

MINNESOTA HEALTH-RELATED LICENSING BOARDS

COUNCIL OF HEALTH BOARDS



Review of Legislative Request:
Health Occupation Review

Professional Licensing and
Criminal Sexual Misconduct
(HF3634/SF3147)

December 2010

**Minnesota Health Licensing Boards
Council of Health Boards
2829 University Avenue SE, Suite 445, Minneapolis MN 55414**

December 22, 2010

To: Rep. Jim Abeler
State Office Building, Office 203
100 Reverend Dr. Martin Luther King Jr. Boulevard
St. Paul, MN 55155

Re: HF 3634 / SF3147: Professional Licensing and Criminal Sexual Conduct

Dear Representative Abeler:

This report is in response to a legislative request for information from the Minnesota Health-Related Licensing Boards regarding the impact of criminal sexual conduct convictions on the initial licensure, continuation of, or renewal of credentialed health professionals.

Introduction

During the 2010 Legislative Session, the Legislature considered and passed a bill related to the initial licensure, continuation of, or renewal of licenses of chiropractors who had been convicted of criminal sexual conduct (HF 3634 / SF 3147), codified as M.S. §148.10, Subdivision 7, as well as M.S. § 364.09(e). In its deliberation of this bill, the Legislature considered whether to apply similar provisions to other health-related practitioners, and subsequently requested review and consideration of this proposal by the Minnesota Health-Related Licensing Boards. (See Appendix A for final bill.)

History

During the 2010 effort, two bills (one Senate, and one House) were considered. The Senate version applied the limitations on issuing licenses to persons convicted of criminal sexual conduct solely to the Minnesota Board of Chiropractic Examiners (MBCE). The House version was amended to apply these limitations to all of the Health-Related Licensing Boards, (HLBs) established under the authority of M.S. § 214. The final result of the conference committee was a bill applying these restrictions solely to the MBCE. The final bill required that the Council of Health Boards review M.S. §148.10 and 364.09, and make "recommendations to the house of representative and senate legislative committees with jurisdiction over licensing health-related occupations regarding the impact of similar legislation on the health-related licensing boards." This report is in response to that legislative mandate.

Currently, the Minnesota Board of Medical Practice has language regarding consequences for conviction of criminal sexual conduct. M.S. 147.091, Subd.1a. states:

Subd. 1a.Conviction of a felony-level criminal sexual conduct offense.

(a) The board may not grant a license to practice medicine to any person who has been convicted of a felony-level criminal sexual conduct offense.

(b) A license to practice medicine is automatically revoked if the licensee is convicted of a felony-level criminal sexual conduct offense.

(c) A license that has been denied or revoked pursuant to this subdivision is not subject to chapter 364.

(d) For purposes of this subdivision, "conviction" means a plea of guilty, a verdict of guilty by a jury, or a finding of guilty by the court, and "criminal sexual conduct offense" means a violation of sections 609.342 to 609.345 or a similar statute in another jurisdiction.

The Board of Pharmacy has the statutory authority, under M.S. §151.06, Subd.1 (7) (ii) to "deny, suspend, revoke, or refuse to renew any registration or license required under this chapter, to any applicant or registrant or licensee upon any of the following grounds:

(ii) in the case of a pharmacist, conviction in any court of a felony."

This language is not specific to sexual conduct.

Similarly, the Minnesota Department of Health, Health Occupations Program, is governed by statutes that permit enforcement action (including, for example, denial of certificate, imposition of civil penalties, censure) for criminal convictions (e.g., hearing instrument dispensing violations, convictions of law relating to occupational therapy, etc.). It does not have specific language regarding criminal sexual conduct violations.

Council of Health Boards / Health-Related Licensing Boards Structure

As previously noted, HF 3634 / SF 3147 was referred to the Council of Health Boards as a consultative body, for consideration. The Council is organized pursuant to M.S. §214.025, and includes all of the HLBs as well as the Emergency Medical Services Regulatory Board (EMSRB). (Although the EMSRB is included as a member of the Council of Health Boards, it is not included in the list of HLBs or even non-HLBs. Therefore treatment of this issue of Criminal Sexual Conduct restrictions with regard to the EMSRB may be different. It should also be noted that the Office of Mental Health Practice is still included in Chapter 214; however, that Office has sunset, and is no longer in existence.)

