

MEDICAL RECORDS RETENTION: REVISE PROCEDURES

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House Bill 4370 as reported from committee
Sponsor: Rep. Mary Whiteford

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

House Bill 4371 as reported from committee
Sponsor: Rep. Roger Hauck

Committee: Judiciary
Revised 9-18-19

BRIEF SUMMARY: House Bill 4370 would require performance of a medical service involving vaginal or anal penetration to be included in a patient's medical records; require those records to be maintained for at least 15 years; establish administrative and criminal penalties for noncompliance; and require certain professional boards to develop a guidance document on standards of practice for services involving vaginal or anal penetration. House Bill 4371 would add the felonies established under House Bill 4370 and Senate Bill 217 to the sentencing guidelines chapter of the Code of Criminal Procedure. Each bill would take effect 90 days after being enacted.

FISCAL IMPACT: House Bill 4370 would have fiscal implications for the Department of Licensing and Regulatory Affairs (LARA), the judiciary, and state and local corrections agencies. (See **Fiscal Information**, below, for a more detailed analysis.)

THE APPARENT PROBLEM:

Medical, patient, and client records can be an important part of an investigation into allegations or suspicions of misconduct on the part of a health care provider. Many victims, however, do not immediately report incidents of a sexual nature to state regulatory agencies or to the police. Some may doubt their own judgment as to what happened, while others may be children who are too young to self-report or who told an adult who discounted the child's version of events or failed to report the incident to the proper authorities. By the time an incident does get reported and an investigation begins, the record of the exam or treatment may no longer exist. State law only requires licensed health care providers and health agencies such as clinics, nursing homes, and hospitals to maintain patient records for seven years, after which time the records can be destroyed. If a record does exist, important details as to the nature of the exam or treatment may be missing. There are no statutory requirements as to the information that must be recorded for specific types of examinations or treatments.

In an attempt to provide accountability for providers and protections for patients, it has been suggested that the law be changed to require recording each examination and treatment involving anal or vaginal penetration, to extend the time period for which documents containing such information must be retained, and to require certain professional boards to develop documents with guidance on the standard practice of care for such procedures.

THE CONTENT OF THE BILLS:

House Bill 4370 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 was performed unless the medical service met any of the following conditions:

- Related primarily to the patient's urological, gastrointestinal, reproductive, gynecological, or sexual health.
- Was 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.
- Was performed for the purpose of rectally administering a drug or medicine.
- Was performed to measure a patient's temperature.

Medical records retention and destruction

The Public Health 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 seven years from the date of the service to which the record pertains.

Under the bill, a health care licensee (or his or her personal representative if the licensee were deceased) could destroy or otherwise dispose of records for a medical service performed on or after the bill's effective date that requires recording the vaginal or anal penetration of a patient only after their having been maintained for 15 years.

[Note: The requirements for medical records retention and disposal do not apply to persons registered, rather than licensed, 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 medicine (M.D.s), the Board of Osteopathic Medicine and Surgery, which governs doctors of osteopathic medicine (D.O.s), the Board of Chiropractic, the Board of Physical Therapy, and the Board of Athletic Training to each create a document to provide guidance to licensees on generally accepted standards of practice for services involving vaginal or anal penetration (including internal 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,

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, 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.

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 documents, the boards would have 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 became 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 involved 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 was performed unless the medical service met any of the following conditions:

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

In general, the Public Health Code requires a health facility or agency to maintain records for a minimum of seven 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 applied:

- The record included 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 for documentation described above.
- The patient filed a complaint with the health facility or agency alleging **sexual misconduct** by an individual employed by, under contract to, or granted privileges by the health facility or agency. **Sexual misconduct** would mean sexual 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 a new section authorizing 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 an intentional violation: felony punishable by imprisonment for up to two years or a fine of up to \$7,500, or both.

Imposing 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.

- 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 up to two years or a fine of up to \$10,000, or both.

The above penalties would not limit any other sanction LARA is authorized to impose on a health facility or agency.

MCL 333.16213 et al.

House Bill 4371 would place the felony penalties established by House Bill 4370 and **Senate Bill 217** 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 on 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 Bill 4370 and Senate Bill 217, meaning that it cannot take effect unless both of those bills are enacted into law.

Briefly, **Senate Bill 217** 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.
- Require LARA to create a standardized consent form for use by health care licensees and registrants.
- Provide exceptions to the bill’s requirements.
- Establish criminal penalties for a violation of the bill.

