

CHAPTER 325
FORMERLY
HOUSE BILL NO. 459
AS AMENDED BY
HOUSE AMENDMENT NO. 1

AN ACT TO AMEND TITLES 24 AND 29 OF THE DELAWARE CODE RELATING TO THE MEDICAL PRACTICE ACT, THE BOARD OF MEDICAL PRACTICE AND THE DEPARTMENT OF STATE.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend § 1730(b), Title 24 of the Delaware Code by redesignating that subsection as (b)(1) and striking the words "that would require a National Practitioner Data Bank (NPDB) report or a Healthcare Integrity and Protection Data Bank (HIPDB) report by a hospital".

Section 2. Amend § 1730(b), Title 24 of the Delaware Code by creating new subsection (b)(2) as follows:

"(2) Every person certified to practice medicine in this state shall report to the Board within 30 days any civil or criminal investigation in any jurisdiction which concerns their certification or license or other authorization to practice medicine. The Board may require an applicant to provide sufficient documentation to enable the Board to determine whether to investigate, pursuant to § 1732, or whether there are grounds for discipline under § 1731(b).".

Section 3. Amend § 1731(a), Title 24 of the Delaware Code by adding at the end of the subsection the following sentence: "The Board shall permanently revoke the certificate to practice medicine in this State of a person who is convicted of a felony sexual offense.".

Section 4. Amend § 1731(b)(2), Title 24 of the Delaware Code by striking the words "Conviction of or admission under oath to having committed a" and substituting in lieu thereof "Conduct that would constitute a".

Section 5. Amend § 1731(b)(11), Title 24 of the Delaware Code by adding after the word "Misconduct," the words "including but not limited to sexual misconduct," and by adding after the words "gross negligence" the words "or pattern of negligence".

Section 6. Amend § 1731(b), Title 24 of the Delaware Code by striking the period at the end of subsection (21) and substituting in lieu thereof "; and", and adding new subsections (22) or otherwise as the next numbered subsection as follows:

"(22) Wilful failure to report to the Board when required by § 1731A of this title.".

Section 7. Amend § 1731A(a), Title 24 of the Delaware Code by striking subsections (5) and (6) and substituting in lieu thereof the following:

"(5) All State agencies other than law enforcement agencies;

(6) All law enforcement agencies in the State, except that such agencies are required to report only new or pending investigations of alleged criminal conduct specified in subsection (b)(2) of section 1731 of this chapter, and are further required to report within 30 days of the close of a criminal investigation or the arrest of a person licensed under this chapter.".

Section 8. Amend § 1731A(a), Title 24 of the Delaware Code by deleting the words and punctuation ", in writing," in the first sentence.

Section 9. Amend § 1731A, Title 24 of the Delaware Code by adding a new subsection (j) as follows: "(j) Upon receiving a complaint involving potential criminal conduct, the Board shall promptly report the complaint to appropriate law enforcement agencies, including the Delaware Department of Justice.".

Section 10. Amend § 1732, Title 24 of the Delaware Code by deleting the Section Header and substituting in lieu thereof, "Investigations of Complaints; Executive Director Authority", by striking subsections (a) and (b), and inserting in lieu thereof the following:

"(a) All complaints of unprofessional conduct, unauthorized practice of medicine, or medical malpractice shall be referred to the Division of Professional Regulation to be investigated. Complaints alleging

potential sexual misconduct by a licensee should be afforded priority by the Division. The Division of Professional Regulation shall formulate charges, if circumstances warrant, by bringing a formal complaint against a person to whom a certificate to practice medicine or otherwise licensed or registered in this State has been issued.

(b) The Executive Director shall initiate investigations concerning inability to practice medicine with reasonable skill or safety to patients. The Executive Director with the Board president or the president's designee, shall, after reviewing the results of the investigation, determine whether the person to whom a certificate to practice medicine has been issued is able to practice medicine with reasonable skill and safety to patients, either on a restricted or unrestricted basis. If the Executive Director reasonably believes that a diagnostic mental or physical examination of the person under investigation is necessary, the Executive Director shall order the person to submit to an examination at the person's expense to be conducted by a physician or agency designated by the Executive Director. Every person to whom a certificate to practice medicine has been issued is deemed to have given that person's own consent to submit to a diagnostic mental or physical examination when so directed by the Executive Director, and to have waived all objections to the admissibility of the examination report to the Board. A person who submits to a diagnostic mental or physical examination as ordered by the Executive Director has the right to designate another physician to be present at the examination and to submit an independent report on the examination to the Board."

Section 11. Amend § 1732, Title 24 of the Delaware Code by striking subsection (c), re-designating subsections (d) and (e) as subsections (c) and (d), and inserting a new subsection (e) as follows:

"(e) When a complaint is made by a law enforcement agency or employee thereof and involves allegations of criminal activity, the Division of Professional Regulation and the Executive Director shall suspend any new or pending investigation upon a written request to do so by the Delaware Department of Justice or a federal law enforcement authority. Such written request shall suspend the duty to investigate pursuant to this section, duty to regularly advise the complainant pursuant to section 1733(a)(2) of this Title and any other duties that would interfere with the ability of law enforcement to investigate the allegations successfully. The suspension shall remain in effect until the Delaware Department of Justice or federal law enforcement informs the Executive Director in writing that action by the Division of Professional Regulation will not interfere with a pending law enforcement investigation."

