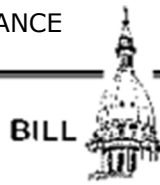




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BILL ANALYSIS

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Senate Bill 789 (as reported without amendment)
Sponsor: Senator Rick Jones
Committee: Judiciary

(as passed by the Senate)

Date Completed: 11-17-11

RATIONALE

The Public Health Code includes five separate schedules of controlled substances and prescribes criminal penalties for the improper manufacture, delivery, possession, and use of those substances. Often, however, illicit drug producers elude criminal liability by manufacturing and marketing so-called designer drugs that differ only slightly from scheduled controlled substances. Individual substances may be added to the various schedules either by statutory amendment or administrative procedures, but neither process allows additional items to be scheduled expeditiously. Some people believe the law should permit more flexibility in adding controlled substances to the schedules, by authorizing the Michigan Board of Pharmacy to schedule a controlled substance temporarily at the request of the Director of the Department of Community Health (DCH).

In addition, Federal law contains similar schedules of controlled substances and the Code provides for the inclusion of federally scheduled substances in Michigan's schedules if the Board holds a meeting within 91 days of receiving a Federal notice to determine whether a substance should be controlled under Michigan law. Some people believe that federally scheduled substances should be included automatically in Michigan's schedules unless the Board holds such a meeting.

CONTENT

The bill would amend the Public Health Code to do the following:

- Require the Director of the Department of Community Health to**

notify the Michigan Board of Pharmacy if the Director determined that imminent danger to life or health could be prevented or controlled by temporarily scheduling a substance as a controlled substance.

- Allow the Board of Pharmacy to add, delete, or reschedule a substance pursuant to the DCH Director's notification and the procedures outlined in the bill.**
- Establish procedures, including public notice and a public hearing, for the temporary scheduling of a substance.**
- Allow temporary scheduling of a substance for up to 180 days, and provide for an extension of up to 180 additional days.**
- Revise the procedure for State scheduling of a federally scheduled substance.**

Imminent Danger/Scheduling of Substance

Under the bill, if the DCH Director determined that an imminent danger to the health or lives of individuals in Michigan could be prevented or controlled by temporarily scheduling a substance as a controlled substance, he or she would have to notify the Michigan Board of Pharmacy (the "administrator"). The notification would have to be in writing and include a description of the substance and the grounds for the Director's determination. The Director could provide copies of police, hospital, and laboratory reports and other information as he or she considered appropriate. (Under the Code, "imminent danger" means a condition or practice exists

that could reasonably be expected to cause death, disease, or serious physical harm immediately or before the imminence of the danger can be eliminated through enforcement procedures otherwise provided.)

The Code requires the Board of Pharmacy to administer Article 7 (Controlled Substances) of the Code, and allows the Board to add substances to, or delete or reschedule substances in, the schedules enumerated in Article 7, pursuant to the Administrative Procedures Act (APA). The bill also would authorize the Board to add, delete, or reschedule substances as provided in the bill.

Temporary Scheduling of Substance

In making a determination regarding a substance, the Board must consider certain factors. The Board then must make findings with respect to those factors and promulgate a rule controlling the substance, if the Board finds the substance has a potential for abuse.

For purposes of temporary scheduling only, the bill would require the Board to consider whether the DCH Director had notified it that the substance constituted an imminent danger. If the Board received this notice, it could proceed to determine whether the substance should be temporarily scheduled or rescheduled as a controlled substance under Article 7. If the Board decided to proceed, it would have to conduct at least one public hearing on the matter, providing at least 10 days' notice of the hearing. The notice would have to specify, at a minimum, the purpose of the hearing and state that the hearing was open to the public at a designated time and place. The Board would have to transmit the notice to the Department of Licensing and Regulatory Affairs (LARA) for placement in the Michigan Register. The notice would be effective when its text became available to the public on the internet.

A quorum for the meeting and business conducted at a hearing would be a majority of the professional members of the Board of Pharmacy. Any Board member could attend the hearing by two-way teleconferencing. Except as otherwise provided, the APA and the Open Meetings Act would not apply to these procedures.

The Board of Pharmacy could temporarily schedule or reschedule the substance as a controlled substance for a period of up to 180 days. The Board could extend the temporary scheduling for up to an additional 180 days. The public notice requirements described above, the APA, and the Open Meetings Act would not apply to an extension.

If the Board determined that a substance should be temporarily scheduled or rescheduled, it would have to order the substance scheduled or rescheduled on a temporary basis by written order. The Board would have to transmit the order to LARA for placement in the Michigan Register. The order would be effective when its text became available to the public on the internet.

