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PROHIBIT PHYSICIAN GAG RULES

House Bill 4392 as introduced
Sponsor: Rep. Mary Schroer

House Bill 4393 as introduced
Sponsor: Rep. Mark Schauer

House Bill 4394 as introduced
Sponsor: Rep. Joseph Palamara

Committee: Health Policy
First Analysis (3-6-97)

THE APPARENT PROBLEM:

Managed care plans have been integral in holding down the rising costs of medical care in recent years. However, stories have surfaced nationwide through news stories and magazine and newspaper articles citing examples of physicians being prohibited by health care plans of which they are participating providers from informing patients of certain treatment options not covered by the plans, and of physicians being offered financial incentives to withhold referrals to specialists and orders for certain tests. Physicians who make too many specialist referrals, order too many expensive tests, or discuss treatment options not offered by a specific plan in violation of the plan's "gag rule" may find themselves facing financial penalties, having to pay for a patient's treatment out of their own pocket, or being removed as a provider from the plan—thus losing a segment of their patient base.

To many, the practice by some managed health care plans such as Health Maintenance Organizations (HMOs), Physician Hospital Organizations (PHOs), and Physician Organizations (POs) to include so-called gag rules in provider contracts creates conflict of interest issues for physicians and undermines the trust and communication in doctor/patient relationships, which in turn may affect quality of care. In response, many states have adopted some form of prohibition on gag rules that restrict physicians from discussing treatment options with a patient or from disclosing information on how physicians are compensated. A New York Times article dated September 17, 1996 reported that 16 states had adopted such laws in 1996. At the federal level, legislation has been introduced in the form of HR 586, the Patient Right to Know Act, to prohibit restrictions on medical communications between physicians and their patients.

Michigan, on the other hand, does not appear to have the problem with gag rules in managed care or other health and insurance plans reported by other states. According to the Insurance Bureau staff, no plan containing gag rule clauses has been filed with the bureau, and to their knowledge, no plans currently operating in the state contain gag rules. A survey conducted recently by the Michigan State Medical Society also failed to uncover any gag rules imposed on Michigan providers. However, since there is no prohibition on HMOs and other health plans from restricting certain communications between a physician and patient, and since self-funded employer plans are not state regulated, a possibility does exist that a health care plan in the state may contain a gag rule, or could impose such gag rules in the future. Therefore, legislation has been proposed to prohibit any ban on doctor/patient communications regarding the disclosure of treatment options, quality assurance plans, and certain financial information for licensed health plans.

THE CONTENT OF THE BILL:

The bills would prohibit health maintenance organizations (HMOs), Blue Cross and Blue Shield of Michigan (BCBSM), and disability insurers from prohibiting or discouraging health professionals and providers from discussing any of the following with an enrollee or member:

- * Health care treatments and services.
- * Quality assurance plans required by law, if applicable.
- * Financial relationships between an HMO, BCBSM, or insurer and the health professional or provider that would include the following, if applicable:

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– Whether a fee-for-service arrangement exists (where the provider is paid a specified amount for each covered service rendered to the participant).

– Whether a capitation arrangement exists (where a fixed amount is paid to the provider for all covered services that are or may be rendered to each covered individual or family).

– Whether payments to providers are made based on standards relating to cost, quality, or patient satisfaction.

House Bill 4392 would amend the Public Health Code (MCL 333.1101 et al.) to apply to group and individual contracts of HMOs. House Bill 4393 would amend the Nonprofit Health Care Corporation Reform Act (MCL 550.1101 et al.) to apply to group and nongroup certificates of Blue Cross and Blue Shield of Michigan. House Bill 4394 would amend the Insurance Code (MCL 500.100 et al.) to apply to expense-incurred hospital, medical, or surgical policies and certificates of commercial health insurance companies.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the bills are not anticipated to have any significant fiscal impact on the state or local government, as it is not current practice for Michigan HMOs to contain gag rule clauses. Gag rules are already prohibited under the Medicaid program and proposed federal legislation would prohibit all other health insurance plans from gag rule clauses in provider contracts. (2-27-97)

ARGUMENTS:

For:

Though the Department of Community Health reports that it finds no evidence of gag rules in Michigan, and does not anticipate any problems in the future, it does oppose any restrictions on speech between doctors and patients. Many industry members also echo the belief that doctor/patient communications should be protected and encouraged. In essence, the bills would be putting current practice into law. The bills would prohibit any licensed health care plan, such as a current or future HMO, managed care plan that assumed risk, BCBSM plan, or insurance plan, from restricting doctors from freely discussing treatment options or disclosing the kind, if any, of financial incentives (rewards or punishments) that the plan imposes on a doctor. The bills would not, however, apply to self-funded employer plans. Reportedly, there is no evidence at this time of any problems with self-funded employer plans containing gag rules.

Further, according to a representative from Blue Cross/Blue Shield of Michigan, Blue Care Network, the language in the bill concerning financial arrangements would be broad enough to enable doctors to talk in general terms that could answer a patient's question regarding a physician's motivation, rather than in exact dollar amounts which may not be relevant to patient care. Patients would be assured of continued open communication with their doctors, and doctors would not have to be concerned that they would be punished for disclosing prohibited treatment options.

Response:

Though the bills do send a strong message that communications between a physician and patient must be unrestricted, some feel that they would not protect physicians from "implied" gag rules or prevent a so-called "carrot approach" whereby doctors could get increased financial incentives if they do not discuss certain treatment options. In addition, several states have adopted legislation that allows physicians to advocate on behalf of their patients, especially in cases where a recommended treatment or payment for a service has been denied. Reportedly, without such protection in the law, many physicians are hesitant to help patients with appeals for fear of reprisals from the health care plan. Provisions to give added protection to physicians should be adopted.

POSITIONS:

The following testified in support of the bills before the House Committee on Health Policy (3-4-97):

C Michigan Association of Health Plans

C Consumer Health Care Coalition

C Right to Life of Michigan

C Michigan State Medical Society

C Michigan Osteopathic Association

C Department of Community Health

C American Association of Retired Persons

The Economic Alliance of Michigan supports the bills. (3-4-97)

The Michigan Health Purchaser Coalition supports the bills. (3-4-97)

The Michigan Health and Hospital Association supports the bills. (3-5-97)

The Golden Rule Insurance Company supports the bills.
(3-4-97)

The Michigan Chamber of Commerce supports the bills.
(3-4-97)

The Michigan Education Association supports the bills.
(3-4-97)

The Blue Cross/Blue Shield of Michigan - Blue Care
Network supports the bills. (3-4-97)

The American Society of Employers supports the bills.
(3-5-97)

The Advocacy Organization for Patients and Providers
supports the bills. (3-4-97)

The Michigan Orthopaedic Society supports the bills. (3-
4-97)

The PT Today, Inc. (Physical Therapy) organization
supports the bills. (3-4-97)

The Michigan Manufacturers Association supports the
bills. (3-5-97)

Analyst: S. Stutzky

~~This analysis was prepared by staff of the House of Representatives~~
their deliberations, and does not constitute an official statement of legislative intent.