



Senate Fiscal Agency
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BILL ANALYSIS



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Senate Bills 69 through 72 (as enacted)

PUBLIC ACTS 60-63 of 2023

Sponsor: Senator Lana Theis (S.B. 69)
Senator Ruth Johnson (S.B. 70)
Senator Roger Hauck (S.B. 71)
Senator Kristen McDonald Rivet (S.B. 72)

Senate Committee: Civil Rights, Judiciary, and Public Safety
House Committee: Health Policy

Date Completed: 5-23-24

RATIONALE

According to testimony before the Senate Committee on Civil Rights, Judiciary, and Public Safety, some physicians have adopted standards for making certain they have consent before undertaking medical procedures on a minor that involve vaginal or anal penetration; however, some have not. Additionally, sexual contact and penetration under the pretext of medical treatment is not uncommon, such as the treatment of minors under the care of Larry Nassar, who was convicted of several counts of first-degree criminal sexual conduct that he perpetrated during his work as the team doctor for USA and Michigan State University gymnastics. Some people believe that the power imbalance in a patient-physician relationship puts a patient at the mercy of a physician's presumed expertise and unwilling to disagree to a procedure, such as in the case with Larry Nassar. Accordingly, it was suggested that physicians be required to get formal consent from a minor patient's guardian before undertaking such medical procedures and that health professionals be required to document medical service involving vaginal or anal penetration to improve accountability and deter medical malpractice.

CONTENT**Senate Bill 69 amended the Public Health Code to do the following:**

- Prohibit a licensee or registrant from performing on a patient who is a minor a medical treatment, procedure, or examination that involves vaginal or anal penetration unless it is within the scope of the licensee's or registrant's practice, a medical assistant or another licensee is present in the room, and the minor's parent or guardian gives his or her consent.
- Specify circumstances under which the prohibition does not apply, such as if the treatment or procedure is 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 provides to a minor patient a medical treatment, procedure, or examination that involves vaginal or anal penetration.
- Require LARA to make the form publicly available on its website.

Senate Bill 70 amended the sentencing guidelines in the Code of Criminal Procedure to include the felonies proposed by Senate Bill 69 and Senate Bill 71.

Senate Bill 71 amended 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 has been performed unless the service meets one of several circumstances.**
- **Require a health facility or agency to ensure that a patient's medical record states that a medical service involving vaginal or anal penetration has been performed unless the service meets 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 involves 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 bill.**
- **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 involves vaginal or anal penetration of a patient only after maintaining it for 15 years.**
- **Allow LARA to promulgate rules that provide guidance to certain licensees on generally accepted standards of practice for services involving vaginal or anal penetration.**

Senate Bill 72 amended the sentencing guidelines in the Code of Criminal Procedure to include the felonies proposed by Senate Bill 69 and Senate Bill 71.

The bills took effect October 10, 2023.

Senate Bill 69

Medical Treatment of Minor Involving Vaginal or Anal Penetration; Prohibition

Except as otherwise provided, the bill prohibited a licensee or registrant from performing on a patient who is a minor a medical treatment, procedure, or examination that involves the vaginal or anal penetration of the minor unless all the following are met:

- The medical treatment, procedure, or examination is within the licensee's or registrant's scope of practice for his or her health profession.
- A medical assistant or another licensee or registrant is in the room while the medical treatment, procedure, or examination is 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 is authorized to provide it, on a form created under the bill or another form that includes the same information.

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

A licensee or registrant who obtains the consent and who requires subsequent visits to perform the same treatment, procedure, or examination on the minor may perform them on subsequent visits without obtaining the consent if the subsequent treatment, procedure, or examination is performed within six months from the date of obtaining the consent.

Exceptions to the Prohibition

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

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

"Medical emergency" means 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. "Children's advocacy center" means 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.

Penalties

A person who knowingly performs a medical treatment, procedure, or examination in violation of the prohibition is guilty of a felony punishable as follows:

- For the first offense, up to two years' imprisonment 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.

Under the bill, a person may be charged with, convicted of, or punished for any other violation of law that is committed by that person while violating the prohibition. The court may 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 must create and may periodically update a standardized consent form for use by a licensee or registrant who provides to a minor a medical treatment, procedure, or examination that involves the vaginal or anal penetration of the minor. The Department must use generally accepted standards of medical practice in determining the information to be included on the form. The form must include at least all the following statements:

- That gloves are generally used for a treatment, procedure, or examination involving vaginal or anal penetration.
- That the person providing consent for the treatment, procedure, or examination has the right to request information on whether there is a reasonable alternative that does not consist of anal or vaginal penetration.
- That the person providing the consent has the right to request a clear explanation of the nature of the treatment, procedure, or examination.
- That the person providing consent may request that gloves be used during the treatment, procedure, or examination.
- That a licensee or registrant generally cannot be alone in the room with the patient while the treatment, procedure, or examination is being performed.

