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BILL ANALYSIS

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Senate Bill 504 (as enrolled)

Sponsor: Senator William Sederburg

Senate Committee: Health Policy

House Committee: Public Health

Date Completed: 9-26-89

**PUBLIC ACT 174 of 1989****RATIONALE**

As part of a recent package of legislation dealing with AIDS (acquired immunodeficiency syndrome), Public Act 488 of 1988 amended the Public Health Code to regulate testing for the presence of the AIDS virus, antibodies to the human immunodeficiency virus (HIV), and AIDS-related complex (ARC). Among other things, the Act prohibits the release of information pertaining to a communicable disease or serious communicable disease unless the disclosure is specifically authorized by the patient. Reportedly, this restriction has made it difficult for hospitals to obtain reimbursement from third party payors (e.g., insurers), which require medical records to determine their financial liability for services provided, and has created problems for the Department of Social Services (DSS).

Typically, a patient signs a general waiver of confidentiality upon entering a hospital and has been discharged by the time the hospital bills the insurer and receives the insurer's request for medical information. The hospital then must review the patient's records to determine whether the patient has a communicable disease that cannot be disclosed without a specific waiver. If a communicable disease is identified, the hospital must withhold the information or seek a waiver from the patient.

In addition, the DSS apparently has experienced difficulty as a result of the Act in obtaining information for Medicaid reviews and billing, as well as administering its other

medical services programs, and cannot tell foster parents or placement facilities about communicable diseases of children being placed with them. The Office of Services to the Aging also reportedly has had trouble getting medical information from the DSS concerning Medicare appeals.

In order to alleviate these problems, it has been suggested that the law's confidentiality provisions be limited to AIDS and AIDS-related diseases, and that the Department of Public Health be authorized to promulgate confidentiality rules for other communicable diseases.

**CONTENT**

The bill would amend the Public Health Code to:

- Require the Department of Public Health (DPH) to promulgate rules to provide for the confidentiality of certain medical records associated with communicable diseases and serious communicable diseases or infections. These rules would not apply, however, to AIDS, HIV infection, or ARC, which would remain subject to the law's confidentiality provisions.
- Revise the Code's confidentiality and disclosure provisions

S.B. 504 (9-26-89)

**concerning information associated with a communicable disease or a serious communicable disease or infection to limit those provisions to AIDS, HIV infection, or ARC.**

- **Replace current penalties with uniform penalties for the unlawful disclosure of information pertaining to a person with AIDS, HIV infection, or ARC.**

### Rules

The Department would be required to promulgate rules to provide for the confidentiality of reports, records, and data pertaining to testing, care, treatment, reporting, and research associated with communicable diseases and serious communicable diseases or infections. The rules would have to specify the communicable diseases and serious communicable diseases or infections covered under the rules and would have to include, but would not be limited to, hepatitis B, venereal disease, and tuberculosis. The rules could not apply to the serious communicable diseases or infections of HIV infection, AIDS, or ARC. The DPH would be required to submit the rules, under the provisions of the Administrative Procedures Act, within 90 days after the bill's effective date.

### Confidentiality

Currently, the Code contains provisions on the confidentiality of all reports, records, and data regarding testing, care, treatment, reporting, and research associated with "a communicable disease or a serious communicable disease or infection", and specifies that the ordering of a test and the results of that test for the presence of a "communicable disease or a serious communicable disease or infection" are privileged information under the Revised Judicature Act. The Code also specifies when disclosure of information pertaining to "a communicable disease or serious communicable disease or infection" may be released: if required by the Child Protection Act; under a court order; to a legislative body; to the DPH, a local health department, or other health care provider in certain instances; by a physician or public health officer to a contact of the person who has "a communicable disease or serious

communicable disease or infection"; by a representative of the DPH or local health officer to an employee of a school district; and, upon written authority of the person who has "a communicable disease or serious communicable disease or infection". The bill would delete the references to "a communicable disease or serious communicable disease or infection" and replace them with references to HIV infection, AIDS, or ARC.

In addition, the bill provides that when disclosure of such information was authorized in writing by a person who was HIV-infected or had been diagnosed as having AIDS or ARC, and the person was a minor or otherwise incapacitated, the written authorization could be executed by that person's parent or legal guardian.

