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Bill Analysis
Legislative Service Commission

H.B. 516

126th General Assembly
(As Introduced)

Reps. Fessler, C. Evans, Reidelbach, Setzer, Brinkman, Skindell, Miller, Fende, Barrett, Allen

BILL SUMMARY

- Requires the State Medical Board, not later than two years after the complaint is filed, to make a decision regarding the disposition of a complaint alleging that a physician's failure to meet minimal standards of care resulted in a patient's death.
- Requires the Attorney General to monitor and enforce this requirement.

CONTENT AND OPERATION

Background

Medical Board investigations

(R.C. 4731.22(F) and (O); R.C. 4731.39)

Two sections of current law pertain to when and how an investigation of a complaint filed with the State Medical Board must occur. One, Revised Code § 4731.22, addresses the investigative duty of the Board as a whole, while the other, R.C. 4731.39, addresses the investigative duty of the Board's Secretary.

Board must investigate certain evidence. R.C. 4731.22 requires the Board to investigate evidence that appears to show that a person has violated any provision of the Revised Code chapter governing physician licensing, Chapter 4731., or any rule adopted under it. Any person is permitted to report to the Board, in a signed writing, information that the person may have that appears to show a violation. All information received by the Board pursuant to an investigation is confidential and not subject to discovery in a civil action. The Board is required to conduct all investigations and proceedings in a manner that protects the confidentiality of patients and complainants. The Board is prohibited from making public the names or any other identifying information about patients

or complainants unless proper consent is given or, in the case of a patient, the patient properly waives the physician-patient privilege.¹

A person who reports information to the Board relating to an alleged violation or who testifies before the Board in an administrative hearing is not liable in damages in a civil action as a result of the report or testimony, unless the person does so in bad faith. The Board must assign a case number to each complaint or allegation of a violation received and record the complaint or allegation.

This section requires that each investigation be supervised by the Board's Supervising Member and Secretary.² However, it permits the Board's President to designate another Board member to supervise the investigation in place of the Supervising Member. It prohibits any Board member who supervises the investigation of a case from participating in further adjudication of the case.

In investigating a possible violation, the Board is permitted to administer oaths, order the taking of depositions, issue subpoenas, compel the attendance of witnesses, and compel the production of books, accounts, papers, records, documents, and testimony.³ All hearings and investigations of the Board are considered civil actions for purposes of the law governing the confidentiality of records and proceedings that are within the scope of a health care entity's peer review committee.⁴

The Board may share any information it receives with respect to an investigation, including patient records and patient record information, with law enforcement agencies, other licensing boards, and other governmental agencies that are prosecuting, adjudicating, or investigating alleged violations of statutes or administrative rules. However, an agency or board that receives such information must comply with the same requirements regarding confidentiality as those with which the Medical Board must comply. In a judicial proceeding, the information may be admitted into evidence only in accordance with the Rules of Evidence, but the court must require that appropriate measures are taken to ensure that

¹ *A waiver of privilege is not needed, however, if the Board possesses reliable and substantial evidence that no bona fide physician-patient relationship exists.*

² *The Secretary of the Board must be a physician in good standing (R.C. 4731.02).*

³ *A subpoena for patient record information, however, cannot be issued without consultation with the Attorney General's Office and approval of the Board's Secretary and Supervising Member.*

⁴ *R.C. 2305.252.*

confidentiality is maintained with respect to any part of the information that contains names or other identifying information about patients or complainants whose confidentiality was protected by the Medical Board when the information was in the Board's possession. A court may take measures to ensure confidentiality, including sealing its records or deleting specific information from its records.

The Board is required, on a quarterly basis, to prepare a report that documents the disposition of all cases during the preceding three months. The report must contain the following information about each case with which the Board has completed its activities: (1) the case number assigned to the complaint or alleged violation, (2) the type of certificate to practice, if any, held by the individual against whom the complaint is directed, (3) a description of the allegations contained in the complaint, and (4) the disposition of the case.

The report must also state how many cases are still pending and must be prepared in a manner that protects the identity of each person involved in the case. The report is a public record subject to disclosure under Ohio's public records law.⁵

In addition, the Board is required as part of its investigative duties to develop and implement a quality intervention program designed to improve through remedial education the clinical and communication skills of physicians and podiatrists.

Duty to investigate when Secretary has notice or knowledge of a violation.

R.C. 4731.39 requires, in relevant part, the Secretary of the Medical Board, if the Secretary has knowledge or notice of a violation of the law governing physician licensing, to investigate the matter and, if there is probable cause, file a complaint and prosecute the offender.⁶

⁵ R.C. 149.43.

⁶ *An Ohio appellate court has found that the Medical Board does not have a duty, under current law, to issue a finding of probable cause or no probable cause, or to state the reasons for its conclusions, after an investigation (Talwar v. State Med. Bd. of Ohio (2004), 156 Ohio App. 485, 488).*

Sanctions for failure to meet minimal standard of care

(R.C. 4731.22(B)(2) and (B)(6))

Existing law requires the State Medical Board, by an affirmative vote of at least six of its twelve members,⁷ and to the extent permitted by law, to limit, revoke, or suspend an individual's certificate to practice, refuse to register an individual, refuse to reinstate a certificate, or reprimand or place on probation a certificate holder for one or more specific reasons. Among the reasons for which a physician can be disciplined are (1) failure to maintain minimal standards applicable to the selection or administration of drugs, or failure to employ acceptable scientific methods in the selection of drugs or other modalities for treatment of disease, and (2) a departure from, or the failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances, whether or not actual injury to a patient is established.

