

STATE OF FLORIDA
DEPARTMENT OF HEALTH
BOARD OF MEDICINE

IN RE:

Petition for Declaratory Statement of
Florida Medical Association, Inc., Doug
Murphy, M.D., The Florida Academy of
Family Physicians, Inc., The Florida
Chapter of the American Academy of
Pediatrics, Inc., The Florida Chapter of the
American College of Physicians, Inc., and
The Florida Society of Dermatologists and
Dermatologic Surgeons, Inc.

Case No. _____

PETITION FOR DECLARATORY STATEMENT

Petitioners, the Florida Medical Association, Inc. (“FMA”), Doug Murphy, M.D., The Florida Academy of Family Physicians, Inc. (“FAFP”), The Florida Chapter of the American Academy of Pediatrics, Inc. (“FCAAP”), The Florida Chapter of the American College of Physicians, Inc. (“FCACP”), and The Florida Society of Dermatologists and Dermatologic Surgeons, Inc. (“FSDDS”), by and through their undersigned counsel and pursuant to Section 120.565, Florida Statutes, and Chapter 28-105, Florida Administrative Code, petition the Florida Board of Medicine for a Final Order setting forth a declaratory statement on the facts and law presented herein:

1. Petitioner FMA is a professional association dedicated to the service and assistance of Doctors of Medicine and Doctors of Osteopathic Medicine in Florida, located at 1430 Piedmont Dr. E., Tallahassee, FL 32308. The office telephone number is (850) 224-6496 and the facsimile number is (850) 222-8827. For purposes of this petition, the email address of the FMA is jscott@flmedical.org. The FMA is organized and maintained for the benefit of the approximately 25,000 licensed Florida physicians who comprise its membership. One of the primary purposes of the FMA is to act on behalf of its members by representing their common interests before the various governmental entities of the State of Florida, including the Department of Health and its Boards.

2. Petitioner Douglas Murphy, M.D. is an allopathic physician licensed in Florida. Dr. Murphy routinely performs pelvic examinations on his patients. For the purposes of this petition, Dr. Murphy’s address, phone number and email address is that of his undersigned counsel.

3. Petitioner, The Florida Academy of Family Physicians, Inc. (“FAFP”), is a Florida-based trade organization comprised of approximately 3,300 Florida physicians, each of whom specializes in Family Medicine. As a result, members of the FAFP routinely engage in pelvic examinations, as that term is defined in F.S. 456.051. FAFP’s address, phone number and facsimile

number are as follows: 13241 Bartram Park Road, Unit 1321, Jacksonville, FL 32258-5229. The office telephone number is (904) 338-4825. For purposes of this petition, the email address of the FAFP is jmillson@fafp.org. The FAFP routinely participates in advocacy efforts on behalf of its members in matters concerning the rights and obligations of physicians, including issues legislation and rules affecting its members.

4. Petitioner, The Florida Chapter of the American Academy of Pediatrics, Inc. (“FCAAP”), is a Florida-based trade organization comprised of Florida physicians, each of whom specializes in Pediatrics. As a result, members of the FCAAP routinely engage in pelvic examinations, of newborns and minors as that term is defined in F.S. 456.051. FCAAP’s address, phone number and facsimile number are as follows: 119 S. Monroe Street, #200, Tallahassee, FL 32301. The telephone number is (850) 572-8495. The email address is: doug.bell@mhdfirm.com. The FCAAP routinely participates in advocacy efforts on behalf of its members in matters concerning the rights and obligations of physicians, including issues legislation and rules affecting its members.

5. Petitioner, The Florida Chapter of the American College of Physicians, Inc. (“FCACP”), is a Florida-based trade organization comprised of approximately 7,000 Florida physicians, each of whom specializes in Internal Medicine. As a result, members of the FCACP routinely engage in pelvic examinations, as that term is defined in F.S. 456.051. FCACP’s address, phone number and facsimile number are 2410 Ormsby Circle West, Jacksonville, FL 32210. The telephone is (904) 355-0800. Email address is dmoerings@floridachapteracp.org. The FCACP routinely participates in advocacy efforts on behalf of its members in matters concerning the rights and obligations of physicians, including issues legislation and rules affecting its members.

