.
- For a violation that is the result of gross negligence: misdemeanor punishable by imprisonment for up to 180 days or a fine of \$10,000, or both.
- For an intentional violation: felony punishable by imprisonment for not more than 2 years or a fine of not more than \$10,000, or both.

The above penalties would not limit any other sanction the Department of Licensing and Regulatory Affairs is authorized to impose on a health facility or agency.

MCL 333.16213 et al.

House Bill 5793 would add a new section to the Public Health Code to prohibit a licensee or registrant from performing a medical treatment, procedure, or examination on a patient who is a minor (under 18 years of age) that involves the vaginal or anal penetration of the minor unless all of the following conditions are met:

- The medical treatment, procedure, or examination is within the scope of practice of the licensee's or registrant's health profession.

- A medical assistant or another licensee or registrant is in the room while the medical treatment, procedure, or examination is performed.
- The licensee or registrant obtains the written consent of a parent, guardian, or person in loco parentis of the minor (or the consent of any person authorized by law to provide consent) on a form created as specified in the bill or on another form that includes the same information. The written consent, which may be obtained electronically, must be obtained before the medical treatment, procedure, or examination is performed. A new consent form would not be required if the same medical treatment, procedure, or examination were required to be performed on a subsequent visit within 6 months from the date the first written consent was obtained. Further, the consent form must be maintained in a patient's medical record for not less than 15 years from the date on which the medical treatment, procedure, or examination was performed.

Exceptions

The conditions described above would not apply to a medical treatment, procedure, or examination performed in the following circumstances:

- If necessary and associated with, or incident to, a medical emergency (which would mean a circumstance that, in the licensee's or registrant's good-faith medical judgment, creates an immediate threat of serious risk to the life or physical health of the patient).
- If primarily related to the patient's urological, gastrointestinal, reproductive, gynecological, or sexual health.
- If performed at a children's advocacy center, as defined in the Child Protection Law.
- If performed for purposes of a sexual assault medical forensic examination under Section 21527 of the Code.
- If performed for the purpose of measuring the patient's temperature.
- If performed for the purpose of rectally administering a drug or medicine.

Penalties

A person who knowingly violates the bill's requirements pertaining to a medical service involving vaginal or anal penetration performed on a minor would be guilty of a felony punishable by imprisonment for up to 2 years or a fine of up to \$5,000, or both, for a first offense, and by imprisonment for up to 5 years or a fine of up to \$10,000, or both, for a second or subsequent offense.

The bill would not prohibit a person from being charged with, convicted of, or punished for any other violation of law committed by that person while violating the bill's provisions. A court could order a term of imprisonment imposed for a violation to be served consecutively to a term of imprisonment imposed for any other crime, including any other violation of law arising out of the same transaction as the violation of the bill. (This means that multiple sentences could be ordered to be served one at a time rather than all at the same time.)

Consent Form

The Department of Licensing and Regulatory Affairs (LARA) would be required to create and could periodically update, and make publicly available on its website, a standardized consent form for use by a health care licensee or registrant who provides a medical treatment, procedure, or examination to a minor involving vaginal or anal penetration. Generally accepted standards of medical practice would have to be used in determining the information to be

included on the form. At a minimum, the form would have to include all of the following statements:

- That gloves are generally used for a medical treatment, procedure, or examination involving vaginal or anal penetration.
- That the person providing consent may request that gloves be used during the treatment, procedure, or examination.
- That the person providing consent has the right to request a clear explanation of the nature of the treatment, procedure, or examination.
- That the person providing consent has the right to request information on whether there is a reasonable alternative to the treatment, procedure, or examination that does not consist of anal or vaginal penetration.
- That a licensee or registrant generally cannot be alone in the room with the patient while the treatment, procedure, or examination is being performed.

The bill is tie-barred to House Bill 5783, meaning that it cannot take effect unless House Bill 5783 is also enacted into law.

Proposed MCL 333.16279 and 333.16279a

House Bill 5784 would place the felony penalties established by House Bills 5783 and 5793 within the sentencing guidelines portion of the Code of Criminal Procedure as follows:

Offense	Crime Group	Felony Class	Maximum Term of Imprisonment
Medical record—intentional omission of certain medical services by a health professional	Public Trust	G	2 years
Performing certain medical treatment of a minor—first offense	Person	G	2 years
Performing certain medical treatment on a minor—subsequent offense	Person	E	5 years
Medical record—intentional omission of certain medical services by a health facility or agency	Public Trust	G	2 years

The bill is tie-barred to House Bills 5783 and 5793, meaning that it cannot take effect unless both of those bills are enacted into law.

