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AIDS CONFIDENTIALITY

Senate Bill 504 as passed by the  
First Analysis (7-26-89)

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Sponsor: Rep. William A. Sederburg  
Senate Committee: Health Policy Mich. State Law Library  
House Committee: Public Health

### **THE APPARENT PROBLEM:**

Public Act 488 of 1988 (enrolled House Bill 5189) amended the Public Health Code to regulate testing for the presence of antibodies to human immunodeficiency virus (HIV), the virus associated with acquired immunodeficiency syndrome (AIDS) and acquired immunodeficiency syndrome related complex (ARC). Among other things, the act prohibits releasing medical information on any patient with a communicable disease or infection unless the patient signs a release. The prohibition has resulted in hospitals having difficulty in obtaining reimbursement from third party payors.

In order to obtain payments from health insurers, hospitals must release records to the insurers, which means that hospital staff must go through every new patient's medical records and check for more than 30 communicable diseases, a time-consuming and costly process. But even when one or more communicable diseases have been identified in a patient's medical record, hospitals have been advised by their legal counsels not to disclose any information on communicable diseases which are not listed specifically on the release. Reportedly, the Department of Social Services (DSS) and the Office of Services to the Aging (OSA) also have been having difficulty getting information for Medicaid reviews and billing and Medicare appeals.

The Michigan Hospital Association has requested legislation which would address these reimbursement problems resulting from last year's legislation.

### **THE CONTENT OF THE BILL:**

The bill would amend the Public Health Code to limit the confidentiality provisions in Public Act 488 of 1988 to HIV infection, AIDS, and ARC (instead of applying them to all communicable and serious communicable diseases) and would create a single misdemeanor penalty for unlawful disclosure of information about someone with HIV infection, AIDS, or ARC.

Confidentiality. The bill would require the Department of Public Health (DPH) to promulgate rules (a) requiring the confidentiality of medical records concerning certain communicable diseases (including serious communicable diseases) and (b) listing the communicable diseases and serious communicable diseases or infections falling under these rules. The list would have to include hepatitis B, venereal disease, and tuberculosis, but would not include HIV infection, AIDS, or ARC. The bill also would restrict the confidentiality provisions (and exceptions) of Section 5131 of the Public Health Code (added by Public Act 488 of 1988) to HIV infection, AIDS, and ARC.

Penalties. The bill would revise the penalties for unlawful disclosure of information regarding communicable diseases. Public Act 488 established three levels of penalties for such disclosure, depending on whether the

information was about a communicable disease or a serious communicable disease and, in the case of a serious communicable disease, whether the violator were a government employee or not. Unlawful disclosure of information about a communicable disease is a misdemeanor punishable by up to 90 days' imprisonment and a fine of up to \$500. Non-government employees who unlawfully disclose information about a serious communicable disease are liable for civil damages (actual damages or \$1,000, whichever is greater) and costs. Government employees who unlawfully disclose such information are guilty of a felony, punishable by up to three years' imprisonment and a fine of up to \$5,000.

The bill would amend these penalties by deleting the penalty for unlawfully disclosing information about someone with a communicable disease and by establishing a single penalty for unlawfully disclosing information about someone with HIV infection, AIDS, or ARC. Violators would be guilty of a misdemeanor, punishable by a fine of up to \$5,000 and up to one year's imprisonment.

Miscellaneous. The bill also would allow parents or legal guardians to give written authorization for disclosure of information about a child or ward who was HIV infected or had AIDS or ARC.

MCL 333.5111 and 333.5131

### **FISCAL IMPLICATIONS:**

According to the Senate Fiscal Agency, the bill would have no fiscal implications for the state. (7-5-89)

### **ARGUMENTS:**

#### **For:**

The confidentiality provisions of Public Act 488 of 1988 have caused serious reimbursement problems for hospitals. Because of these confidentiality requirements, hospitals must review patients' medical records and obtain specific authorizations from patients to release medical records if the patients have any communicable disease or serious communicable disease or infection. Given that there are some 30 communicable and serious communicable diseases or infections (including measles and influenza), and given the volume of hospital admissions and emergency rooms visits (some larger hospitals have as many as 40,000 admissions annually, 200,000 emergency room visits, and two million outpatient visits), the strict confidentiality requirements imposed by Public Act 488 are posing extreme logistical, record-checking and reimbursement problems for hospitals.

In order to comply with the act's requirement, a hospital must either review a patient's medical record (which often averages over 100 pages in length) to see if he or she was diagnosed as having any of the communicable diseases

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covered by the law or else it must get a release authorization from all patients whose medical records are requested. One problem that hospitals have with release forms is a low return rate. For example, one hospital sending release forms to patients for their signatures has a return rate of only 42 percent. But in addition to low return rates, hospitals also say that they are unclear which communicable diseases require a signed release. Public Act 491 (enrolled Senate Bill 1041) defines "serious communicable disease or infection" to mean a communicable disease or infection that is designated as "serious" by the Department of Public Health, and includes, but is not limited to, HIV infection, AIDS, ARC, venereal disease and tuberculosis. However, since the DPH has not created a list of communicable or serious communicable diseases, hospitals, on the advice of their legal counsels, have hesitated to release any information on communicable diseases which are not listed specifically on the release form.