6. Petitioner, The Florida Society of Dermatologists and Dermatologic Surgeons, Inc. (“FSDDS”), is a Florida-based trade organization comprised of approximately 530 Florida physicians, each of whom is board certified in Dermatology. As a result, members of the FSDDS routinely engage in pelvic examinations, of newborns and minors as that term is defined in F.S. 456.051. FSDDS’s address, phone number and facsimile number are as follows: 6134 Poplar Bluff Road, Suite 101, Peachtree Corners, GA 30092. The telephone number is (904) 880-0023 Facsimile: (305) 422-3327. The Email address is: fsdds@att.net. The FSDDS routinely participates in advocacy efforts on behalf of its members in matters concerning the rights and obligations of physicians, including issues regarding the interpretation of legislation and regulations.

7. The legislation eliciting this Petition is Section 3 of Florida Senate Bill 698, codified as Section 456.51, Florida Statutes. This legislation, which became effective on July 1, 2020, prohibits health care practitioners, medical students, or any other students receiving training as a health care practitioner from performing a pelvic examination on a patient (in most instances) without the written consent of the patient or the patient’s legal representative.

8. A substantial number of members of the Association Petitioners perform “pelvic examinations” or portions of “pelvic examinations” as that term is now defined in section 456.51, Florida Statutes, on their patients, or, perform examinations that may or may not be considered a pelvic examination under s. 456.51, Florida Statutes. These members, including Dr. Murphy, are

substantially affected by section 456.51, Florida Statutes, as failure to comply with the written consent requirement may result in disciplinary action by the Board.

9. The written consent requirement imposed by s. 456.51, Florida Statutes, has created a tremendous amount of uncertainty for Dr. Murphy and other physicians in Florida as to whether the medical care provided to a patient in various circumstances constitutes a “pelvic examination” under the new law. The new law defines “pelvic examination” as “the series of tasks that comprise an examination of the vagina, cervix, uterus, fallopian tubes, ovaries, rectum, or external pelvic tissue or organs using any combination of modalities, which may include, but need not be limited to, the health care provider’s gloved hand or instrumentation.” The law does not specifically provide that a “pelvic examination” includes examinations performed on male patients. The original intent of Section 3 of SB 698, which was originally filed as SB 1470 before being added to SB 698, was to require express consent before a pelvic examination is performed on an anesthetized or unconscious female patient. See *Lauren Book seeks protections for women, vulnerable students as 2020 Session nears* <https://floridapolitics.com/archives/315123-book-women-students-2020-session-nears>. A pelvic examination, as understood in the medical community, is performed on female patients as part of a regular checkup, or if the patient is experiencing symptoms such as unusual vaginal discharge or pelvic pain, and involves an examination of the female patient’s vulva, vagina, cervix, ovaries, uterus, rectum and pelvis for any abnormalities. See Mayo Clinic website at <https://www.mayoclinic.org/tests-procedures/pelvic-exam/about/pac-20385135>.

10. Given the legislative intent, the common understanding of the term “pelvic examination” among the medical community, and the fact that s. 456.51, Florida Statutes, does not specifically include or exclude a pelvic examination on a male patient, Petitioners request a declaratory statement that Dr. Murphy is not required by s. 456.51, Florida Statutes, to obtain the written consent of a male patient prior to performing a genital or rectal examination on a male patient.

11. Petitioners are also uncertain as to what exactly constitutes a “pelvic examination.” While the term is defined as the “series of tasks that comprise an examination” of certain parts of the anatomy, the law does not indicate whether the mere touching of or looking at the listed parts of the anatomy in the process of performing a medical procedure or other routine care or treatment also constitutes a “pelvic examination.” The term “examination” is generally defined as “an investigation or inspection made for the purpose of diagnosis.” *The American Heritage Medical Dictionary Copyright 2007, 2004 by Houghton Mifflin Company*. The Petitioners assert that a medical procedure that is performed on the vagina, cervix, uterus, fallopian tubes, ovaries, rectum, or external pelvic tissue or organs for any purpose other than diagnostic purposes¹ does not constitute a “pelvic examination,” and thus the written consent required by s. 456.51, Florida Statutes, should not apply.

¹ The same would be true when cleansing as part of changing a diaper or bandage, inserting or caring for various types of catheters, applying a fecal incontinence bag, application of barrier cream, wound care in the area of the rectum or genitals, bathing a patient, taking a rectal temperature, insertion of a catheter tip for a barium enema or shaving the pelvic area in preparation for surgery.

