

Legislative Analysis



MEDICAL TREATMENT OF MINORS AND MEDICAL RECORDS RETENTION

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

Senate Bill 69 as reported from House committee
Sponsor: Sen. Lana Theis

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

Senate Bill 70 as reported from House committee
Sponsor: Sen. Ruth A. Johnson

Senate Bill 71 as reported from House committee
Sponsor: Sen. Roger Hauck

Senate Bill 72 as reported from House committee
Sponsor: Sen. Kristen McDonald Rivet

1st House Committee (SB 72): Criminal Justice
2nd House Committee (SB 72): Health Policy
House Committee (SBs 69, 70, and 71): Health Policy
Senate Committee: Civil Rights, Judiciary, and Public Safety

Complete to 6-21-23

SUMMARY:

Senate Bill 69 would amend the Public Health Code to require written parental consent before procedures involving vaginal or anal penetration can be performed on a minor; require such procedures to be within the scope of practice of the treating health care professional; require another health professional to be in the room during such procedures; provide exceptions; establish criminal penalties for violations; and require the Department of Licensing and Regulatory Affairs (LARA) to create a standardized consent form.

Senate Bill 71 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.

Senate Bills 70 and 72, which are identical, would add the felonies established under Senate Bills 69 and 71 to the sentencing guidelines in the Code of Criminal Procedure.

Senate Bill 69 would add a new section to the Public Health Code to prohibit a licensee¹ or registrant from performing a medical treatment, procedure, or examination on a patient who is

¹ Currently, the following health care professions are licensed under Article 15 of the Public Health Code: athletic trainers, audiologists, acupuncturists, behavior analysts, chiropractors, counselors, dental assistants, dental hygienists, dentists, marriage and family therapists, massage therapists, midwives, nurses, nursing home administrators,

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 could be obtained electronically, would have to 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 six months from the date the first written consent was obtained. The consent form would have to be maintained in a patient's medical record for at least 15 years after the date 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 (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 violated 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 two years or a fine of up to \$5,000, or both, for a first offense, and by imprisonment for up to five 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.)

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. Registered professions include sanitarians and registered social service technicians.

Consent form

LARA would have 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. The form would have to include at least 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.

Proposed MCL 333.16279 and 333.16279a

Senate Bill 71 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 *unless* the medical service met any of the following:

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

Medical records retention and destruction

The Public Health Code establishes medical record retention and destruction procedures for licensed persons. (Note that these requirements do not apply to persons registered, rather than licensed, under the code, such as sanitarians or registered social service technicians.) In general, a medical record must be retained for at least seven years from the date of the service it pertains to. Under the bill, a health care licensee (or their 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 they had been maintained for 15 years.

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 each to 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, 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 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 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:

- It related primarily to the patient's urological, gastrointestinal, reproductive, gynecological, or sexual health.
- It was necessary and associated with or incident to a medical emergency.
- It was performed for the purpose of rectally administering a drug or medicine.
- It 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; county medical care facility; freestanding surgical outpatient facility; health maintenance organization; home for the aged; hospital; nursing home; facility or agency previously listed that is located in a university, college, or other educational institution; hospice; or 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.

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.

Senate Bills 70 and 72, which are identical, would place the felony penalties established by SBs 69 and 71 in the sentencing guidelines chapter of the Code of Criminal Procedure.

Performing certain medical treatments on a minor, first offense, would be a Class G felony against a person with a two-year maximum term of imprisonment and a subsequent offense would be a Class E felony with a five-year maximum term of imprisonment.

The intentional omission of a medical service involving vaginal or anal penetration from a patient's medical record would be a Class G crime against the public trust with a statutory maximum term of imprisonment of two years whether committed by a health professional or by a health facility or agency.

Neither bill can take effect unless both SBs 69 and 71 are also enacted.

MCL 777.13n

Each bill would take effect 90 days after being enacted.

BACKGROUND:

Senate Bill 69 is a reintroduction of SB 226 of the 2021-22 legislative session, SB 217 of the 2019-20 legislative session, and HB 5793 of the 2017-18 legislative session. SB 226 was passed by the Senate and HB 5793 was passed by the House of Representatives.

Senate Bill 71 is a reintroduction of HBs 4853 of the 2021-22 legislative session, HB 4370 of the 2019-20 legislative session, and HB 5783 of the 2017-18 legislative session, all of which were passed by the House of Representatives.

