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Aug. 25, 2020

Department of Licensing and Regulatory Affairs
Bureau of Professional Licensing, Boards and Committees Section
Public Health Code - Disciplinary Rules
ARS #2019-104 LR
Attention: Policy Analyst
P.O. Box 30670
Lansing, MI 48909
BPL-BoardSupport@michigan.gov

On behalf of Sparrow Health System, I respectfully submit the following comments on the proposed Public Health Code - Disciplinary Rules.

Under the "Historical Records" section, Sparrow strongly opposes the proposed rule that would authorize the department "to obtain and maintain," as part of a licensee's or registrant's individual historical record, "reports or information from a professional peer review organization." [R 338.1603(a)].

This proposed rule is contrary to Michigan's peer review statutes. Under existing law, the reports and information of a professional peer review organization are confidential and protected against disclosure. The Michigan Supreme Court has ruled that these statutory protections prohibit the Department from obtaining records, data, and knowledge gathered by or for individuals and committees with assigned review functions. In particular, the Supreme Court held that the department cannot obtain protected information for use in carrying out its responsibilities under Article 15 of the Public Health Code, which includes MCL 333.16211, the statute governing permanent historical records.

This proposed rule is inconsistent with Michigan's strong commitment to patient safety and quality improvement. Data gathered by a licensed health facility for quality improvement or professional practice review purposes should not be included in a licensee's or registrant's historical record. The confidentiality protections for information collected for quality improvement enable providers to work to improve patient safety and reduce the incidence of adverse events. Professional practice evaluation is the process by which a health facility, using its own medical staff, performs a peer review of a practitioner's professional practice for performance improvement and to ensure safe and high-quality patient care.

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As the Michigan Supreme Court has frequently emphasized, the assurance of confidentiality provided by the peer review statutes is essential to the candid and conscientious assessment of clinical practice and patient safety. Disclosure of information collected and evaluated by professional peer review organizations would be a significant and undesirable threat to the confidentiality essential to effective peer review. The threat is further aggravated because a licensee or registrant is entitled to review his or her historical record under MCL 333.16211(6). The licensee or registrant would be free to publicly and widely disclose the confidential peer review information.
We understand that individual historical records can be obtained, with certain exceptions, through the Freedom of Information Act. Unlike other information in a historical record that is specifically exempt from FOIA disclosure, such as participation in the Health Professional Recovery Program, it is not at all certain that peer review information would be protected against public disclosure.

The prospect that the Department, the licensee, and even the public, could obtain the confidential information collected and evaluated by a professional peer review organization would undermine the critical process used to promote and improve the safety and quality of patient care in Michigan.

Sincerely yours,

John A. Shaski
Government Relations Officer
Sparrow Health System

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August 25, 2020

Department of Licensing and Regulatory Affairs
Bureau of Professional Licensing
Boards and Committees Section
P.O. Box 30670
Lansing, MI 48909

Attention: Policy Analyst
Administrative Rules for Public Health Code – Disciplinary Rules
Rule Set 2019-104 LR

Dear Policy Analyst:

The Health Care Association of Michigan (HCAM) is writing to submit comments to the proposed rule set 2019-104 LR. HCAM is opposed to a number of changes contained in the proposed rule set. Each are highlighted below.

First, HCAM is opposed to language in the proposed rule under Part 2, subsection (a) (R 338.1603(a)), which allows LARA to *obtain* reports and information from a peer review organization to include in a licensee's or registrant's record.

The Supreme Court and Court of Appeals have more than once held that MCL 333.20175 operates as an absolute bar to the state obtaining reports and information collected for a professional review function from a health facility. See *In re Investigation of Lieberman*, 250 Mich. App. 381 (2002); and *Krusac v. Covenant Medical Center*, 497 Mich. 251 (2015). This privilege exists even against subpoena or criminal search warrant. The privilege is narrowly drawn, and it does not apply to underlying documents, such as clinical records, not made by or expressly at the direction of a peer review organization. Rather, it applies to the deliberative process of the peer review organization itself.

The language in the proposed rule completely negates the privilege upheld by the two court decisions cited above. Without a protection of the privilege for peer review materials, facilities will be reluctant to engage in such activities in an open and honest manner within the committee. This will have the effect of jeopardizing the important goal of reducing morbidity and mortality in facilities, which is the entire purpose of peer review organizations.