MCL 777.13n

BACKGROUND:

House Bills 4370 and 4371 are reintroductions of House Bills 5783 and 5784, respectively, of the 2017-18 legislative session. Both bills were passed by the House of Representatives.

FISCAL INFORMATION:

Licensing and Regulatory Affairs

House Bill 4370 would not likely have a significant fiscal impact on LARA. 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 make 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 of up to \$1,000 and a second violation would incur a fine of up to \$2,500. A first violation in a health facility or agency would incur a fine of up to \$2,500 and a second violation a fine of up to \$5,000. The bill does not stipulate where revenues from the administrative fines would be deposited.

Judiciary and Corrections

House Bill 4370 would have an indeterminate fiscal impact on the state and on local units of government. The number of convictions that would result under provisions of the bill is not known. 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. Costs of local incarceration in county jails and local misdemeanor probation supervision, and how those costs are financed, vary by jurisdiction. New felony convictions would result in increased costs related to state prisons and state probation supervision. In fiscal year 2018, the average cost of prison incarceration in a state facility was roughly \$38,000 per prisoner, a figure that includes various fixed administrative and operational costs. State costs for parole and felony probation supervision averaged about \$3,700 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 4371 is a companion bill to HB 4370 and SB 217 and amends sentencing guidelines. The bill would not have a direct fiscal impact on the state or on local units of government.

ARGUMENTS:

For:

As details emerged in the criminal cases against Larry Nassar, a former sports physician at Michigan State University and USA Gymnastics national team doctor, regarding sexual exploitation during medical exams and treatments, it was revealed that Nassar did not always follow accepted medical practices. For instance, he did not always wear gloves when conducting exams and treatments involving penetration of the anus or vagina, explain what he would be doing, or obtain consent. Sadly, some of the girls and women he assaulted did not know that it is standard practice for medical providers to wear gloves when performing certain procedures, or to be clear about the nature of an exam or procedure, and believed they would have reported his conduct sooner had they known.

House Bill 4370 would address the issue by requiring several health-related boards to create documents providing guidance for health care licensees to follow when performing medical services that involve vaginal or anal penetration, such as internal pelvic floor treatments. Each board required to create such a document must then make it available to the public. Not only could licensees easily access the documents, but also any patient who wishes to identify whether his or her treating provider followed the appropriate standard medical practices. Educating patients as to what constitutes accepted standards of practice could result in better reporting of providers who do not follow medical guidelines, as well as reassure patients when the providers are adhering to proper standards of care.

For:

During investigations into alleged abuses by Larry Nassar, some patients found that their medical records lacked important details that could have substantiated, or disproved, allegations of improper conduct on his part. In addition, many records had been destroyed or were missing. Under House Bill 4370, all licensed health care providers would be required to document, in a patient's medical record, if a physical examination or treatment included vaginal or anal penetration. In addition, the required time period for retention of those records would be more than doubled—from 7 to 15 years. An exemption from the bill's requirement to log all exams and treatments involving anal or vaginal penetration would be provided for routine care involving the types of exams and treatments provided by midwives, obstetricians and gynecologists, urologists, and gastroenterologists (and similar care provided by other licensees relating to a patient's urological, gastrointestinal, reproductive, gynecological, or sexual health) as well as for emergency care, administering a medicine by suppository, or taking a patient's temperature rectally.

Failure to properly record examinations or treatments involving vaginal and anal penetration could result in administrative fines, with a third or subsequent violation triggering criminal charges, in addition to sanctions allowed to be imposed or taken by a disciplinary subcommittee. Such requirements could result in more accountability by medical providers and availability of detailed medical records if an allegation of improper or criminal conduct should arise. Proper record keeping could not only increase protections for patients but also protect health professionals from unfounded allegations.

Against:

Although no opposition to House Bill 4370 was offered in committee, a similar bill last year generated concern about inadvertent omissions in a patient's record, for example if a medical records transcriber or computer glitch (such as when offices switch from one medical records software program to another) caused a file or the details of an examination or treatment to be missing.

POSITIONS:

The following entities indicated support for the bills:

- Department of Licensing and Regulatory Affairs (9-3-19)
- Michigan Domestic and Sexual Violence Prevention and Treatment Board (8-27-19)
- Michigan Coalition to End Domestic and Sexual Violence (8-27-19)
- Michigan Catholic Conference (8-27-19)

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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.