Pursuant to M.S. 214.01, the Health-Related Licensing Boards are:

- Board of Examiners for Nursing Home Administrators
- Office of Unlicensed Complementary and Alternative Health Care Practice
- Board of Medical Practice
- Board of Nursing
- Board of Chiropractic Examiners
- Board of Optometry
- Board of Physical Therapy
- Board of Psychology
- Board of Social Work
- Board of Marriage and Family Therapy
- Office of Mental Health Practice [this Office has sunset]
- Board of Behavioral Health and Therapy
- Board of Dietetics and Nutrition Practice

- Board of Dentistry
- Board of Pharmacy
- Board of Podiatric Medicine
- Board of Veterinary Medicine

Additionally, the Board of Barber Examiners and the Board of Cosmetologist Examiners have been working cooperatively with the HLBs. These two Boards are also established under Chapter 214, but are designated as “Non-Health-Related Licensing Boards (Non-HLBs). [See M.S. §214.01, Subd.3] They are housed in the same building as the HLBs, participate in the monthly Executive Directors Forum and with the Council of Health Boards, and engage in shared services through the Administrative Services Unit. Accordingly, they were included in the present review and recommendations. Solely for the purposes of this report, the term HLBs should be construed to include these two Boards as well.

Committee Structure and Activities

The Criminal Sexual Conduct Review Committee (Hereinafter “Committee”) was composed of Larry A. Spicer, DC (Chair; Board of Chiropractic Examiners, Executive Director); Kate Zacher-Pate, LSW (Board of Social Work, Executive Director); Rene Cronquist, (Board of Nursing, Assistant Director); Tom Hiendlmayr (Designee of the Commissioner of Health), and was staffed by Cindy Greenlaw Benton from the Administrative Services Unit. This committee met on July 28, 2010 and October 28, 2010. Input was requested from all Health-Related Licensing Boards. The entire Council of Health Boards met to consider this report on December 7, 2010.

All of the HLBs, with the exception noted below, are amenable to having language included in either their practice acts or in Chapter 214 that is similar to that contained in M.S. 148.10, Subdivision 7 and §364.09 with inclusion of suggested modifications to legislative language.

Further, the Department of Health has advisory council members of occupations credentialed by that Department, including audiologists, hearing instrument dispensers, occupational therapy practitioners and speech language pathologists. These occupations work with vulnerable populations and agree that their patients/clients should have the protections afforded by this law. These councils were also in accord that their respective practice acts did not provide the credentialing authority with sufficient legal basis to efficiently revoke a credential or deny an application for a credential on grounds of criminal sexual conduct felony convictions.

The Department of Health noted split opinions among its advisory councils on whether it would be preferable to have a comprehensive amendment applicable to all health-related occupations rather than separate and duplicate provisions to each practice act. If a comprehensive approach were to be taken, there is recognition that some cross reference would be needed from each practice act to the criminal sexual conduct provision, if for example it would be amended to Ch. 214. It was suggested that the Revisor might determine a method for accomplishing this in a uniform manner.

Board of Psychology Does Not Support This Proposal

The Board of Psychology has declined to support the proposed legislation in its present form. The Psychology Board’s response is included here.

Upon recommendation from the Legislative Committee, the Minnesota Board of Psychology (Board) reviewed the proposed language of Minnesota Statutes, section 148.10 recently enacted for the Minnesota Board of Chiropractic Examiners. The Board raised the following concerns regarding an extension of the proposed statutory language to all Health-Related Licensing Boards, but specifically to the Minnesota Board of Psychology:

- The Board discussed the mandatory nature of the legislation which removes discretion from the full Board to grant or renew a license to practice [psychology] to any person convicted of a felony-level criminal sexual conduct offense, on or after enactment. The Board notes that the legislation substitutes the discretion of the Legislature for that of the Board in the area of regulation and issuance of professional licenses. The Health-Related Licensing Boards (HLBs) are comprised of subject matter experts in each health field as well as public members. The Board holds a strong belief in independent Board or committee review of licensure and complaint resolution matters on a case-by-case basis.
- In connection with the mandatory nature of the legislation, the Board focused review on the fact that the basis upon which the licensure decision would be made is "conviction." The Board notes that subdivision 7, (d) defines conviction differently than the criminal justice system and fails to account for juvenile offenders who may be found to have committed an offense by the court, but are not truly convicted. The Board finds that further examination of the definition of the term "conviction" for the purposes of this legislation is important. The Board would also continue to advocate for an opportunity for the Board or its committees to review the specific circumstances of each incident on a case-by-case basis.
- The Board notes concerns with the all inclusive nature of the criminal sexual offenses, in that it includes all levels of CSC crimes (1st through 4th degree) stating that "a license to practice [psychology] is automatically revoked if the licensee is convicted of an offense listed in paragraph (a) of this section."
- The Board is apprehensive about subdivision 7, (c) which exempts the proposed boards from the Criminal Rehabilitation Act (Chapter 364).
- The Board discussed the starting point for demonstrating rehabilitation and the ability for licensure is "a rebuttable presumption" that "the applicant is not suitable for licensing or credentialing" and feels that this requires further consideration.
- The Board reviewed section 1, subdivision 7, (e)(3), where one of the criteria whereby an individual convicted of an offense listed in paragraph (a) may become licensed, requires the Board to "require that a minimum of ten years has elapsed since the applicant was released from any incarceration or supervisory jurisdiction related to the offense." The Board finds the 10 year period to be