It is our understanding that the department interprets this language does not apply to the quality assurance committees, and the materials they produce, within nursing facilities. As nursing facilities are required to engage quality assurance committees, HCAM requests that the language make clear the materials and information derived from these committees are not included in this rule.

Second, HCAM is opposed to the deletion of Rule 4 under R 338.1604, which explicitly prohibits an individual taking an active part in the investigatory or allegation process from participating in deciding the contested case. Presumably, the deletion of this language would allow an investigator to participate

in the determination of whether a licensee has violated the public health code, as well as what sanction may be appropriate under the circumstances. The current language should be maintained to prohibit an investigator from also acting as the decision maker in the case.

Third, HCAM opposes the language in proposed rule R 338.1607(a)(4), which would allow the department to file an amended formal complaint at least 31 days prior to a scheduled contested case hearing before an administrative law judge. While this language also makes clear that a respondent shall be given reasonable time to provide an amended answer and prepare a defense, this is only the case when the amendment to the complaint is substantial, which is not defined. HCAM is concerned this could lead to a situation where an amendment is filed late in the process and the respondent may be deprived of enough time to adequately prepare a defense.

Finally, HCAM requests that the proposed changes under R 338.1608 include language making it clear that if a compliance conference is conducted, that it shall be conducted informally and not as an evidentiary hearing, as is the case currently under the rule.

HCAM is available at your convenience to answer any questions you may have.

Respectfully,

Rich Farran
V.P. of Government Services, HCAM
517-622-6181
RichFarran@hcam.org

August 25, 2020

Department of Licensing and Regulatory Affairs
Bureau of Professional Licensing
Boards and Committees Section
Public Health Code - Disciplinary Rules
ARS #2019-104 LR

Attention: Policy Analyst
P.O. Box 30670
Lansing, MI 48909

Re: Public Health Code – Disciplinary Rules

Submitted electronically to BPL-BoardSupport@michigan.gov

To Whom It May Concern:

On behalf of Henry Ford Health System (HFHS), I respectfully submit the following comments on the proposed Public Health Code - Disciplinary Rules.

HFHS is a Michigan-based, not-for-profit corporation and one of the nation's largest, integrated health care systems, with over 33,000 employees, headquartered in Detroit, where we have been committed to improving the health and well-being of the community for over 100 years. HFHS offers health care services across the continuum through a diverse network of facilities in Southeast Michigan (Metro Detroit) and South Central Michigan (Jackson). In the Detroit area, HFHS includes five acute-care hospitals, including our flagship hospital - Henry Ford Hospital - a large academic located within the city of Detroit, an inpatient psychiatric facility, and a network of outpatient medical facilities staffed by members of the Henry Ford Medical group (HFMG). HFMG is a salaried, multi-specialty group practice of some 1,200 clinicians, and has been fully integrated in administrative, clinical, and medical information functions with Henry Ford Hospital (HFH).

HFHS's main concern is that the proposed rule contains provisions that impact individual and health care facility rights, with a potentially chilling effect on peer review. We believe this will negatively impact patient safety and quality of care improvement activities throughout the system.

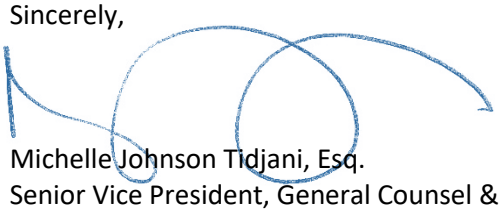
Specifically, HFHS is opposed to the provision that would provide authorization to the Department to "obtain and maintain reports or information from a professional peer review organization" as part of a licensee or registrant's individual historical record. This goes against Michigan's current peer review regulations, which indicate that the reports and information of a professional peer review organization are confidential and cannot be disclosed. This statutory protection blocks the Department from accessing records, data, and knowledge gathered by or for individuals and committees with assigned review functions.

The proposed rule conflicts with HFHS' commitment to patient safety and quality improvement activities. Data collected by a licensed health facility for quality improvement or peer review purposes should be omitted from a licensee or registrant's historical record, not only due to the current Michigan peer review statutes, but because we believe that this information could be misinterpreted. Our concern is that the potential misinterpretation of this data if shared with the Department may deter health care providers from obtaining candid data for quality improvement purposes and providing honest peer reviews, which could have a negative impact on patient safety and quality of care.