The Department must make the form publicly available on its website.

Senate Bill 70

The bill added the following sentencing guidelines in the Code of Criminal Procedure for a violation of the proposed prohibition in Senate Bill 69 and Senate Bill 71:

- A first offense of performing certain medical treatment on a minor is a Class G felony against a person with a statutory maximum of two years' imprisonment.
- A subsequent offense is a Class E felony against a person with a statutory maximum of five years' imprisonment.
- A health professional's or a health facility's or agency's intentional omission of certain medical services from a medical record is a class G felony against the public trust with a statutory maximum of two years' imprisonment.

Senate Bill 71

Retention of Record

The Public Health Code requires a licensee to keep and maintain a record for each patient that the licensee has provided with medical services and treatment. Generally, a licensee must keep each record for a minimum of seven years from the date of service unless a longer retention period is required by State or Federal law or generally accepted standards of medical practice.

As a result of the bill, if a medical service provided to a patient on or after October 10, 2023, involves the vaginal or anal penetration of the patient, a licensee must state expressly in the record that vaginal or anal penetration was performed unless the medical service meets any of the circumstances described in the list below. A licensee must retain a record for such a medical service for a minimum of 15 years from the date of service to which the record pertains. These provisions do not apply to a record for any of the following:

- A medical service that primarily relates to the patient's urological, gastrointestinal, reproductive, gynecological, or sexual health.
- A medical service that is necessary and associated with or incident to a medical emergency, meaning a circumstance that, in the licensee's good-faith medical judgement, create an immediate threat of serious risk to the life or physical health of the patient.
- A medical service performed for the purpose of rectally administering a drug or medicine.
- A medical service performed to measure a patient's temperature.

Destruction of Records

Generally, a licensee or health facility or agency may destroy a record that is less than seven years old only if 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.

The Code prohibits a licensee from abandoning records required under the Code if the licensee ceases to practice. In this instance, a licensee, or a personal representative of a deceased licensee, must send a written notice to LARA specifying who will have custody of the medical

records and how patients can access them. The licensee or representative also must either transfer the records or send a written notice to the last known address of each patient for whom the licensee provided medical services.

Under the bill, these options to destroy the records apply except as otherwise provided below.

Generally, medical records may be destroyed or otherwise disposed of after seven years. Under the bill, this applies to a record other than a record for a medical service performed on or after October 10, 2023, that involves the vaginal or anal penetration of the patient, which may be destroyed or otherwise disposed of after 15 years. A licensee or health facility or agency may destroy a record for a medical service that involves the vaginal or anal penetration of the patient only in accordance with the Code's requirements for destruction of those records.

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 violates the bill's requirement for documentation in a patient's medical record of a medical service involving vaginal or anal penetration, the person is 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 \$2,500.
- 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 violates the bill's documentation requirement is guilty of a misdemeanor punishable by up to 180 days' imprisonment or a maximum fine of \$5,000, or both, if the violation is the result of gross negligence. A person who intentionally violates the bill's documentation requirement is guilty of a felony punishable by up to two years' imprisonment or a maximum fine of \$7,500, or both.

Under the bill, a disciplinary subcommittee may impose or take any other sanction or additional action.

Guidance to Licensees

Under the bill, LARA may promulgate rules that provide guidance to licensees under Part 164 (Chiropractic), Part 170 (Medicine), Part 175 (Osteopathic Medicine and Surgery), Part 178 (Physical Therapy), and Part 179 (Athletic Training) on generally accepted standards of practice for services involving vaginal or anal penetration, including internal pelvic floor treatments. If LARA promulgates such rules, it must consult with appropriate professional associations and other interested stakeholders.

The guidance issued to licensees under Parts 170 (Medicine) or 175 (Osteopathic Medicine and Surgery) must exclude information 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.

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 October 10, 2023, involves the vaginal or anal penetration of the patient, the facility or agency must ensure that the patient's medical record expressly states that vaginal or anal penetration has been performed unless the medical service meets any of the circumstances under which a record does 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: a 15-year retention requirement for records that include a medical service involving the vaginal or anal penetration of a patient, subject to the same exceptions.

Additionally, a record must be retained for 15 years from the date of a service performed on or after October 10, 2023, if the patient files 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 facility or agency. "Sexual misconduct" means 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.)

The bill exempts from this requirement, and other requirements under the bill, a health facility or agency that is a health maintenance organization. The bill also exempts a health facility or agency that is a health maintenance organization from a provision allowing a health facility or agency to employ or contract, arrange, or enter into an agreement with another health facility or agency or a medical records company to protect, maintain, and provide access to the patient records described above.