MCL 777.13n

FISCAL IMPACT:

Department of Licensing and Regulatory Affairs

House Bill 5783 would have not likely have a significant fiscal impact on the Department of Licensing and Regulatory Affairs. The department would be responsible for investigating allegations that licensees and registrants received felony convictions related to new provisions in the bill and for reporting such instances to the appropriate disciplinary subcommittee. The subcommittee could then levy licensing sanctions including one or more of the following: probation, limitation, denial, suspension, revocation, permanent revocation, restitution, or fines. These investigations would likely be supported by existing appropriations, and given the limited number of licensees likely to commit such violations, any impact on revenues would be negligible. Boards housed within the department would also be required to create guidance documents for licensees on generally accepted standards of medical practice for medical services involving vaginal or anal penetration in various clinical circumstances, and making the documents publicly available. Any costs associated with the production of these documents would be negligible and sufficiently covered by existing appropriations. The bill would allow for administrative fines to be assessed for violations of the requirements for licensed individuals and health facilities and agencies to document procedures involving vaginal or anal penetration in a patient's medical records. A first violation by a licensed individual would incur a fine not to exceed \$1,000 and a second violation would incur a fine not to exceed \$2,500. A first violation in a health facility or agency would incur a fine of not more than \$2,500 and a second violation a fine of not more than \$5,000. The bill does not stipulate where revenues from the administrative fines would be deposited.

House Bill 5793 would not have a significant fiscal impact on the Department of Licensing and Regulatory Affairs (LARA). The bill would require LARA to create a standardized consent form for use by licensees and registrants who provide treatments described in the bill and to make this form available on the department's website. This would result in nominal administrative costs, which would be sufficiently provided for by existing appropriations. The department would also experience costs related to the felonies established by the bill. LARA would be tasked with investigating and reporting alleged felony convictions by licensees to the appropriate disciplinary subcommittee, and the subcommittee could then levy licensing sanctions including one or more of the following: probation, limitation, denial, suspension, revocation, permanent revocation, restitution, or fines. These investigations would likely be supported by existing appropriations, and given the limited number of licensees likely to commit such violations, any impact on revenues would be negligible.

Judiciary and Corrections

House Bill 5783 would have an indeterminate fiscal impact on the state and on local units of government. Information is not available on the number of convictions that would result under provisions of the bill. Violations could be either misdemeanors or felonies, depending on the circumstances. New misdemeanor convictions would increase costs related to county jails and/or local misdemeanor probation supervision. The costs of local incarceration in a county jail and local misdemeanor probation supervision vary by jurisdiction. New felony convictions would result in increased costs related to state prisons and state probation supervision. In fiscal year 2017, the average cost of prison incarceration in a state facility was roughly \$37,000 per prisoner, a figure that includes various fixed administrative and operational costs. State costs for parole and felony probation supervision averaged about \$3,600 per supervised offender in the same year. The fiscal impact on local court systems would depend on how provisions of

the bill affected caseloads and related administrative costs. Increased costs could be offset, to some degree, depending on the amount of additional court-imposed fee revenue generated. Any increase in penal fine revenue would increase funding for local libraries, which are the constitutionally designated recipients of those revenues.

House Bill 5784 amends sentencing guidelines and would not have a direct fiscal impact on the state or on local units of government.

House Bill 5793 would have an indeterminate fiscal impact on the state and on local units of government. Information is not available on the number of convictions that would result under provisions of the bill. New felony convictions would result in increased costs related to state prisons and state probation supervision. In fiscal year 2017, the average cost of prison incarceration in a state facility was roughly \$37,000 per prisoner, a figure that includes various fixed administrative and operational costs. State costs for parole and felony probation supervision averaged about \$3,600 per supervised offender in the same year. The fiscal impact on local court systems would depend on how provisions of the bill affected caseloads and related administrative costs. Increased costs could be offset, to some degree, depending on the amount of additional court-imposed fee revenue generated. Any increase in penal fine revenue would increase funding for local libraries, which are the constitutionally designated recipients of those revenues.

POSITIONS:

Representatives of the following entities testified in support of all of the bills:

- Michigan State Medical Society (4-24-18)
- American Academy of Pediatrics – Michigan Chapter (4-24-18)
- Michigan Academy of Family Physicians (4-24-18)

The following entities indicated support for all of the bills:

- Department of the Attorney General (4-17-18)
- Michigan Coalition to End Domestic and Sexual Violence (4-17-18)
- American Association of University Women (4-17-18)
- Wayne County SAFE Program (4-25-18)

A representative of the Michigan Department of Licensing and Regulatory Affairs indicated support for HBs 5783 and 5793. (4-17-18)

A representative of the Michigan Catholic Conference indicated support for HBs 5783 and 5784. (4-17-18)

A representative of Jupiter Family Medicine testified on HB 5783 regarding concerns with the bill. (4-17-18)

Legislative Analyst: Susan Stutzky
Fiscal Analysts: Marcus Coffin
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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.