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BILL ANALYSIS



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House Bill 5783 (Substitute H-3 as passed by the House)
House Bill 5784 (Substitute H-1 as passed by the House)
House Bill 5793 (Substitute H-1 as passed by the House)
Sponsor: Representative Mary Whiteford (H.B. 5783)
Representative Roger Hauck (H.B. 5784)
Representative Lana Theis (H.B. 5793)

House Committee: Law and Justice
Senate Committee: Judiciary

Date Completed: 6-4-18

CONTENT**House Bill 5783 (H-3) would amend the Public Health Code to do the following:**

- Require a health profession licensee to indicate in a patient's medical record that a medical service involving vaginal or anal penetration was performed unless the service met one of several circumstances.
- Require a health facility or agency to ensure that a patient's medical record stated that a medical service involving vaginal or anal penetration was performed unless the service met one of several circumstances.
- Require a health profession licensee, or a health facility or agency, to keep and retain a medical record for a service that involved vaginal or anal penetration of a patient for at least 15 years from the date of service.
- Prescribe administrative fines and criminal penalties for a violation of the documentation requirements.
- Allow a licensee or his or her personal representative, or a health facility or agency to destroy or dispose of a medical record for a service that involved vaginal or anal penetration of a patient only after maintaining it for 15 years.
- Require various health profession boards to create a document that provided guidance to licensees on generally accepted standards of practice for services involving vaginal or anal penetration.

House Bill 5793 (H-1) would amend the Public Health Code to do the following:

- Prohibit a licensee or registrant from performing on a patient who was a minor a medical treatment, procedure, or examination that involved vaginal or anal penetration unless it was within the scope of the licensee's or registrant's practice, a medical assistant or another licensee was present in the room, and the minor's parent or guardian gave his or her consent.
- Specify circumstances under which the prohibition would not apply, such as the treatment or procedure was necessary and associated with a medical emergency.
- Prescribe felony penalties for a violation.
- Require the Department of Licensing and Regulatory Affairs (LARA) to create a standardized consent form to be used by a licensee or registrant who provided to a minor patient a medical treatment, procedure, or examination that involved vaginal or anal penetration.
- Require LARA to make the form publicly available on its website.

House Bill 5784 (H-1) would amend the sentencing guidelines in the Code of Criminal Procedure to include the felonies proposed by House Bill 5783 (H-3) and House Bill 5793 (H-1).

House Bill 5793 (H-1) is tie-barred to House Bill 5783. House Bill 5784 (H-1) is tie-barred to House Bills 5783 and 5793. Each bill would take effect 90 days after its enactment.

House Bill 5783 (H-3)

Documentation of Medical Service

Under the Public Health Code, an individual licensed under Article 15 (Occupations) must keep and maintain a record for each patient for whom he or she has provided medical services, including a complete record of tests and examinations performed, observations made, and treatments provided. Under the bill, if a medical service provided to a patient on or after the bill's effective date involved the vaginal or anal penetration of the patient, a licensee would have to expressly state in the patient's record that vaginal or anal penetration was performed unless the medical service met any of the circumstances described below.

Currently, unless a longer retention period is otherwise required under Federal or State laws or regulations or by generally accepted standards of medical practice, a licensee must keep and retain each record for a minimum of seven years from the date of service to which the record pertains. Under the bill, if a record were for a medical service performed on or after the bill's effective date that involved the vaginal or anal penetration of the patient, the record would have to be maintained for 15 years from the date of service to which the record pertained. This would not apply to a record for any of the following:

- A medical service that primarily related to the patient's urological, gastrointestinal, reproductive, gynecological, or sexual health.
- A medical service that was necessary and associated with or incident to a medical emergency.
- A medical service performed for the purpose of rectally administering a drug or medicine.
- A medical service performed to measure a patient's temperature.

"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.