Administrative Fines & Criminal Penalties; Health Facility or Agency

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

Senate Bill 72

The bill added the following sentencing guidelines in the Code of Criminal Procedure for a violation of the prohibitions in Senate Bill 69 and Senate Bill 71:

- A first offense of performing certain medical treatment on a minor is a Class G felony against a person with a statutory maximum of two years' imprisonment.
- A subsequent offense is a Class E felony against a person with a statutory maximum of five years' imprisonment.
- A health professional's or a health facility's or agency's intentional omission of certain medical services from a medical record is a class G felony against the public trust with a statutory maximum of two years' imprisonment.

MCL 333.16279 & 333.16279a (S.B. 69)

777.13n (S.B. 70)

333.16213 et al. (S.B. 71)

777.13n (S.B. 72)

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 bills will improve doctor-patient trust. According to testimony before the Senate Committee on Civil Rights, Judiciary, and Public Safety, there is a power imbalance between doctors and their patients. Patients, who may lack knowledge and understanding about their medical condition, especially if they are young, are vulnerable and rely on the expertise of their doctors. As a result, doctors often are trusted members of their communities; however, some abuse this power and exploit their patients' vulnerabilities. For example, Larry Nassar abused his patients by claiming his actions were necessary medical treatments. His patients, mostly young girls, and their families believed his explanations. Some of the survivors who testified during Nassar's trial recounted how their parents were in the room while they were abused but could not see or did not understand the nature of the abuse.¹

Testimony also indicates that sexual assault psychologically, emotionally, and physically scars survivors, which may lead them to distrust medical professionals. Patients, including assault survivors and their families, deserve safe, mindful medical care, especially during sensitive operations. The bills will balance the power relationship between doctors and their patients by requiring the presence of a medical assistant or another licensee capable of understanding the nature of a procedure. They also require informed consent for invasive procedures on minor children, aiding patients and their families in making the best decisions for their health. Lastly, they require doctors to document instances of vaginal or anal penetration, dissuading doctors from performing abuse and punishing those who fail to comply. Overall, the bills will provide patients another layer of protection against abuse and ensure the trustworthiness of medical professionals.

Legislative Analyst: Eleni Lionas

FISCAL IMPACT

Senate Bill 69 will have a negative fiscal impact on State and local government. New felony arrests and convictions under the bill may increase resource demands on law enforcement, court systems, community supervision, jails, and correctional facilities; however, it is unknown how many people will

¹ Moghe, Sonia, and Lauren del Valle, "Larry Nassar's abuse victims, in their own words", *CNN*, January 17, 2018.

be prosecuted under provisions of the bill. The average cost to State government for felony probation supervision is approximately \$4,200 per probationer per year. For any increase in prison intakes the average annual cost of housing a prisoner in a State correctional facility is an estimated \$45,700. Per diem rates range from \$98 to \$192 per day, depending on the security level of the facility. Any associated increase in fine revenue will increase funding to public libraries.

Senate Bill 70 will 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 bills will 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.

Under Senate Bill 71, and except as otherwise provided, a violation of Section 16213(1) requiring documentation of procedures involving vaginal or anal penetration may result in an administrative fine of not more than \$1,000 for a first violation and not more than \$2,500 for a second violation. Any additional violation will be classified as a misdemeanor and may result in a fine of not more than \$5,000, imprisonment for not more than 180 days, or both. If a violation is the result of gross negligence, it will automatically be considered a misdemeanor and may be subject to the fine of not more than \$5,000, imprisonment for not more than 180 days, or both. An intentional violation may result in a fine of not more than \$7,500, imprisonment for not more than two years, or both. A disciplinary subcommittee may impose additional fines.

Similarly, a violation of Section 20175(1) may result in an administrative fine of not more than \$2,500 for a first violation and not more than \$5,000 for a second violation. A subsequent violation may result in a fine of not more than \$7,500, imprisonment for not more than 180 days, or both. A grossly negligent or intentional violation may result in a fine of not more than \$10,000, imprisonment for not more than 180 days (negligent) or two years (intentional), or both. A disciplinary subcommittee may impose additional fines.

The bill also will have a negative fiscal impact on State and local government. New felony arrests and convictions under the bill may increase resource demands on law enforcement, court systems, community supervision, jails, and correctional facilities; however, it is unknown how many people would be prosecuted under provisions of the bill. The average cost to State government for felony probation supervision is approximately \$4,200 per probationer per year. For any increase in prison intakes the average annual cost of housing a prisoner in a State correctional facility is an estimated \$45,700. Per diem rates range from \$98 to \$192 per day, depending on the security level of the facility. Any associated increase in fine revenue will increase funding to public libraries.

Senate Bill 72 will 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 will 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.

Fiscal Analyst: Joe Carrasco, Jr.
Nathan Leaman

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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.