The bill: pre-investigation notification and disposition requirements

(R.C. 4731.228(A) and (B); R.C. 4731.229)

When operative

The bill requires the State Medical Board to meet the pre-investigation notification and disposition requirements, described below under "**Specific requirements**," as soon as practicable after it assigns a case number to a complaint or alleged violation, if *either* of the following is true:

(1) Evidence submitted to, or collected by, the Board for an investigation appears to show a physician's⁸ failure to meet minimal standards of care (as described above in "**Sanctions for failure to meet minimal standard of care**") and a patient has died as a result of the alleged failure of the physician to maintain the minimal standards of care.

⁷ *Eight of the twelve Board members must be physicians or surgeons licensed to practice in Ohio and three members must represent the "interest of consumers." Of the three "consumer" members, at least two cannot be a member of, or associated with, a health care provider or profession. At least one consumer member must be at least 60 years old. (R.C. 4731.01.)*

⁸ *The bill defines a "physician" as a person who holds a valid certificate authorizing the certificate holder to practice medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery.*

(2) The Board's Secretary has knowledge or notice of a physician's failure to meet minimal standards of care (as described above in "Sanctions for failure to meet minimal standard of care") and a patient has died as a result of the alleged failure of the physician to maintain the minimal standards of care.

Specific requirements

If either of the conditions discussed above is present, the bill specifies that the Board must do two things as soon as practicable after it assigns a case number to a complaint or alleged violation: (1) notify the complainants, and (2) take an action (see "Disposition," below) regarding the disposition of the complaint no later than two years after the date the case number is assigned to the complaint or alleged violation.

Pre-investigation notification. The Board must notify, in writing, the individual or, if more than one individual, each individual, who filed the complaint or made the allegation, of all of the following:

- (1) The case number assigned to the complaint or allegation.
- (2) The date the case number was assigned and an investigation initiated.
- (3) The date by which the Board must make a decision regarding the disposition of the complaint or alleged violation.

The bill provides that this notice is a "confidential law enforcement investigatory record" as defined in the Ohio Public Records Law.⁹ Under this Law, a confidential law enforcement investigatory record is not a public record subject to disclosure.

Disposition. The Board must, no later than two years after the date the case number is assigned to the complaint or alleged violation, do one of the following:

⁹ A "confidential law enforcement investigatory record" is any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent that the release of the record would create a high probability of disclosure of any of the following: (a) the identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised, (b) information provided by an information source or witness to whom confidentiality has been reasonably promised, which information would reasonably tend to disclose the source's or witness's identity, (c) specific confidential investigatory techniques or procedures or specific investigatory work product, (d) information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source (R.C. 149.43(A)(2)).

(a) Pursue disciplinary action (as described in "**Sanctions for failure to meet minimal standard of care**," above) against the physician who is the subject of the complaint or alleged violation.

(b) Require the physician who is the subject of the complaint or alleged violation to successfully complete an individual educational program and participate in any monitoring determined appropriate by the Board's Quality Intervention Program panel of case reviewers assigned to review the complaint or alleged violation.

(c) Enter into a consent agreement with the physician who is the subject of the complaint or alleged violation.¹⁰

(d) Close the complaint or alleged violation.

Post-investigation notification requirement

(R.C. 4731.228(C))

The bill requires the Medical Board, as soon as practicable after taking an action described above under "**Disposition**," to notify, in writing, the individual or, if more than one individual, each individual, who filed the complaint or made the allegation alleging that a physician's failure to meet minimal standards of care resulted in a patient's death, describing the action the Board has decided to take.

The bill provides that this notice is a "confidential law enforcement investigatory record" as defined in the Ohio's public records law. As described above under "**Pre-investigation notification**," a confidential law enforcement investigatory record is not a public record subject to disclosure.

Attorney General's duty to monitor and enforce requirements

(R.C. 4731.228(D))

The bill requires the Attorney General to monitor the State Medical Board's compliance with the requirements described above and to apply to the Franklin

¹⁰ *The Board is authorized, in lieu of an adjudication under the Ohio Administrative Procedure Act (R.C. Chapter 119.), to enter into a consent agreement with an individual to resolve an allegation of a violation of the law governing physician licensing. A consent agreement, when ratified by an affirmative vote of not fewer than six Board members, constitutes the findings and order of the Board with respect to the matter addressed in the agreement. If the Board refuses to ratify a consent agreement, the admissions and findings contained in the consent agreement are of no force or effect. (R.C. 4731.22(C).)*

County Court of Common Pleas for a writ of mandamus to compel compliance with those requirements if the Attorney General finds that the Board has failed to comply with them.¹¹

HISTORY

ACTION	DATE
Introduced	02-14-06

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¹¹ A writ of mandamus is issued in the name of the State to an inferior tribunal, corporation, board, or person commanding the performance of an act that the law specifically enjoins as a duty specifically resulting from an office, trust, or station (R.C. 2731.01).