Section 12. Amend § 1733(a), Title 24 of the Delaware Code by deleting in subsection (a)(2) the words and punctuation "acknowledge to the complainant in writing receipt of the complaint within 1 week of receiving the complaint, and shall", and by striking subsection (a)(3) in its entirety and substituting in lieu thereof the following:

"(3) The Executive Director shall communicate with the Delaware Department of Justice, at least monthly, regarding the status of complaints filed by law enforcement, and shall report the case status to the Board only if the case is no longer subject to suspension pursuant to section 1732(e) of this Title."

Section 13. Amend § 1733, Title 24 of the Delaware Code by striking subsection (c) in its entirety, and substituting in lieu thereof the following: "The Executive Director may maintain the confidentiality of the complaining party or the respondent from the Board. In the absence of an Executive Director or acting Executive Director, the Secretary of State may exercise that discretion."

Section 14. Amend § 1713(a), Title 24 of the Delaware Code by designating subsection (16) as subsection (17) and inserting the following subsection (16):

"(16) To designate, through the Executive Director, any person qualified by relevant experience as an examiner for the purpose of hearing any alleged charges of the inability to practice medicine as set forth in § 1731(c) of this title, or for the purpose of making determinations of fact in connection with the temporary suspension of a certificate to practice medicine pursuant to § 1738 of this title, or for necessary purposes relating to disciplinary or other action against the holder of a certificate, license, or other authorizing document issued under this chapter;"

Section 15. Amend § 1734(a)(1), Title 24 of the Delaware Code by adding after the words "the Executive Director shall appoint" and before "a hearing panel" the words "an examiner pursuant to Section

1713 of this Title or", by striking the words "in executive session", and by adding after "heard by the hearing panel, the panel" and before "shall make," the words "may convene in executive session for consideration of the evidence presented at the hearing and for purposes permitted by section 10004 of Title 29, and".

Section 16. Amend § 1734(b), Title 24 of the Delaware Code by inserting after the words "conducted by a hearing panel" the words "or examiner", and by striking the words "only at the request of the person complained about" and substituting in lieu thereof ", except the Board may conduct executive session for deliberations and purposes permitted by section 10004 of Title 29".

Section 17. Amend § 1734(c), Title 24 of the Delaware Code by inserting after the words "the Board's hearing panels" the words "or examiner".

Section 18. Amend § 1734(d), Title 24 of the Delaware Code by inserting after the words "before a hearing panel" the words "or examiner", and by striking the words "hearing panel hearing" wherever those words appear and by substituting in lieu thereof the word "hearing".

Section 19. Amend § 1734, Title 24 of the Delaware Code by re-designating subsections (f) through (h) as subsections (g) through (i), and adding a new subsection (f) as follows:

"(f) Conduct of hearing before the examiner. - - An attorney from the Office of the Attorney General shall present evidence in support of the allegations contained in the formal complaint. The attorney may call witnesses and cross-examine any witnesses called on behalf of the person complained about. The examiner may administer oaths, examine witnesses and receive evidence in any locality. The testimony or evidence so taken or received shall have the same force and effect as if taken or received by the Board, or by a hearing panel pursuant to Section 1713(a)(15) and Section 1734 of this Chapter. Upon completion of such hearing or the taking of such testimony and evidence, the examiner shall submit to the Board his findings and recommendations thereon, which findings and recommendations shall be considered by the Board and such action taken with respect thereto by the Board as it decides to be proper."

Section 20. Amend § 1768(b) of Title 24 of the Delaware Code by adding in the last sentence of the subsection, after the words "pursuant to § 1731A(d) of this title," the following: "or issued by the Attorney General pursuant to § 2504(4) of Title 29,".

Section 21. Amend §1768, Title 24 of the Delaware Code by adding the following sentences at the end of the section: "Notwithstanding the foregoing, in cases in which any disciplinary action by the Board was issued, the formal complaints prepared by the Delaware Department of Justice and the results of the hearings are not confidential and are public records except insofar as they contain confidential patient information or are otherwise subject to an exception under Chapter 100 of Title 29."

Section 22. Amend Title 24 of the Delaware Code by adding a new section 1761A, to read as follows:

"§ 1761A. Appointment of a custodian of patient records.

(a) If the Board receives a formal or informal complaint concerning access to patient records as a result of a physician's physical or mental incapacity, or abandonment or involuntary discontinuation of a medical-practice business in this State, the Board may temporarily or permanently appoint a person or entity as custodian of the physician's patient records, in accordance with the procedures set forth in §§ 1732-1734 of this title.

