

Legislative Analysis



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

Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

House Bill 5783 as introduced
Sponsor: Rep. Mary Whiteford

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

House Bill 5784 as introduced
Sponsor: Rep. Roger Hauck

House Bill 5793 as introduced
Sponsor: Rep. Lana Theis

Committee: Law and Justice
Complete to 4-16-18

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 criminal penalties for noncompliance regarding the required documentation of records.
- Require both physician medical boards to develop a document providing guidance on generally accepted standards of medical practice for medical services involving vaginal or anal penetration that are provided by physicians who are not board-certified obstetrician-gynecologists 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.
- 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 a felony 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

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 professional to expressly state in the patient's medical record that vaginal or anal penetration was performed.

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 service to which the record pertains. The bill would increase the minimum retention period to 15 years if the record was for a medical service that involved the vaginal or anal penetration of a patient performed on or after the bill's effective date. 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 representation if the licensee is deceased) could be destroyed or otherwise disposed of after being maintained for 15 years. The 15-year retention period would not apply to a record for a medical service that primarily relates to the patient's reproductive, gynecological, or sexual health.

[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), and the Michigan Board of Osteopathic Medicine and Surgery, which governs doctors of osteopathic medicine (D.O.s), to create a document to provide guidance to licensees on generally accepted standards of medical practice for medical services involving vaginal or anal penetration (including pelvic floor treatments) that are provided by physicians other than board-certified obstetrician-gynecologists (OB-GYNs).

The boards would have to make the required document publicly available within one year after the bill becomes law.

Health Facilities and Agencies

The Code also provides for medical record retention and destruction by health facilities and agencies.¹ 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

¹ **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.

to ensure that the patient's medical record expressly states that vaginal or anal penetration was performed.

In general, records are maintained 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 primarily relating to the patient's reproductive, gynecological, or sexual health.
- 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 first- through fourth-degree criminal sexual conduct or assault with intent to commit first- through third-degree criminal sexual conduct.

In general, a health facility or agency could only destroy or dispose of a medical record for a medical service involving vaginal or anal penetration after being maintained for 15 years.

Penalties for noncompliance

Currently, a person, whether a licensed health professional or a health facility or agency, who fails to comply with the retention and/or destruction requirements for medical records is subject to an administrative fine of not more than \$10,000 if the failure was the result of gross negligence or willful and wanton misconduct.

The bill would add criminal penalties for violations regarding documenting a medical service involving vaginal or anal penetration in a patient's medical record. Specifically, a person who violated the bill's provision regarding documentation of such a medical service would be guilty of a misdemeanor punishable by imprisonment for not more than 180 days or a fine of not more than \$1,000 (\$2,500 for a violation involving a health facility or agency), or both.

A person who intentionally violated the documentation requirements proposed by the bill would be guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than \$5,000 (\$10,000 for a violation involving a health facility or agency), or both.

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.]

MCL 333.16213 et al.

House Bill 5793

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. 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.

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.
- If primarily related to the patient's reproductive, gynecological, or sexual health.
- If performed at a children's advocacy center, as that term is defined in the Child Protection Law.
- If performed for purposes of a sexual assault medical forensic examination under Section 21527 of the Code.

Penalties

A person who violates the bill's prohibitions would be guilty of a felony punishable by imprisonment for not more than 2 years, a fine of not more than \$5,000, or both, for a first offense, and imprisonment for not more than 5 years, a fine of not more than \$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 would be required to create, 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. 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 patient 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 the patient has the right to request a clear explanation of the nature of the treatment, procedure, or examination.
- That a licensee or registrant 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

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 likely not 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. Licensing boards housed within the department would also be required to create a guidance document for licensees on generally accepted standards of medical practice for medical services involving vaginal or anal penetration and to make the document publicly available. Any cost associated with the production of this document would be negligible and sufficiently covered by existing appropriations.

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.

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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.