The bills are part of a larger package of bills to address sexual assault that were originally introduced following the revelation of hundreds of instances in which Larry Nassar, a nationally known physician employed by Michigan State University who also provided medical treatments to members of the USA Olympics women's gymnastics team, was found to have engaged in practices that constituted criminal sexual conduct.

BRIEF DISCUSSION:

Senate Bill 69

Generally speaking, most people, and especially children, do not know the statutory scope of practice of different licensed health professions. Therefore, even if a parent is in the examination room with their child during an examination or procedure, improper conduct on the part of the health provider may not be recognized. In some circumstances, a child's or parent's trust in the provider may override an instinctive sense that something is not right.

With some exceptions for common procedures performed by a health provider within their related scope of practice, such as a pediatrician taking an infant's temperature rectally, or gynecologic examinations, the bill would enact requirements and prohibitions that will mitigate the type of abuse perpetrated on minors by Larry Nassar and the late Dr. Robert Anderson, a physician with the University of Michigan who, among other sexual assault abuses, reportedly conducted inappropriate and unnecessary rectal, vaginal, and genital exams even for medical conditions like sore throats and migraines. Failure to follow the bill's requirements and restrictions could result in being charged with and convicted of a felony.

Senate Bill 71

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 their 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 requires licensed health care providers and health agencies such as clinics, nursing homes, and hospitals to maintain patient records for only 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 also no statutory requirements as to the information that must be recorded for specific types of examinations or treatments. 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.

Senate Bill 71 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, and make those documents available to the public. Not only could licensees easily access the documents, but so could any patient who wished to identify whether their treating provider followed the appropriate standard medical practices. Supporters of the bill argue that 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. Proper record keeping could not only increase protections for patients but also protect health professionals from unfounded allegations. Failure to properly record examinations or treatments involving vaginal and anal penetration could result in administrative fines, license sanctions, and even criminal charges, depending on the circumstances of the violation.

FISCAL IMPACT:

Senate Bill 69 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 2022, the average cost of prison incarceration in a state facility was roughly \$47,900 per prisoner, a figure that includes various fixed administrative and operational costs. State costs for parole and felony probation supervision averaged about \$5,000 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. Any increase in penal fine revenue would increase funding for public and county law libraries, which are the constitutionally designated recipients of those revenues.

The bill would not have a significant fiscal impact on the Department of Licensing and Regulatory Affairs. 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.

Senate Bill 71 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

misdeemeanor 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 2022, the average cost of prison incarceration in a state facility was roughly \$47,900 per prisoner, a figure that includes various fixed administrative and operational costs. State costs for parole and felony probation supervision averaged about \$5,000 per supervised offender in the same year. Those costs are financed with state general fund/general purpose revenue. The fiscal impact on local court systems would depend on how provisions of the bill affected caseloads and related administrative costs. It is difficult to project the actual fiscal impact to courts due to variables such as law enforcement practices, prosecutorial practices, judicial discretion, case types, and complexity of cases. Any increase in penal fine revenue would increase funding for public and county law libraries, which are the constitutionally designated recipients of those revenues.

The bill would not have a significant fiscal impact on the Department of Licensing and Regulatory Affairs. Under the Public Health Code, LARA is responsible for investigating whether grounds for disciplinary action against licensees and registrants exist, and provisions contained within the bill would meet the criteria for disciplinary action under the Public Health Code. Disciplinary subcommittees have the ability to levy licensing sanctions including one or more of the following: probation, limitation, denial, suspension, revocation, permanent revocation, restitution, or fines. Any resulting 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 LARA 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. The cost associated with the production of these documents would likely be negligible. 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.

Senate Bills 70 and 72 are companion bills that amend sentencing guidelines to include felonies created under Senate Bills 69 and 71 related to performing certain medical treatments on a minor or the intentional omission of certain medical services from a patient's medical record. The bills would not have a direct fiscal impact on the state or on local units of government.

POSITIONS:

A representative of the Michigan Coalition to End Domestic and Sexual Violence testified in support of the bills. (5-25-23)

The following entities indicated support for the bills:

- Michigan Nurses Association (6-8-23)

- Michigan Catholic Conference (6-8-23)
- Michigan Council for Maternal and Child Health (6-8-23)
- Michigan Family Forum (6-8-23)
- Michigan Poverty Law Program (5-25-23)
- State Public Affairs Committee of the Michigan State Conference of Junior Leagues (5-25-23)

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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.