reasonable, but identified the need for clarification of the term "supervisory jurisdiction."

- The Board reviewed the Committee recommendation on the provision which states, "[t]he board shall not consider an application under this paragraph if the board determines that the victim involved in the offense was a patient or a client of the applicant at the time of the offense." The Board agrees with the Committee and finds this provision to be in line with its mission of public protection.

Board of Psychology Summary: The Board finds that the legislation requires a more in-depth review as the language presents complex issues related to the criminal justice system in general. In its present form the Board would not support this proposed legislation.

Additional Considerations for Legislative Review

1. Applicability of Statute to HLBs and non-HLBs and Amendment to Chapter 214 or Individual Practice Acts.

The Legislature has the option of including CSC language in either Chapter 214 or in individual HLB practice acts. Should the Legislature determine to include this language in the individual practice acts, it must consider the complexity of amending 17 practice acts.

On the other hand, amending chapter 214 to include CSC language also has a degree of complexity. Two of the Boards included in this review (Cosmetologist Examiners and Barber Examiners) are non-HLB's, but are supportive of the legislative proposal. Thus if the Legislature decided to amend Chapter 214, the Legislature would have to:

1) Include other 214 non-HLB's that have not participated in this inquiry (since M.S. 214.01, Subd. 3 covers a number of other unrelated boards, such as the Board of Assessors and the Board of Accountancy, as well as the Barber and Cosmetologist Boards, which are contained in Chapter 214;

2) include the two non-HLBs (Barber Board, Cosmetologist Board) with separate language that does not include other non-HLBs; or

3) not include any Chapter 214 non-HLBs

The Department of Health notes that there is split opinion on whether or not it would be preferable to a comprehensive amendment applicable to all health-related occupations rather than separate provisions to each practice act. However, there is recognition that some cross reference would be needed from a particular practice act to the criminal sexual conduct provision, if for example it would be amended to Chapter 214. Perhaps the Revisor could determine a method to apply these provisions in a uniform manner.

2. Ambiguous "effective date" statutory language.

There are two “effective dates” identified in the language contained in the bill, which appear to be conflicting. The first “effective date” is based on the date of conviction, and the second is based on the issue date of the new license.

The first contained in SF3147, now codified into M.S. § 148.10, states, in part:

Subd. 7 Conviction of a felony-level criminal sexual conduct offense. (a) Except as provided in paragraph (e), the board shall not grant or renew a license to practice chiropractic to any person who has been convicted on or after August 1, 2010...

The final “effective date” language contained in the bill states:

This section (M.S. 148.10, subd.7) is effective for new licenses issued on or after August 1, 2010.

Similar “effective date” language is contained in the bill amending M.S. 364.09 (e)

The Health-Related Licensing Boards issue initial licenses when established requirements for initial licensure (including education and testing) are met. In common vernacular “initial” licensing could also be considered a “new” license.

Once initial licensing has been completed, licenses are renewed at a regular interval (generally either annually or biennially) provided the licensee meets the applicable requirements for continued licensure. These renewed licenses would not necessarily be considered to be “new” licenses.

Accordingly, there is ambiguity regarding whether this law would apply to any person whose license or registration was originally issued prior to August 1, 2010. In other words, it would apply primarily to persons newly licensed after August 1, 2010, which constitutes a very small proportion of licensees. It arguably would not apply to the more than 100,000 licensees *currently* regulated by the Boards because renewal of a license would not constitute issuance of a “new” license.