Administrative Fines & Criminal Penalties; Licensees

Generally, a person who fails to comply with requirements relating to the retention of medical records is subject to a maximum administrative fine of \$10,000 if the failure was the result of gross negligence or willful and wanton misconduct. Under the bill, except as provided for a violation involving gross negligence or intent, if a person violated the bill's requirement for documentation in a patient's medical record of a medical service involving vaginal or anal penetration, the person would be subject to an administrative fine or guilty of a crime as follows:

- For a first violation, an administrative fine of up to \$1,000.
- For a second violation, an administrative fine of up to \$2,000.
- For a third or subsequent violation, a misdemeanor punishable by up to 180 days' imprisonment or a maximum fine of \$5,000, or both.

A person who violated the documentation requirement would be guilty of a misdemeanor punishable by up to 180 days' imprisonment or a maximum fine of \$5,000, or both, if the violation were the result of gross negligence. A person who intentionally violated the documentation requirement would be guilty of a felony punishable by up to two years' imprisonment or a maximum fine of \$7,500, or both.

The bill would not limit any other sanction or additional action a disciplinary subcommittee would be authorized to impose or take.

Guidance to Licensees

The bill would require the Michigan Board of Chiropractic, the Michigan Board of Medicine, the Michigan Board of Osteopathic Medicine and Surgery, the Michigan Board of Physical Therapy, and the Michigan Athletic Trainer Board each to prepare guidance to licensees on generally accepted standards of practice for services involving vaginal or anal penetration, including internal pelvic floor treatments. The guidance prepared by the Boards of Medicine and Osteopathic Medicine and Surgery would exclude medical services that primarily related to a patient's urological, gastrointestinal, reproductive, gynecological, or sexual health, that were performed to measure a patient's temperature, or that were performed for the purpose of rectally administering a drug or medicine. In creating the guidance document, each Board would have to consult with appropriate professional associations and other interested stakeholders.

Each Board would have to make its guidance document publicly available within one year after the bill's effective date.

Records for Health Facilities & Agencies

The Code requires a health facility or agency to keep and maintain a record for each patient, including a complete record of tests and examinations performed, observations made, treatments provided, and, in the case of a hospital, the purpose of hospitalization. Under the bill, if a medical service provided to a patient on or after the bill's effective date involved the vaginal or anal penetration of the patient, the facility or agency would have to ensure that the patient's medical record expressly stated that vaginal or anal penetration was performed unless the medical service met any of the circumstances under which a record would not have to be retained for 15 years.

The Code's record retention requirement for health facilities and agencies is the same as the requirement for licensees. As proposed for licensees, the bill would create a 15-year retention requirement for records that included a medical service involving the vaginal or anal penetration of a patient, subject to the same exceptions.

The bill also would require a record to be retained for 15 years from the date of a service performed on or after the bill's effective date if the patient had filed a complaint with the health facility or agency alleging sexual misconduct by an individual who was employed by, under contract to, or granted privileges by the facility or agency. "Sexual misconduct" would mean the conduct described in Section 90, 136, 145a, 145b, 145c, 520b, 520c, 520d, 520e, or 520g of the Michigan Penal Code, regardless of whether the conduct resulted in a criminal conviction. (Those sections prohibit the following conduct, respectively: sexual intercourse under the pretext of medical treatment, female genital mutilation, accosting or soliciting child for immoral purpose, accosting or soliciting a minor for immoral purposes after a prior conviction, child sexually abusive activity, first-, second-, third-, and fourth-degree criminal sexual conduct (CSC), and assault with intent to commit CSC.)

Administrative Fines & Criminal Penalties; Health Facility or Agency

A person that fails to comply with requirements relating to the retention of a facility's or agency's medical records is subject to a maximum administrative fine of \$10,000 if the failure was the result of gross negligence or willful and wanton misconduct.