We agree with the Michigan Health & Hospital Association's (MHA's) assessment that the prospect that the Department, the licensee/registrant, and even the public, could obtain the confidential information collected and evaluated by a professional peer review organization would undermine the critical process used to promote and improve the safety and quality of patient care not only at HFHS, but across the state.

Thank you again for the opportunity to comment on the proposed rule.

Sincerely,



Michelle Johnson Tidjani, Esq.
Senior Vice President, General Counsel & Corporate Secretary
Henry Ford Health System

MHA Michigan Health & Hospital Association | Leading Healthcare

Aug. 25, 2020

Department of Licensing and Regulatory Affairs
Bureau of Professional Licensing
Boards and Committees Section
Public Health Code - Disciplinary Rules
ARS #2019-104 LR

Attention: Policy Analyst
P.O. Box 30670
Lansing, MI 48909
BPL-BoardSupport@michigan.gov

Greetings:

On behalf of the Michigan Health & Hospital Association (MHA), we respectfully submit the following comments on the proposed Public Health Code - Disciplinary Rules.

Under the "Historical Records" section, the MHA strongly opposes the proposed rule that would authorize the department "to obtain and maintain," as part of a licensee's or registrant's individual historical record, "reports or information from a professional peer review organization." [R 338.1603(a)].

This proposed rule is contrary to Michigan's peer review statutes. Under existing law, the reports and information of a professional peer review organization are confidential and protected against disclosure. The Michigan Supreme Court has ruled that these statutory protections prohibit the Department from obtaining records, data, and knowledge gathered by or for individuals and committees with assigned review functions. In particular, the Supreme Court held that the department cannot obtain protected information for use in carrying out its responsibilities under Article 15 of the Public Health Code, which includes MCL 333.16211, the statute governing permanent historical records.

This proposed rule is inconsistent with Michigan's strong commitment to patient safety and quality improvement. Data gathered by a licensed health facility for quality improvement or professional practice review purposes should not be included in a licensee's or registrant's historical record. The confidentiality protections for information collected for quality improvement enable providers to work to improve patient safety and reduce the incidence of adverse events. Professional practice evaluation is the process by which a health facility, using its own medical staff, performs a peer review of a practitioner's professional practice for performance improvement and to ensure safe and high-quality patient care.

As the Michigan Supreme Court has frequently emphasized, the assurance of confidentiality provided by the peer review statutes is essential to the candid and conscientious assessment of clinical practice and patient safety. Disclosure of information collected and evaluated by

professional peer review organizations would be a significant and undesirable threat to the confidentiality essential to effective peer review. The threat is further aggravated because a licensee or registrant is entitled to review his or her historical record under MCL 333.16211(6). The licensee or registrant would be free to publicly and widely disclose the confidential peer review information. MHA has consulted with health law counsel and understands that individual historical records can be obtained, with certain exceptions, through the Freedom of Information Act. Unlike other information in a historical record that is specifically exempt from FOIA disclosure, such as participation in the Health Professional Recovery Program, it is not at all certain that peer review information would be protected against public disclosure.

The prospect that the Department, the licensee, and even the public, could obtain the confidential information collected and evaluated by a professional peer review organization would undermine the critical process used to promote and improve the safety and quality of patient care in Michigan.

Please reach out to me with any with questions.

Respectfully submitted,

Amy Barkholz
General Counsel & Board Secretary
Michigan Health & Hospital Association
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MSMS
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August 25, 2020

Via email (BPL-BoardSupport@michigan.gov)
Michigan Department of Licensing and Regulatory Affairs
Bureau of Professional Licensing - - Boards and Committees Section
Attention: Policy Analyst
P.O. Box 30670
Lansing, MI 48909-8170

Re: Administrative Rules for Public Health Code – Disciplinary Rules - Rule Set 2019-104 LR

To Whom It May Concern:

I am writing on behalf of the Michigan State Medical Society (MSMS) regarding the proposed Public Health Code disciplinary rules. MSMS represents approximately 15,000 Michigan physicians, residents and medical students of all specialties and practice settings.

MSMS has serious concerns regarding the intended and unintended consequences of several of the proposed changes. Therefore, MSMS respectfully requests consideration of the following revisions:

1. Revise Proposed Rule 338.1603 by deleting the words "or information" from subrules (a) and (c).

   Rationale: The addition of "or information" is overly broad. The scope of information which potentially could be obtained from a professional peer review organization or professional association or professional society and maintained in a licensee's file—and available for public inspection—could be limitless.