The order would expire as follows:

- On the date specified in the order, except as provided below.
- Upon the expiration of 180 days after the Board signed the order.
- When the substance specified in the order was otherwise scheduled or rescheduled under Article 7 or designated as a drug, including a controlled substance, as otherwise provided by law.

An extension of an order would become effective in the same manner and would be subject to the same conditions as an original order, except that the requirement for a public hearing would not apply.

State Scheduling of Federal Schedule

Under the Code, if a substance is designated, rescheduled, or deleted as a controlled substance under Federal law and notice of that action is given to the Michigan Board of Pharmacy, the Board must hold a meeting within 91 days to determine whether the substance should be similarly controlled under State law. Under the bill, instead, if the Board received such a notice, the substance would be similarly scheduled under State law unless the Board held a meeting within 91 days to determine whether the substance should be controlled under State law.

MCL 333.2251 et al.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The legislative process and administrative procedures for adding a substance to Michigan's controlled substance schedules can be cumbersome and time-consuming. Consequently, law enforcement and public health officials may not be able to address the development of dangerous new designer drugs in a timely manner. Some forms of synthetic cannabinoid compounds, known by names like "K2", "Spice", and "Spice Gold", and certain other street-drugs were added to the Public Health Code's list of Schedule 1 controlled substances in 2010. Earlier in 2011, additional amendments included amphetamines widely known as "bath salts" in Schedule 1. Those substances, however, had been widely distributed and used, with dangerous consequences in some cases, before the law banned their possession and use. Since the addition of K2 and bath salts to Schedule 1, chemists have developed similar compounds that mimic the effects of substances like synthetic marijuana and bath salts, without strictly meeting the chemical structure now listed in law as a controlled substance.

Rather than seeking an amendment to the Public Health Code every time a dangerous new designer-type drug surfaces in Michigan communities, law enforcement and public health officials would like to be able to respond more rapidly. By authorizing the Michigan Board of Pharmacy to schedule a substance temporarily, the bill would provide the flexibility needed to curb the distribution of newly developed compounds that can be hazardous and addictive. The Board's placement of a substance in the schedules would not be unilateral, however, and the scheduling of the substance would not be permanent. The Board could act only upon the recommendation of the DCH Director if he or she determined that an imminent danger to the health or lives of individuals could be prevented or controlled by the temporary scheduling of the substance, and the substance's listing could last only up to 180 days, with the possibility of one extension of up to the same amount of time. Temporary scheduling would allow immediate intervention into the distribution

and use of a dangerous drug and provide the time needed to pursue the permanent addition of the substance to the schedules via legislation or administrative rules.

Supporting Argument

The bill would expedite the inclusion of federally scheduled substance in Michigan's controlled substance schedules. Currently, when substances are added to, rescheduled in, or deleted from the Federal schedules, the Board must hold a meeting within 91 days after receiving notice to determine whether the substance should be similarly controlled in Michigan. The bill essentially would reverse that process by requiring a federally controlled substance to be included in Michigan's schedules *unless* a hearing were held within 91 days.

Supporting Argument

The Marquette County Health Officer submitted written testimony to the Senate Judiciary Committee about his response to problems associated with a particular type of amphetamine known as White Rush Bath Salts. Early in 2011, he was informed by the county's medical director and local law enforcement about a growing number of cases of individuals treated in local emergency rooms for problems associated with that new designer drug. The health officer was able to have an immediate effect on the sale of these bath salts through authority granted in Section 2451 of the Public Health Code, which allows a local health officer to make a determination that an imminent danger exists in the area he or she serves and to order immediate action to avoid, correct, or remove the danger. To have a regional affect in the Marquette area, though, two other neighboring health officers had to take similar action. By authorizing the DCH Director and the Board of Pharmacy to take similar actions with regard to harmful substances, the bill would provide for statewide impact without the local process authorized by Section 2451 having to be repeated all across Michigan.

Legislative Analyst: Patrick Affholter

FISCAL IMPACT

The Michigan Board of Pharmacy would face minor administrative costs due to the notification and public hearing components of the bill.

To the extent that the bill resulted in an increase in the number of criminal convictions related to controlled substances, the State and local units of government would incur additional correctional costs. Local governments would incur the costs of incarceration in local facilities, which vary by county. The State would incur the cost of felony probation at an annual average cost of \$2,500, as well as the cost of incarceration in a State facility at an average annual cost of \$34,000. Additional penal fine revenue would benefit public libraries.

Fiscal Analyst: Steve Angelotti
Matthew Grabowski

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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.