Under the bill, except as provided for a failure resulting from gross negligence or intent, a person that violated the bill's requirement for a facility or agency to document a medical service involving vaginal or anal penetration in a patient's medical record would be subject to an administrative fine or guilty of a crime as follows:

- For a first violation, an administrative fine of up to \$2,500.
- For a second violation, an administrative fine of up to \$5,000.
- For a third or subsequent violation, a misdemeanor punishable by up to 180 days' imprisonment or a maximum fine of \$7,500, or both.

A person that violated the documentation requirement would be guilty of a misdemeanor punishable by up to 180 days' imprisonment or a maximum fine of \$10,000, or both, if the violation were the result of gross negligence. A person who intentionally violated the documentation requirement would be guilty of a felony punishable by up to two years' imprisonment or a maximum fine of \$10,000, or both. The bill would not limit any other sanction that LARA would be authorized to impose.

Destruction of Records

A licensee or health facility or agency may destroy a record that is less than seven years old only if both of the following are satisfied: a) the licensee, facility, or agency sends a written notice to the patient at his or her last known address informing him or her that the record is about to be destroyed, offering the patient the opportunity to request a copy of that record, and requesting the patient's written authorization to destroy it; and b) the licensee receives written authorization from the patient or his or her authorized representative agreeing to the destruction of the record. Under the bill, this would apply except as provided below.

If a licensee or registrant sells or closes his or her practice, retires from practice, or otherwise ceases to practice under Article 15, the licensee or his or her personal representative, if the licensee is deceased, may not abandon the patient records and must send to LARA a written notice that specifies who will have custody of the medical records and how a patient may request access to or copies of his or her medical records, and must either transfer the records to a successor license or other listed entity, or destroy the records, as long as the licensee or his or her personal representative sends a written notice to the patient's last known address and receives written authorization from the patient or his or her authorized representative. Under the bill, the option to destroy the records would apply except as otherwise provided below.

Generally, medical records may be destroyed or otherwise disposed of after seven years. Under the bill, this would apply to a record other than a record for a medical service performed on or after the bill's effective date that involved the vaginal or anal penetration of the patient, which could be destroyed or otherwise disposed of after 15 years. A licensee or health facility or agency could destroy a record for a medical service that involved the vaginal or anal penetration of the patient only in accordance with the Code's requirements for destruction of those records.

House Bill 5793 (H-1)

Medical Treatment of Minor Involving Vaginal or Anal Penetration; Prohibition

Except as otherwise provided, the bill would prohibit a licensee or registrant from performing on a patient who was a minor a medical treatment, procedure, or examination that involved the vaginal or anal penetration of the minor unless all of the following were met:

- The medical treatment, procedure, or examination was within the licensee's or registrant's scope of practice for his or her health profession.
- A medical assistant or another licensee or registrant was in the room while the medical treatment, procedure, or examination was performed.
- Before performing the treatment, procedure, or examination, the licensee or registrant obtained the written consent of a parent, guardian, or person in loco parentis of the minor or the consent of any person who was authorized to provide it, on a form created under the bill or another form that included the same information.

The written consent could be obtained through electronic means, and the person providing consent could waive the requirement for the presence of a medical assistant or another licensee in the room during the treatment or examination. The consent form would have to be maintained in a patient's medical record for at least 15 years from the date on which the treatment, procedure, or examination was performed.

A licensee or registrant who obtained the consent and who required subsequent visits to perform the same treatment, procedure, or examination on the minor could perform them on subsequent visits without obtaining the consent if the subsequent treatment, procedure or examination was performed within six months from the date of obtaining the consent.

Exceptions to Prohibition

The prohibition would not apply under any of the following circumstances:

- The treatment, procedure, or examination was necessary and was associated with or incident to a medical emergency.
- The treatment, procedure, or examination primarily related to the patient's urological, gastrointestinal, reproductive, gynecological, or sexual health.
- The treatment, procedure, or examination was performed at a children's advocacy center.
- The treatment, procedure, or examination was performed for the purposes of a sexual assault medical forensic examination.
- The treatment, procedure, or examination was performed to measure a patient's temperature.
- The treatment, procedure, or examination was performed for the purpose of rectally administering a drug or medicine.