   This could have a chilling effect on the role that professional peer review organizations and professional associations or societies play in the monitoring of health professionals, particularly if there is no legal assurance that information obtained by the organization, association or society will remain confidential.

2. Revise Proposed Rule 338.1603, subrules (i) and (j) as follows (proposed new language is identified by strikethrough and underlining):
   (i) Reports ~~or information~~ related to the individual's failure to satisfactorily participate in or complete a treatment plan under the health professional recovery program (HPRP) to the extent permitted by section 16170(2) and section 333.16170a(2) of the code, MCL 333.16170(2) and MCL 333.16170a(2).
   (j) For a period of 5 years following the individual's successful completion of the HPRP, those records permitted to be held by the department pursuant to sections 16168(2) and 16170(2) of the code, MCL 333.16168(2) and MCL 333.16170(2), pertaining to the individual's participation in the HPRP, and in compliance with section 16170a(3) of the code, MCL 333.16170a(3).

   Rationale: This language is necessary to clarify that the Department is not permitted to access or maintain HPRP records beyond what is presently permitted under the Public Health Code. Statutory

provisions grant participants certain rights to confidentiality and privileged communications that could be usurped by overly broad or ambiguous language.

3. Delete proposed Rule 338.1604 or amend the provision to state that the investigation of any subsequent allegations or potential violations identified during the course of the department's investigation shall also be conducted pursuant to the requirements in MCL 333.16221.

   Rationale: As written, this proposed rule would circumvent the requirement for board authorization of investigations of allegations under MCL 333.16231 and effectively give the Department the unchecked authority to investigate potential violations without a board's statutorily required review and authorization. The Public Health Code already has a process in place should the Department's investigation uncover new allegations or potential violations other than those specifically identified when the investigation was initiated. Under the Public Health Code, if the Department's investigation uncovers new allegations or potential violations other than those specifically identified when the investigation was initiated, the Public Health Code requires the allegation to be submitted to the Department in writing, and for an investigation of the allegation to be approved by a panel of at least three board members unless the licensee's historical record includes one substantiated investigation or two or more written investigated allegations from two or more different individuals or entities (see MCL 333.16231).

4. Delete subrule 338.1608(2).

   Rationale: Compliance conferences are informal proceedings intended to encourage voluntary resolution of matters. This subrule is unnecessary, as it does nothing to encourage voluntary resolutions via compliance conferences. Instead, it will create unnecessary hurdles to schedule or reschedule a compliance conference in a manner which the Public Health Code does not authorize the Department to utilize.

5. If subrule 338.1608(5) is deleted, a new subrule should be added to clarify that a matter becomes a contested case if the licensee files an answer to an administrative compliant which denies one or more allegations set forth in the administrative complaint.

   Rationale: It is important to licensees and the Department that there continues to be clarity as to when a matter becomes a contested case under the Administrative Procedures Act, as this is not defined in the Public Health Code and certain rights and obligations are triggered when a matter becomes a contested case. For example, a matter must be a "contested case" in order for a licensee to request and obtain access to the Department's investigative records for the matter under MCL 24.274(2). If subrule (5) is deleted, then a new subrule should be enacted in its place as described above.

6. Under Rule 338.1612, reinstate subrules (5) and (6).

   Rationale: The Regulatory Impact Statement proposes that this rule be rescinded on the basis that it pertains to cease and desist orders and duplicates MCL 333.16233. Although subrules (1)-(4) may concern cease and desist orders consistent with MCL 333.16233, subrules (5) and (6) do not address cease and desist orders, and do not appear in the Public Health Code. Instead, these subrules are valuable for encouraging the voluntary resolution of a matter, as well as the prompt scheduling of an administrative hearing, and should not be rescinded.

7. Delete subrule 338.1632a(4).

   Rationale: If the Department desires license surrender, whether prospective or retroactive, to be a recognized sanction under MCL 333.16226 of the Public Health Code, it must seek legislation to do so. The language in subrule (4) provides the Department with authority beyond that authorized by the Public Health Code. Currently, the Public Health Code does not provide statutory authority to the Department to establish disciplinary sanctions via administrative rule or to determine eligibility to apply for a license other than education and training standards in consultation with a board.

Thank you for the opportunity to comment. Your thoughtful consideration is appreciated.

Sincerely,

Julie L. Novak
Chief Executive Officer