This ambiguity could be addressed by stating the law applies to applicants or persons with a current or expired license, convicted on or after [a certain] date. Additionally, and in any event, this ambiguity should be repaired in the previously enacted “effective date” language of M.S. §148.10.

3. Ambiguous Coverage for Licensees Who Hold Licensees in Other States.

SF3147 states, now codified into M.S. §148.10, states, in part:

Subd. 7. Conviction of a felony-level criminal sexual conduct offense. (a) Except as provided in paragraph (e), the board shall not grant or renew a license to practice chiropractic to any person who has been convicted on or after August 1, 2010, of any of the provisions of sections 609.342, subdivision 1, 609.343, subdivision 1, 609.344, subdivision 1, paragraphs (c) to (o), or 609.345, subdivision 1, paragraphs (b) to (o).

The criminal sexual conduct included in this section falls under the criminal code of Minnesota. However, licensed professionals may enter Minnesota from other States and seek Minnesota

licensure; any prior criminal sexual conduct convictions in other states would not be covered by Minnesota's criminal code.

The Legislature might want to consider language that includes criminal sexual conduct convictions "in this or any other jurisdiction" to ensure the inclusion of persons convicted of criminal sexual conduct crimes outside of Minnesota. The Legislature might want to consider language that includes criminal sexual conduct violations "in this or any other jurisdiction" insofar as criminal sexual conduct laws are consistent throughout the country; to determine the consistency of such laws throughout the country would require additional legislative research and inquiry; and may also wish to consider language that might align with that contained within the Medical Practice Act.

4. Criteria for Reinstatement.

SF3147, now codified into M.S. 148.10, states in part:

- (e) The board may establish criteria whereby an individual convicted of an offense listed in paragraph (a) of this subdivision may become licensed provided that the criteria:
 - (1) utilize a rebuttable presumption that the applicant is not suitable for licensing or credentialing;
 - (2) provide a standard for overcoming the presumption; and
 - (3) require that a minimum of ten years has elapsed since the applicant was released from any incarceration or supervisory jurisdiction related to the offense.

This law permits a Board to establish criteria for an individual with a criminal sexual conduct conviction to be licensed. The Boards have been entrusted with the responsibility of making determinations on individuals' competence to practice in accordance with standards of practice, and are practice subject matter experts in making such determinations.

No other guidance is issued in regard to how the boards may establish such criteria, and likely would establish it through the State's rulemaking process.

If the goal of this legislation was uniform, consistent treatment of applicants and licensees convicted of certain criminal sexual conduct, it may not be the result here because boards could enact varying reinstatement standards. The statute does, however, establish minimum criteria for all boards.

Additionally, if the presumption criteria is to be established by boards, the Legislature may want to give consideration to whether the Legislature would want this criteria created through rulemaking; the mechanism is not explicitly stated in the legislation. One Board has recently moved all its rules into statute. It is not certain when, or if, this Board (or any other) would determine to enter into rulemaking to establish additional criteria. Some Boards may also find the cost of rulemaking prohibitive. *The Legislature should note that since establishment of such criteria is permissive, if the Board does not enact such criteria, issuance or reinstatement of a license would be barred.*

5. Offense Against a Patient or Client

SF3147, now codified into M.S. §148.10, states in part:

The board shall not consider an application under this paragraph if the board determines that the victim involved in the offense was a patient or a client of the applicant at the time of the offense.

When considering complaints of practice act violations, the boards frequently consider the impact of the conduct on the patient or client, including in matters of sexual misconduct. The Boards suggest broadening the prohibition when the victim was a current or former patient or client of the licensee. This is consistent with standards of practice limiting post-termination relationships. The Legislature could consider a definition of former client or patient that places a time limit on the prohibition after termination of the professional relationship.

6. Licensing / Registration / Unregulated Professions and Impact of Statutory Language

HF 3634 / SF3147 applies only to the Board of Chiropractic Examiners, and prohibits “grant” or renew[al] of “*license[s]* to practice”. If the Legislature determines to extend this statutory prohibition to other licensing boards, and if the goal of the statute is to standardize practices of credentialed health-related professionals, a review of various regulatory systems would be warranted. That is, some boards license practitioners, while others are registered or certified. Some occupations, e.g., massage therapists, are neither licensed nor registered. The language of the current statute applies only to *licensing*.

