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FISCAL IMPACT REPORT

LAST UPDATED _____
ORIGINAL DATE 2/17/23

SPONSOR Rehm/Lord

BILL
NUMBER House Bill 63/ec

SHORT TITLE Medical Malpractice Changes

ANALYST Esquibel

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT* (dollars in thousands)

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Patient's Compensation Fund impact		Indeterminate but substantial	Indeterminate but substantial	Indeterminate but substantial	Recurring	Patient's Compensation Fund
OSI administrative costs		\$350.0	\$350.0	\$700.0	Recurring	General Fund

Parentheses () indicate expenditure decreases.
*Amounts reflect most recent analysis of this legislation.

Relates to HB465, HB88, SB296, HB500, SB446, and SB447

Sources of Information

LFC Files

Responses Received From

- Administrative Office of the Courts (AOC)
- Attorney General's Office (NMAG)
- Department of Health (DOH)
- Human Services Department (HSD)
- Office of Superintendent of Insurance (OSI)

SUMMARY

Synopsis of House Bill 63

House Bill 63 (HB63) proposes to amend the Medical Malpractice Act to add a new section for patient examinations, restore definitions of "health care providers," remove the independent provider designation, remove punitive damages, provide procedures for challenging judgments, provide limitations of claims, provide guidelines for healthcare providers' applications, remove the video conference option for hearings of the New Mexico Medical Review Commission, provide hearing procedures, remove the requirement of a third-party administrator for the patient's compensation fund, remove an annual fund audit requirement, remove an annual actuarial study requirement, and repeal the patient's compensation fund advisory board.

The bill contains an emergency clause and would be effective on the governor's signature.

FISCAL IMPLICATIONS

Volume 2 of the LFC annual recommendation to the Legislature, *Legislative for Results: Appropriations Recommendations*, notes:

The patient's compensation fund (PCF) pays malpractice settlements for member physicians and hospitals. Established under the New Mexico Medical Malpractice Act, the program provides affordable malpractice coverage that caps the amount of damages awarded against the member healthcare providers. The fund's solvency has been a concern in recent years as Laws 2021, Chapter 16, amended the Medical Malpractice Act to include new providers eligible for participation in the PCF, raised the required underlying coverage limit from \$200 thousand to \$250 thousand, and increased the cap on nonmedical damages for independent providers from \$600 thousand to \$750 thousand in 2022, with an inflation adjustment annually thereafter.

Laws 2021, Chapter 16, also required the PCF deficit be eliminated by January 1, 2027. The fund has a projected deficit of almost \$69 million despite a \$30 million infusion of state funds during the 2022 regular legislative session. According to a September 2022 actuarial report, OSI would need to issue a 32 percent surcharge increase to meet solvency requirements, which could potentially push physicians out of the PCF or, worse, out of the state. Instead, the superintendent issued a 10 percent surcharge increase on physician contributions to the PCF coupled with proposed changes to the Medical Malpractice Act that would result in cost-savings to the fund. Suggested statutory changes included limiting "medical care and related benefits" only to amounts actually paid by or on behalf of an injured patient and accepted by a healthcare provider in payment of charges, clarifying what constitutes a "reasonable charge," and permitting examinations to determine the necessity of future medical care.

Under the provisions of the bill, OSI would administer the PCF, and OSI reports it would have to employ and train additional staff to perform the duties. OSI estimates it would need 4 FTE, with the additional help and assistance of other OSI staff at a project cost of \$350 thousand.

SIGNIFICANT ISSUES

The Attorney General's Office reports the following:

Section 1: Provides a right for a healthcare provider subject to a payments from malpractice claim to dictate examinations of the injured patient by a physician of the provider's choice, which raises consideration of the impartiality of the selected physician and places a number of new burdens, including short notice periods, on the patient that did not exist before and may prove challenging to interpret and enforce without further clarification.

Section 2 (A): Definition of "health care provider" excludes certified nurse practitioner, clinical nurse specialist, or certified nurse-midwife. Thus, claims by patients injured by these specific practitioners will not be subject to the provisions of the Medical Malpractice Act.

Sections 5 and 6: The judicial process set forth will require a supplemental proceeding

following a jury trial to determine the value of future medical care and related benefits for the injured party rather than addressing the issue at trial through the jury. The court may or may not be able to expeditiously set these hearings based on the pre-existing needs of their own docket and could affect the timeliness of payments to patients.

Section 7: This section places the statute of limitations for a minor at age 9. This section may remove any opportunity for a minor who is injured, whose caregiver’s fail, for whatever reason to advocate for him, to pursue his claim after he reaches the age of majority. This section may be particularly adverse to New Mexico children whose caregiver’s do not understand medical malpractice, who are not well-versed in the English language, who are unaware that they can pursue a claim for their child, and who may be in a socioeconomic or immigration status that impairs their immediate ability to seek judicial recourse.

Section 12: Removing the video conferencing aspect for panel hearings may adversely affect the testimony and evidence presented at the hearing as witness availability is limited due to jobs, income, lack of transportation, lack of childcare, or other barriers, and would be a regressive approach to advancement in technology and accessibility.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HB63 relates to HB465, Medical Malpractice Changes; HB88, Medical Malpractice Damages Cap; SB296, Medical Malpractice Changes; HB500, Medical Malpractice Premium Assistance; SB446, Medical Malpractice Definition of Occurrence; SB447, Medical Malpractice Recovery Amounts.

TECHNICAL ISSUES

The Administrative Office of the Courts questions removing the definition for “independent provider” and references to the term in the Medical Malpractice Act.

The Department of Health notes page 31, lines 22-25 and page 32, lines 1-20, are repeated text.

The Human Services Department notes there is a general lack of clarity in the definitions section. For example, the bill considers physician assistants and nurse anesthetists as healthcare providers, but not nurse practitioners and midwives.

OTHER SUBSTANTIVE ISSUES

The Administrative Office of the Courts reports the bill would affect the courts in numerous ways, including requiring the court to, in a supplemental proceeding, estimate the value of future medical care and related benefits, which would affect the courts’ schedules. The court requirements in the bill may also impact court personnel if court personnel are required to attend to a petition for an increase in medical care and related benefits and its related expedited hearing.

The Department of Health reports the bill proposes to remove changes made to the Medical Malpractice Act in 2021, including the addition of several categories of independent medical providers to the definition of healthcare provider, which provides qualifying individual

practitioners the protections of the act when malpractice claims are alleged. This includes certified nurse midwives, certified nurse practitioners, clinical nurse specialists, and healthcare business entities added in 2021. Removal of these practitioners from the protection of the act may stifle the desire of these practitioners to practice in rural New Mexico areas, where they become primary caregivers to communities, leading to increased health care inequity for rural communities.

The bill proposes to revert to the language concerning the statute of limitations for minors that was in effect before January 1, 2022. This provision was ruled in 2004 to be an unconstitutional violation of due process. *See Jaramillo v Heaton*, 2004-NMCA-123, ¶19.

The bill proposes to give authority to the court that may interfere with the contractual rights of a patient under their insurance policy by authorizing a court to order that a patient who refuses or fails to submit to examination in accordance with the Medical Malpractice Act forfeits all medical care and related benefits that would accrue or become due to the patient.

RAE/mg/hg/mg