Legislative Analysis

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IMMUNITY FOR UNCOMPENSATED CARE

House Bill 4350 (Substitute H–1)
Sponsor: Rep. Gail Haines
Committee: Health Policy

Revised First Analysis (4-14-11)

BRIEF SUMMARY: The bill would revise a provision of the health code that provides civil immunity to health care providers who provide uncompensated, nonemergency care so as to extend immunity to charitable non-health facility entities that coordinate and provide referrals for the provision of nonemergency health care and to define the term "indirectly" with respect to compensation.

FISCAL IMPACT: The bill would have no fiscal impact on state or local government as it relates to the judicial system. The bill would have no direct fiscal impact on the Department of Community Health.

THE APPARENT PROBLEM:

Public Act 172 of 2001 amended the Public Health Code to provide civil immunity to licensed or registered health professionals who provide uncompensated, nonemergency health care in certain health facilities or entities, though certain restrictions apply. The focus of the legislation was, by providing immunity from lawsuits, to increase volunteer participation by health care workers at free clinics serving low-income individuals and the uninsured and also to increase the numbers of physicians providing free services in their offices to those in need.

As the ranks of the uninsured continue to swell, the health care services provided by these volunteer health care professionals are needed more than ever. Apparently, however, the immunity provisions as currently written do not cover health care providers in all situations. For instance, most of the physicians working in hospitals are employed as staff of those hospitals. If these physicians wish to volunteer at a free clinic in their spare time, some feel that the definition of "compensation" contained in the act would exclude them from being covered under the immunity provision. In addition, the immunity does not appear to extend to certain charitable organizations that coordinate a network of volunteer health care professionals, clinics, and hospitals offering free care (e.g., Project Access and Project Chessed). These organizations serve to help the uninsured and poor navigate the health care industry in finding free care by providing referral lists – no health care services are provided by these groups. Therefore, some believe that immunity from lawsuits arising from services provided by facilities or health care workers on the referral lists should be extended to these charities, also.

Legislation has been offered to address these concerns.

THE CONTENT OF THE BILL:

Generally speaking, the Public Health Code provides civil immunity to licensed or registered health professionals who provide uncompensated, nonemergency health care in certain health facilities or entities. Certain restrictions apply, such as written disclosure to patients that the health care is free, that no compensation will be requested from any source, and that liability is limited. (Acts arising from gross negligence, willful and wanton misconduct, or one intended to injure a patient are excluded and therefore actionable).

Currently, "compensation" is defined to mean payment or expected payment from any source, including, but not limited to, payment or expected payment directly from a patient; from a patient's parent, guardian, or spouse; or from a public or private health care payment or benefits plan on behalf of the patient, or indirectly in the form of wages, salary, or other valuable consideration under an employment or service agreement.

House Bill 4350 would amend the Public Health Code (MCL 333.16277) to extend civil immunity to licensed or registered health care providers who provided uncompensated, nonemergency health care services in an entity that is not a health facility and that provides or that coordinates or otherwise arranges for the provision of nonemergency health care to uninsured or underinsured individuals through the voluntary services of or through referrals for the voluntary services of licensees or registrants who receive no compensation for providing the nonemergency health care. (The underlined words are the ones newly added by the bill.)

The written disclosure to patients previously mentioned would have to be provided by the licensee, registrant, or health facility or entity described above.

The bill would also provide immunity to an entity that is not a health facility, has federal tax exempt status as a 501(c)(3) charity, and is organized and operated for the sole purpose of coordinating and providing referrals for nonemergency health care to uninsured or underinsured individuals through licensees or registrants who do not receive compensation for providing the nonemergency health care. Specifically, such an entity would not be liable in a civil action for damages that arise from the nonemergency health care provided by the licensee, registrant, or health facility or entity described in subsection (2) of Section 16277 (the section being amended by the bill).

A similar provision pertaining to immunity for health facilities that are providing certain supporting services to another facility or entity providing the free care already exists in the code. However, the bill would amend that provision to clarify that the immunity extends to uncompensated, nonemergency services provided by the licensee or registrant, and not just the health facility or entity as currently written.

In addition, the bill would define the term "indirectly." With respect to compensation, the term would not include the receipt by a licensee or registrant who is employed by a health facility – other than a health facility that was organized and operated for the sole

purpose of delivering nonemergency health care without receiving compensation – of wages, salary, or other valuable consideration from the employing health facility for providing health care as described in the section being amended, if the employing health facility did not receive compensation for the provision of the health care.