7. Statewide Consistency for Background Studies

The Department of Human Services (“DHS”) conducts background studies on individuals that will have direct contact with persons served by programs or facilities regulated by the Minnesota Department of Health or DHS. Study subjects may be disqualified for a history of substantiated maltreatment or conviction of specific crimes. Additionally, DHS disqualifies study subjects when “a preponderance of the evidence indicates the individual has committed an act or acts that meet the definition of any of the crimes listed in section 245C.15, regardless of whether the preponderance of the evidence is for a felony, gross misdemeanor, or misdemeanor level crime.” (See Minn. Stat. §245C.14, subd. 1 (a)(2)). The standard of review is not explicitly stated in the proposed legislation at issue here.

Similarly, the language of the statute applies to convictions only, a substantially higher standard than “preponderance of the evidence.” If the language in Minn. Stat § 148.10 is applied to all HLBs, some potential conflict between the Boards’ licensing acts and the DHS standards is possible. Additionally, the background study statutes provide for disqualification for a broader range of crimes. The HLBs are not recommending the proposed legislation be expanded to include the full range of crimes identified in the DHS background study law but identifies the differences in the laws.

8. Enforcement of Statute

There is an issue as to how the licensing authority can effectively and efficiently know or learn of licensees’ or applicants’ convictions in Minnesota or other jurisdictions. Currently, applicants and licensees are required to respond to “ethical/background questions” on applications for initial license and renewal of license. In the absence of required criminal background checks, the ethical/background questions on applications are the mechanism by which an applicant or licensee would be required to self-disclose a criminal conviction. Any falsification of this data can be the cause for disciplinary action.

As proposed, the statute provides grounds for revocation based on criminal sexual conduct felony convictions. The statute does not provide a mechanism for required background checks with Bureau of Criminal Apprehension for Minnesota convictions, or required fingerprinting and regular checks with records maintained by federal authorities. The lack of required criminal background checks of licensees and applicants for health-related licenses potentially compromises public protection gains to be achieved by extending Minn. Stat §148.10, Subd. 7 to all HLBs. The HLBs note that the matter of required background checks is currently under consideration by the Legislature as an amendment to the practice act for the Board of Nursing.

Impact on Licensees and Licensing Boards

The Boards are not certain what the impact of this statute will be in fiscal terms or in terms of numbers of licensees affected, although (with the exception of the Board noted above), the Boards are generally supportive of the proposal. The Boards do anticipate that the numbers of persons who would fall under coverage of this statute would be small. The Boards have long issued disciplinary action to practitioners who have engaged in sexual impropriety, and do not anticipate a large number of practitioners would be added by this coverage, so the complaints could be handled. The main difference in this statute is the requirement of automatic license revocation as opposed to other types of disciplinary action, which do not require such automatic revocation. Automatic revocation is a remedy that is generally limited to exceptional specific statutory instances, including tax delinquency or failure to pay child support. In such an instance, revocation is automatic, based on Department of Revenue authority, and results in a revocation which is public, non-disciplinary adverse action.

In the case of criminal sexual conduct, a positive impact of the proposed legislation is that Board action would be immediate, with less money and resources required to revoke a license. A further positive impact is that the provision would apply uniformly across all health-related regulatory boards.

An additional positive outcome is that persons who are licensed by multiple boards would have the same consequence for the same (criminal sexual conduct) behavior (with the possible exception of the previously discussed reinstatement provisions).

The Legislature may also want to consider the potential impact on the licensing of barbers in that state correctional facilities provide barber training to inmates in the system. It is currently unknown how many persons incarcerated who take such training may have violated criminal sexual conduct statutes. However, such a law with regard to barbers could have an impact on rehabilitative barber training.

Conclusion

With the exception noted herein, the Minnesota Health-Related Licensing Boards are generally supportive of a legislative proposal providing for denial or revocation of professional licenses in the case of Criminal Sexual Conduct on the part of licensees. Although the Boards already have authority to deny or revoke licenses based on sexual impropriety, a legislative prohibition due to criminal sexual conduct convictions would add a level of certainty regarding unacceptable conduct of persons seeking licensure in health-related professions.

The proposed legislation would benefit by some clarifying language, as outlined in this report. Skillful drafting could also improve consistent application of legislative goals.

The Council of Health Boards appreciates the opportunity to provide input, and be of service, to the Legislature on this very important policy and public safety issue. Should questions arise, please contact Larry Spicer, DC, 651-201-2846 / larry.spicer@state.mn.us or Cindy Greenlaw Benton, 651-201-2737 / cindy.benton@state.mn.us

Sincerely,



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