Hospitals have other problems with the act's requirements. For example, during a patient's stay, a hospital must report certain items to the third party payor (such as diagnosis, treatment, and progress), at specific points in the patient's stay. Since hospitals currently have no mechanism for monitoring when a communicable disease is detected during a patient's stay, setting up such a system would require daily monitoring of every patient for diagnosis of a communicable disease. In addition, hospitals say that these problems are compounded in coordination of benefits situations, where a patient is covered by more than one health care insurer. Hospitals also claim that the act's confidentiality requirements effectively curtails utilization and billing audits conducted by all third party payors.

It is neither practical nor necessary to require all communicable diseases (or even all serious communicable diseases, such as hepatitis B, VD, TB) to be subject to the same strict confidentiality requirements as those applied to HIV, AIDS, and ARC, which carry such a heavy social stigma. Requiring specific authorization for release of medical records only for patients diagnosed as having HIV infection, AIDS, or ARC would greatly reduce this costly and time-consuming burden on hospitals.

### **For:**

State agencies also have been experiencing problems because of Public Act 488. The Department of Social Services (DSS) reportedly has experienced problems in administering its medical services (including Medicaid, Crippled Children, General Assistance Medical, and Residential County Hospital programs) because of the act's confidentiality requirements. For example, the state has stopped providing hospitals with the diagnostic codes they need to meet preauthorization requirements for treating children eligible for Crippled Children's funds—which, in effect, could dismantle the health care delivery mechanisms for these children. And DSS reportedly is having difficulty getting information for Medicaid reviews and billing, while also refusing to release medical information (because of the current confidentiality requirements) to the Office of Services to the Aging (OSA). OSA often helps senior citizens with Medicare appeals, but has not been able to get the necessary medical information from DSS to do this. The bill would alleviate all of these problems.

**Response:** The attorney general's office reportedly has ruled that the confidentiality amendments added to the Public Health Code by Public Act 488 were not intended

to affect the administration of the Medicaid program and that the transmission of diagnosis codes or other patient information, strictly limited to what is necessary to effectively administer the Medicaid program, does not disclose or release confidential information in violation of Public Act 488, so this act should not cause the DSS problems with its Medicaid program.

### **For:**

Department of Social Services employees are concerned that the penalties for government employees were too severe, especially since Department of Public Health employees are exempt from penalties under the act. Instead of having separate penalties for government and non-government employees, the bill would establish a single, misdemeanor penalty for anyone violating the confidentiality provisions for HIV, AIDS, and ARC.

### **Against:**

The Department of Social Services (and, reportedly, many foster parents) is concerned that, under Public Act 488, foster parents cannot be told that a child being placed in the home has HIV infection, AIDS, or ARC (or even measles). Although the bill would allow a parent or legal guardian to give written permission to disclose information about a child or ward infected with HIV, AIDS, or ARC, parental authorization is not always possible in these cases. If a bill can be offered to help hospitals get reimbursement, surely something can be done both to protect foster parents from unwitting exposure to HIV infection, AIDS, and ARC as well as to facilitate the placement of children with these (and other) communicable diseases in much-needed foster care situations.

### **Against:**

The bill would appear to establish three levels of confidentiality standards: "superconfidentiality" for AIDS (including HIV infection and ARC), basic confidentiality for medical records in general (currently provided for under Section 2157 of the Revised Judicature Act), and yet another kind of confidentiality (to be established by rules promulgation) for certain communicable diseases. In general, it is poor policymaking to develop confidentiality standards for only one group of diseases, as opposed to treating confidentiality of medical records generically, regardless of an individual's specific illness. Except for AIDS, which clearly represents a special situation, it is not appropriate policy to establish separate standards and penalties depending on the type of disease. The same standard of confidentiality should apply whether a patient has the measles (a communicable disease) or heart disease.

### **Against:**

Rather than establish special confidentiality for any class of disease—including HIV infection, AIDS, or ARC—there should be a single standard of confidentiality. As AIDS activists point out, AIDS is a disease (or, rather, syndrome), and should be treated as such, no more, no less.

**Response:** Ideally, of course, HIV infection, AIDS, and ARC would be treated just like any other disease or ailment. But these infections or syndromes carry a heavy social stigma. Even though one can hope that, just as cancer is beginning to lose its earlier social stigma, so, too, HIV infection, AIDS, and ARC will be accepted as infections rather than as evidence of morally stigmatized behavior, this certainly currently is not the case. People with this infection or syndrome still need—and should have—the protection of extra confidentiality for their medical records.

***POSITIONS:***

The Department of Public Health supports the bill but has some concerns about its present form. (7-5-89)

The Department of Social Services supports the bill but has some other concerns with Public Act 488 of 1988. (7-25-89)

The Michigan Hospital Association supports the bill. (7-25-89)

The Michigan Dental Association supports the bill. (7-25-89)