### Penalties

Under the bill, a person who violated the confidentiality provisions would be guilty of a misdemeanor, punishable by imprisonment for up to one year or a fine of up to \$5,000, or both. The person also would be civilly liable for actual damages or \$1,000, whichever was greater, plus costs and reasonable attorney fees. This would replace current provisions that impose: a maximum penalty of 90 days and/or \$500 for a person who discloses information about an individual who has a communicable disease that is not a serious communicable disease or infection; civil damages of \$1,000 or actual damages for a person who is not a governmental employee or entity and who discloses information about an individual who has a serious communicable disease or infection; and, a maximum penalty of three years and/or \$5,000 for a governmental employee who discloses information about an individual who has a serious communicable disease or infection.

MCL 333.5111 and 333.5131

### FISCAL IMPACT

The bill would have no fiscal impact on State or local government.

## **ARGUMENTS**

### **Supporting Argument**

While the bill would not eliminate the problem entirely, it would reduce the burden on hospitals to undertake the time-consuming and costly process of searching through a patient's medical records for any of 30-plus communicable diseases. Further, by limiting the specific waiver requirement to AIDS, HIV infection, and ARC, the bill would reduce hospitals' potential liability for disclosing confidential information: a hospital that now searches for communicable diseases is not necessarily protected from liability because an exhaustive list of communicable and serious communicable diseases has not been promulgated. If the bill were enacted, hospitals would need to search only for information pertaining to AIDS, HIV infection, and ARC, and could more easily obtain payment from third party payors.

### **Supporting Argument**

The bill would enable the DSS to administer its medical services programs without fear of disclosing confidential information. Although a July 6, 1989, letter opinion from the Attorney General's office concluded that, "the confidentiality amendments to the Public Health Code were not intended to affect the administration of the Medicaid program", and, "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 1988 PA 488", that informal opinion is limited to the Medicaid program. The opinion does not apply to other medical services such as General Assistance medical, county resident hospitalization, and children's special health care services. Nor does it apply to other DSS programs, such as the placement of foster children, in which there may be a need for treatment and knowledge of a medical condition can be crucial. In addition, the DSS often must release medical information to insurance carriers when the Department discovers that a recipient has insurance coverage and attempts to recoup the cost of providing services. Further, the bill would enable the DSS to release medical information to the Office of Services to the Aging, which often helps senior citizens with Medicare

appeals but has been unable to get the necessary medical information to do this.

### **Supporting Argument**

The law's felony and penalty provisions for confidentiality violations by governmental employees are too severe. These provisions primarily affect DSS employees because Public Act 488 can be read as virtually exempting from the penalties Department of Public Health employees who disclose confidential information in the regular course of their duties. Instead of imposing separate penalties for governmental and nongovernmental employees, the bill would more fairly establish a single misdemeanor penalty for anyone violating the confidentiality requirements.

### **Opposing Argument**

In effect, the bill would establish three tiers of confidentiality standards: the current law's superconfidentiality, which the bill would limit to AIDS, HIV infection, and ARC; an intermediate level of confidentiality that would be promulgated by the DPH for other communicable and serious communicable diseases; and the basic confidentiality for medical records that is established under the Revised Judicature Act's physician-patient privilege provision (MCL 600.2157). This would run contrary to the goal of Public Act 488 to handle AIDS as other communicable diseases are handled. As AIDS activists point out, AIDS is a disease and should be treated as such, no more and no less.

**Response:** Because some people unfortunately view AIDS as evidence of morally stigmatized behavior, it is appropriate to afford AIDS patients a superior level of confidentiality.

### **Opposing Argument**

There are still concerns that the bill would not go far enough in enabling the DSS to inform foster parents that a child being placed in their home has AIDS, HIV infection, or ARC. Although the bill would allow the child's parent or legal guardian to authorize disclosure, parental authorization is not always possible to obtain in these cases.

### **Opposing Argument**

The Department of Public Health has questioned whether its powers and duties encompass the authority to determine what is

confidential within the health care system generally and what the scope of disclosure should be, particularly in regard to medical records outside of the Department's domain. While the DPH has the authority to protect the public health, regulating the confidentiality of medical records would seem to be protecting a privacy interest, instead.

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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.