ARGUMENTS:

For:

As the law is currently worded, some feel that a health care worker who is employed by a hospital or health facility, and therefore receiving wages from that entity, may be considered to have been "compensated" for care provided on a volunteer basis to patients at free clinics even if the health care worker was not paid for treating the patient and the clinic did not receive payment for the services either from the patient or from another source. By defining the term "indirectly" as it relates to compensation, House Bill 4350 would address this issue.

Under the bill, it would be clear that a licensed or registered health care worker employed by a hospital or other health facility would be eligible for immunity from malpractice suits when volunteering at free clinics as long as the health facility that employed that health care worker did not receive any type of compensation for the health care rendered by the worker. Thus, it is hoped that more physicians and other health care providers (dentists, mental health practitioners, nurses, and so on) who work for hospitals, nursing homes, and other health facilities would be encouraged to volunteer their services at free clinics.

For:

Several charities collect information and maintain databases regarding free clinics and the names of physicians and other health care professionals offering free, nonemergency services in the clinician's own office -- for example, Project Access and Project Chessed. These databases are only for the purposes of coordinating the types of services available and providing referrals to participating health care professionals. The bill would extend the immunity provision to cover these groups, also. Supporters maintain that this is a sensible approach, as these nonprofit organizations simply coordinate networks of volunteer physicians, clinics, hospitals, and other health care providers and disseminate the information to low-income and uninsured people; these types of nonprofits do not provide healthcare services.

Against:

Some feel strongly that any provision of immunity from medical malpractice creates a two-tier justice system with a higher level of justice going to patients who have the ability to sue (for instance, those with health insurance or who can afford to pay for health care) and less justice afforded to the poor and/or uninsured who must depend on free clinics for their nonemergency health care. The standard of gross negligence is simply so high that, in essence, it is unreachable and therefore acts as a total shield from culpability. To date, no case based on medical gross negligence has been successfully

litigated in the state. Therefore, any expansion of immunity is also seen as an expansion of the population that has no recourse to the courts for medical mistakes.

Against:

On the surface, the bill seems to be a simple clarification that a licensed or registered health care provider that is employed by a health facility (e.g., a hospital or nursing home) could enjoy the same level of immunity from medical malpractice suits that a health care provider in private practice or employed in a setting other than a health facility enjoys when volunteering in free clinics. However, some concerns have been raised over possible unintended consequences of the new language regarding compensation. For instance, if a hospital through a subsidiary or nonprofit opened a free clinic, could the hospital in essence avoid liability for nonemergency care by encouraging its employees to volunteer at the clinic, and encourage emergency room workers to steer uninsured patients with nonemergency complaints to the clinic for free care? Could, over time, the criteria for what would constitute an "emergency" change so that more cases were sent to the free clinic, where the treating health care providers, and the hospital itself, would be immune from lawsuits? If the bill did foster such scenarios, could real emergent conditions be missed under pressure to shunt seemingly nonemergencies to the clinic to the detriment of the patient, who had signed away the right to sue in order to get medical treatment for free? To some, this slippery slope is just not worth any expansion of immunity, which is actually more of an expansion of the numbers of people who cannot sue if injured by a health professional.

Further, it must be mentioned that a low-income or uninsured person who is disabled due to medical malpractice on the part of a volunteer at a free clinic is likely to need public assistance if unable to continue working. Thus, the expansion of immunity amounts to a tax on all state residents. Instead of expanding immunity as a way to encourage health professionals to volunteer their time at free clinics, why isn't pressure being placed on medical malpractice insurance carriers to create a low-cost product that would address the volunteer issue without impacting the types of personal malpractice insurance carried by some practitioners?

In short, any patient in pain, any parent with a child with a high fever, any low-income person who must choose between free care and paying hundreds or thousands of dollars for that same care is likely under the circumstances to surrender their rights to sue. They don't know at the time of signing the disclosure form whether the physician, or nurse, or other health care practitioner that will be treating them is drunk or sober, is good or incompetent, etc. Therefore, is expanding the ranks of people for whom there is no legal recourse for medical injuries really warranted?

POSITIONS:

A representative of the Michigan State Medical Society testified in support of the bill. (3-10-11)

A representative of Project Chessed testified in support of the bill. (3-10-11)

The Michigan Academy of Family Physicians indicated support for the bill. (3-10-11)

The Michigan Health & Hospital Association indicated support for the bill. (3-10-11)

A representative of the Negligence Law Section, State Bar of Michigan testified in opposition to the bill as introduced; the Section remains in opposition to the H-1 Substitute. (4-11-11)

A representative of the Michigan Association for Justice testified in opposition to the bill as introduced and the Association remains in opposition to the bill. (4-12-11)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.