

# HOUSE BILL REPORT

## ESB 5666

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### As Passed House - Amended:

April 16, 2013

**Title:** An act relating to clarifying the law regarding disclosing health care quality improvement, quality assurance, peer review, and credentialing information.

**Brief Description:** Concerning disclosure of information by health care quality improvement programs, quality assurance programs, and peer review committees.

**Sponsors:** Senator Dammeier.

### Brief History:

#### Committee Activity:

Judiciary: 3/26/13, 4/2/13 [DPA].

#### Floor Activity:

Passed House - Amended: 4/16/13, 96-0.

### Brief Summary of Engrossed Bill (As Amended by House)

- Removes language in an exclusive remedy provision of the Health Care Review Act that limits its application to actions taken by a peer review body that are not related to competence or conduct.
- Revises statutory requirements imposed on quality improvement programs with respect to the medical staff privileges sanction procedure and periodic reviews of credentials and competency.

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## HOUSE COMMITTEE ON JUDICIARY

**Majority Report:** Do pass as amended. Signed by 12 members: Representatives Pedersen, Chair; Hansen, Vice Chair; Rodne, Ranking Minority Member; O'Ban, Assistant Ranking Minority Member; Goodman, Jinkins, Kirby, Klippert, Nealey, Orwall, Roberts and Shea.

**Staff:** Cece Clynch (786-7195).

### Background:

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

### Immunity and Limitation on Remedies.

The federal Health Care Quality Improvement Act of 1986 (HCQIA) was enacted with the stated purpose of encouraging effective professional peer review to improve the quality of medical care and reduce the cost of medical malpractice lawsuits. The HCQIA provides immunity from damages for actions taken by a professional peer review body related to the competence and conduct of a health care provider. This immunity extends to the professional peer review body, any person acting as a member or staff to the body, any person under contract with the body, and any person who participates with or assists the body with respect to the action. In order to qualify for such immunity, the actions must relate to competence or conduct and have been taken:

- in the reasonable belief that the action was in the furtherance of quality health care;
- after a reasonable effort to obtain the facts of the matter;
- after adequate notice and hearing procedures; and
- in the reasonable belief that the action was warranted by the known facts.

The state Health Care Peer Review Act (HCPRA) includes two separate provisions which provide immunity/limit remedies with respect to actions taken by a professional peer review body:

1. The first incorporates, by reference to the federal law, the provisions of the federal HCQIA that provide immunity from damages for actions taken by a professional peer review body related to the competence and conduct of a health care provider.
2. The second provides an exclusive remedy for any action taken by a professional peer review body that is found to be based on matters *not* related to the competence or professional conduct of a health care provider. The remedies available in these actions are limited to injunctive relief and damages are allowed only for lost earnings directly attributable to the action taken by the peer review body and incurred between the date of such action and the date such action is functionally reversed by the peer review body.

### Staff Privileges Sanction Procedures and Review of Credentials.

Hospitals and ambulatory surgical facilities must maintain quality improvement programs to improve the quality of health care services and prevent medical malpractice. Program requirements for hospitals and ambulatory surgical facilities (collectively referred to as "facilities") include:

- the establishment of a Quality Improvement Committee (QIC) with responsibility to review the services in the facility, both retrospectively and prospectively;
- a medical staff privileges sanction procedure through which credentials, physical and mental capacity, and competence are periodically reviewed as part of an evaluation of staff privileges;
- periodic review of employee credentials and competency in the delivery of health care services;
- a procedure for prompt resolution of patient grievances;
- collection of information relating to negative outcomes, patient grievances, settlements, awards, and safety improvement activities;
- maintenance of relevant and appropriate information concerning individual physicians with the physician's personnel or credential file;
- quality improvement education programs; and
- policies to ensure compliance with reporting requirements.

#### Required Information Regarding Providers.

Prior to granting or renewing privileges or the hiring or association of a physician or practitioner (collectively referred to as "provider"), facilities must request, and the provider must provide, the following information:

- the name of any facility at which the provider had or has any association, employment, privileges, or practice;
- the reason for the discontinuation of any such affiliation;
- any pending professional misconduct proceedings in this or any state;
- the substance of the findings in such actions or proceedings;
- a waiver of confidentiality; and
- verification that the information provided is accurate and complete.

During this process, facilities must also request the following information from any facility at which the provider has or had privileges:

- any pending professional misconduct proceedings or malpractice actions in this or any state;
- any judgment or settlement of a medical malpractice action and any finding of professional misconduct in this or another state by a licensing or disciplinary board; and
- any information required to be reported by providers pursuant to the Uniform Disciplinary Act and other licensing provisions.