"Children's advocacy center" would mean that term as defined in the Child Protection Law: an entity accredited as a child advocacy center by the National Children's Alliance or its successor agency or an entity granted associate or developing membership status by the National Children's Alliance or its successor agency. "Medical emergency" would be defined as that term would be defined under House Bill 5783 (H-1).

Penalties

A person who performed a medical treatment, procedure, or examination in violation of the prohibition would be guilty of a felony punishable as follows:

- For the first offense, imprisonment for up to two years or a maximum fine of \$5,000, or both.
- For a second or subsequent offense, up to five years' imprisonment or a maximum fine of \$10,000, or both.

The bill would not prohibit a person from being charged with, convicted of, or punished for any other violation of law that was committed by that person while violating the prohibition.

The court could order a term of imprisonment imposed for a violation to be served consecutively to a term imposed for another crime, including any other violation of law arising out of the same transaction.

Standardized Consent Form

The Department would have to create and could periodically update a standardized consent form to be use by a licensee or registrant who provided to a minor a medical treatment, procedure, or examination that involved the vaginal or anal penetration of the minor. The Department would have to use generally accepted standards of medical practice in determining the information to be included on the form. The form would have to include at least all of the following statements:

- Gloves were generally used for a treatment, procedure, or examination involving vaginal or anal penetration.
- The person providing consent for the treatment, procedure, or examination would have the right to request information on whether there was a reasonable alternative that did not consist of anal or vaginal penetration.
- The person providing the consent would have the right to request a clear explanation of the nature of the treatment, procedure, or examination.
- The person providing consent could request that gloves be used during the treatment, procedure, or examination.
- A licensee or registrant general could not be alone in the room with the patient while the treatment, procedure, or examination was being performed.

The Department would have to make the form publicly available on its website.

House Bill 5784 (H-1)

Under the bill, a health professional's, or a health facility's or agency's, intentional omission of certain medical services from a medical record would be a Class G felony against the public trust with a statutory maximum of two years' imprisonment.

A first offense of performing certain medical treatment on a minor would be a Class G felony against a person with a statutory maximum of two years' imprisonment. A subsequent offense would be a Class E felony against a person with a statutory maximum of five years.

MCL 333.16213 et al. (H.B. 5783)

Legislative Analyst: Jeff Mann

MCL 777.13n (H.B. 5784)

Proposed MCL 333.16279 & 333.16279a (H.B. 5793)

FISCAL IMPACT

House Bills 5783 (H-3) and 5793 (H-1)

The bills would have a minimal fiscal impact on the Department of Licensing and Regulatory Affairs. It is probable that the costs of performing the required administrative and investigative activities, as well as creating and updating consent forms, would be covered by existing appropriations to the Department. Given the likely low number of violations of the proposed documentation and record retention requirements, the revenue generated from the proposed administrative fines would likely be negligible.

The bills' criminal penalties would have a negative fiscal impact on the State and local government. More misdemeanor and felony arrests and convictions could increase resource demands on law enforcement, court systems, community supervision, jails, and correctional facilities. The average cost to State government for felony probation supervision is approximately \$3,024 per probationer per year. For any increase in prison intakes, in the short term, the marginal cost to State government is approximately \$3,764 per prisoner per year. Any associated increase in penal fine revenue increases funding to public libraries.

House Bill 5784 (H-1)

The bill would have no fiscal impact on local government and an indeterminate fiscal impact on the State, in light of the Michigan Supreme Court's July 2015 opinion in *People v. Lockridge*, in which the Court ruled that the sentencing guidelines are advisory for all cases. This means that the addition to the guidelines under the bill would not be compulsory for the sentencing judge. As penalties for felony convictions vary, the fiscal impact of any given felony conviction depends on judicial decisions.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.