12. Petitioners therefore request a declaratory statement that when Dr. Murphy performs a surgical procedure on the vagina, cervix, uterus, fallopian tubes, ovaries, rectum, or external pelvic tissue or organs of a patient (such as a circumcision, vasectomy, etc.), or touches the vagina, cervix, uterus, fallopian tubes, ovaries, rectum, or external pelvic tissue or organs for non-diagnostic purposes (such as the insertion of a catheter, rectal wound care, taking a rectal temperature, cleansing the pelvic area after a diaper change, etc.), or touches the vagina, cervix, uterus, fallopian tubes, ovaries, rectum, or external pelvic tissue or organs as part of a diagnostic procedure of tissue or organs not involving the vagina, cervix, uterus, fallopian tubes, ovaries, rectum, or external pelvic tissue or organs (such as barium enemas, voiding cystourethrograms, rectal administration of contrast for CTs and MRIs, etc.) he is not required by s. 456.51, Florida Statutes, to obtain the patient's written consent.

13. In addition to questions regarding the scope of the term "pelvic examination," Petitioners are uncertain as to the scope of the written consent required pursuant to s. 456.51, Florida Statutes. The written consent under this statute must be "executed specific to, and expressly identifying, the pelvic examination." As there is nothing in the legislative history of SB 698 to indicate it was the intent of the legislature to impose extremely burdensome or impractical obligations on health care practitioners, the most reasonable interpretation of this requirement would be that it requires written consent that expressly identifies that a pelvic examination will or may be conducted. There is no temporal requirement for the written consent, or that a separate written consent must be obtained prior to each and every pelvic examination. There is also no requirement that each and every person who may be involved in the pelvic examination be listed by name on the written consent. Therefore, Petitioners request a declaratory statement that the required written consent may authorize one or more "pelvic examinations" as may be necessary during the course of treatment or care for which the patient has presented and must identify the type of provider who may perform the "pelvic examination," but is not required to identify providers by name and does not require separate written consent every successive time a "pelvic examination" is conducted during the course of treatment or care for which the patient has presented.

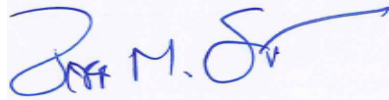
14. Furthermore, it is unclear as to whether the written consent requirement in s.456.51, Florida Statutes, applies in situations where the only "examination" is visual, as may occur when looking to see if there is a rash, wound, or other anomaly involving exterior tissue or organs as might occur in any number of situations, including visual examination of a newborn baby or even a virtual visit being completed via telehealth. Therefore, Petitioners request that the declaratory statement clarify that the written consent requirement in s. 456.51 does not apply in situations where the only examination will be visual without physical contact with any of the parts of the anatomy included in the new statutory definition of "pelvic examination."

15. Finally, s.456.51, Florida Statutes, is silent as to the application of the requirement for written consent in emergent situations when the patient is unable to consent and there is no legal representative of the patient available to give consent. This situation is extremely likely to occur with patients who come to or are brought to an emergency room unattended by a person who has been designated as a legal representative or when a patient has failed to designate a legal

representative and in either case becomes incapable of providing written consent for a “pelvic examination” and the standard of practice requires that an examination of one or more of the parts of the anatomy included in the new statutory definition of a “pelvic examination” be performed. Therefore, Petitioners request that the declaratory statement clarify that in such situations the performance of the medically necessary examination maybe performed without violating s.456.51, Florida Statutes, if a note is entered into the patient record indicating the medical necessity and the reason for the provider’s inability to obtain written consent form the patient or a person designated as the legal representative of the patient.

WHEREFORE, Petitioners respectfully request that the Board of Medicine issue a final order on the individual issues presented above.

Respectfully submitted this 10th day of July, 2020.



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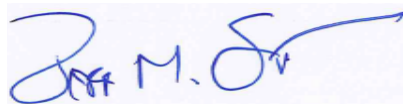
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon Board of Medicine counsel, Edward Tellechea, Esq., Office of Attorney General, via U.S. Mail to The Capitol, PL-01, Tallahassee, FL 32399 and via email to ed.tellechea@myfloridalegal.com, upon the Florida Department of Health, Agency Clerk, via U.S. Mail to 4052 Bald Cypress Way, Bin A-02, Tallahassee, FL 32399, and upon the Board of Medicine via U.S. Mail to 4052 Bald Cypress Way, Bin C-03, Tallahassee, FL 32399-3253, and via email to Claudia.Kemp2@flhealth.gov on this 10th day of July, 2020.



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