(b) The custodian of patient records appointed under this section shall notify the physician's patients of record to that effect by publishing notice in a newspaper of daily circulation in the area where the physician practiced. The notice must be published at least 1 time per month over a 3-month period after the appointment of the custodian and must explain how a patient can procure that patient's records. All patients who have not requested their records 30 days after such publication must be notified by first class mail by the custodian to permit the patients to procure their records. Any patient records that have not been procured within 7 years after the appointment of the custodian may be permanently disposed of in a manner that ensures confidentiality of the records.

(c) A custodian of patient records appointed under this section who disposes of patient records in accordance with the provisions of this section is not liable for any direct or indirect loss suffered as a result of the disposal of a patient's records.

(d) The Board shall establish a registry of physicians and healthcare entities who are willing to serve as records custodians."

Section 23. Amend § 8735(h), Title 29 of the Delaware Code by inserting in subsection (h)(4) a new sentence after the sentence ending with "in the Division's files." and before the sentence beginning "The named licensee" as follows: "The Division of Professional Regulation may, in its discretion, withhold the name of the complainant."

Section 24. Amend § 8735, Title 29 of the Delaware Code by re-designating current subsections (h)(6) through (h)(10) as (h)(7) through (h)(11) respectively, and by inserting a new subsection (h)(6) to read as follows:

"(6) The Division of Professional Regulation shall suspend its investigation and withhold from the respondent reports of unlicensed practice or misconduct if a request to do so is made in writing by the Delaware Department of Justice or a federal law enforcement authority due to the potential effects of such conduct on a pending criminal investigation. Such written request shall suspend any duty to investigate, advise the complainant or respondent, provide a copy of the complaint to the board, commission or agency which regulates the named licensee, or undertake any other duties that would interfere with the ability of law enforcement to investigate the allegations successfully. The suspension shall remain in effect until the Delaware Department of Justice or federal law enforcement informs the Executive Director in writing that action by the Division of Professional Regulation will not interfere with a pending law enforcement investigation."

Section 25. Amend § 8735, Title 29 of the Delaware Code by deleting the word "investigator" in re-designated subsection (h)(9) and replace it with the words "Director of the Division of Professional Regulation".

Section 26. Amend § 8735, Title 29 of the Delaware Code by inserting new subsections (r), (s) and (t) to read as follows:

"(r) The Division shall, upon receiving a complaint involving potential criminal conduct, immediately report the complaint to appropriate law enforcement agencies, including the Delaware Department of Justice.

(s) The Division shall subscribe to and maintain a subscription to a national licensing data bank reporting service in order to receive proactive notification of all disciplinary actions taken against medical licensees in states outside Delaware. Upon receipt of a disciplinary notification concerning an individual who is certified by the Board of Medical Practice, the Division may take the appropriate steps for investigation and, if appropriate, referral to the Department of Justice.

(t) (1) There is hereby created within the Department of State the full-time position of hearing officer. With respect to case decisions arising under Title 29, Chapter 101, Subchapter III, the hearing officers shall have:

(A) All powers and duties conferred or imposed upon such hearing officers by law or by the Rules of Procedure for the any board or commission under Titles 23, 24, and 28;

(B) The power to administer oaths and affirmations;

(C) The power to hear and determine any pre-hearing matter pending before any board or commission under Titles 23, 24, and 28. In such circumstances, the hearing officer's decision has the same authority as a decision of the board or commission and is subject to judicial review on the same basis as a decision of the board or commission;

(D) The power to conduct hearings, including any evidentiary hearings. The testimony or evidence so taken or received shall have the same force and effect as if taken or received by the board or commission. Upon completion of such hearing or the taking of such testimony and evidence, the hearing officer shall submit to the board or commission findings and recommendations thereon. The findings of fact made by a hearing officer on a complaint are binding upon the board or commission. The board or commission may not consider additional evidence. When the proposed order is submitted to the board or commission, a copy shall be delivered to each of the other parties, who shall have 20 days to submit written exceptions, comments and arguments concerning the conclusions of law and recommended penalty. The board

or commission shall make its final decision to affirm or modify the hearing officer's recommended conclusions of law and proposed sanctions based upon the written record.

(2) Hearing officers shall be appointed by the Secretary of State and shall serve for a term of 5 years; provided however, that the initial hearing officers may be appointed to terms shorter than 5 years, but not less than 3 years, to ensure staggered term expirations. Appointees shall be residents of the State, shall be duly admitted to practice law before the Supreme Court of this State and shall not engage in the practice of law nor any business, occupation or employment inconsistent with the expeditious, proper and impartial performance of their duties. Individuals appointed as hearing officers under this section shall take the oath or affirmation prescribed by Article XIV, § 1 of the Delaware Constitution before they enter upon the duties of their office.

(3) Reappointments shall be at the discretion of the Secretary of State.

(4) The removal of a hearing officer by the Secretary of State during the term of appointment may be made for just cause. For the purposes of this subsection only, "just cause" shall be defined as including, but not limited to, reduction in force, inefficiency or unsatisfactory performance of duties."

Section 27. If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application; and, to that end, the provisions of this Act are declared to be severable.

Section 28. This act shall be effective on September 1, 2010.

Approved July 01, 2010