#### **Summary of Amended Bill:**

##### Immunity and Limitation on Remedies.

The HCPRA is amended to provide that if the limitation on damages incorporated by reference to the federal law, and found in the first section referenced above, does not apply, then the second provision provides the exclusive remedies in any lawsuit by a health care provider for action taken by a peer review body. Language that limited operation of the second section to only those peer review actions that were not related to the competence or professional conduct of a health care provider is stricken.

##### Staff Privileges Sanction Procedures and Review of Credentials.

Statutory requirements imposed on hospital and ambulatory surgical facility (collectively referred to as "facilities") quality improvement programs with respect to medical staff privileges sanction procedures and periodic reviews of credentials and competency are revised to specify that such programs:

- may include the establishment of more than one Quality Improvement Committee (QIC) to review different health care services;
- must be conducted in accordance with medical staff bylaws and applicable rules, regulations or policies; and
- are to review professional conduct.

##### Required Information Regarding Providers.

Requirements are amended with respect to inquiries that facilities must make prior to granting or renewing privileges or association or hiring of a provider. It is required that inquiry be made regarding current or past affiliations during the prior five years. It is

permissive, but not mandatory, to make inquiry going back further. In the event the inquiry stretches beyond the prior five years, the provider must use best efforts to comply with the request.

Rather than mandate inquiry into the reason for the "discontinuation" of every past association, employment, privilege, or practice, the required inquiry is targeted at whether the provider has ever been or is in the process of being denied, revoked, terminated, suspended, or the like for professional activity or has ever relinquished or withdrawn an application in order to avoid any adverse action or preclude an investigation relating to professional competence or conduct.

**Appropriation:** None.

**Fiscal Note:** Not requested.

**Effective Date of Amended Bill:** The bill takes effect 90 days after adjournment of the session in which the bill is passed.

**Staff Summary of Public Testimony:**

(In support) This bill strikes a balance between patient protection and disclosure. This iteration is the result of a long series of negotiations, and is agreed upon language that passed out of the Senate 49-0. There still is a bit of fine-tuning to be done. Disruptive behavior can not only be disruptive, but also jeopardize patient care. The pieces of this bill that were included in House Bill 1436 are supported by the Washington State Medical Association (WSMA), as are the provisions specifically allowing more than one QIC and those regarding periodic review of competency. The bill is essential for quality improvement programs which, in turn, prevent adverse medical outcomes. Participants need to know there is a fair and protective process in place. The Washington State Hospital Association (WSHA) supports the bill with the WSHA amendment. Conscience clause language is found in statutes dealing with abortion, the Natural Death Act, the Death with Dignity Act, insurance, and anti-discrimination. There are various concerns with respect to including "disruptive behavior" as a matter to be reviewed. On the one hand, "disruptive behavior" may be used to characterize what are matters of conscience. On the other hand, depending upon what is included in a conscience clause, it may lead to protection of yelling by a doctor at a nurse during surgery insofar as the doctor may claim that he or she only yelled to protect patient care or discipline a nurse.

(Opposed) The prime sponsor is to be thanked for working diligently on this bill and addressing most concerns. As a result of negotiations, the various stakeholders are close on language with respect to a couple of issues. Every action of a peer review committee is already protected from public disclosure. Insofar as "disruptive behavior" is within this peer review process, it is already protected as it is within this box. The concern is that adding language would allow entities to reach outside of the current protection and bring in other, additional matters that they characterize as "disruptive behavior" and thereby bring these under the quality assurance umbrella's protection from disclosure. This protection should not extend to situations involving whistleblowing. There are at least a couple of instances known in which providers who had reported financial improprieties were targeted for "disruptive

behavior." Another case involved a provider who had reported consequences of medical errors to the patient's family. Either "disruptive behavior" needs to be defined, or this provision removed entirely. The current language creates confusion regarding what will be swept into the protection box. Matters of conscience and the Constitution should not be characterized as "disruptive behavior." Currently, the statute protects what is "created for" and what is "collected and maintained by" QICs. Additionally, there should be due process protections for providers. Especially in a small, rural community, this process can affect whether a provider is able to practice at all in that area. As for the five year "look back" provision, this makes sense as long as there are adequate protections. A change needs to be made regarding the reference to "form." As it currently reads, it appears that the DOH could amend the form and thereby amend the statute.

**Persons Testifying:** (In support) Senator Dammeier, prime sponsor; Katie Kolan, Washington State Medical Association; and Jeff Tomlin and Taya Briley, Washington State Hospital Association.

(Opposed) Larry Shannon, Washington State Association of Justice.

**Persons Signed In To Testify But Not Testifying:** None.