

STATE OF FLORIDA
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
THE FLORIDA CHAPTER OF THE AMERICAN
COLLEGE OF PHYSICIANS, INC., AND THE
FLORIDA SOCIETY OF DERMATOLOGISTS
AND DERMATOLOGIC SURGEONS, INC.

FINAL ORDER

This matter came before the Board of Medicine (hereinafter the Board) on August 7, 2020, via a telephonic conference call meeting, for consideration of the above-referenced Petition for Declaratory Statement. The Petitioners were represented by Jeffery M. Scott, Esquire, Mary Thomas, Esquire, and Christopher Nuland, Esquire. The Notice of Petition for Declaratory Statement was published on July 14, 2020, in Vol. 46, No. 136, in the Florida Administrative Register.

The Petitioners' inquiries arise from the application of Section 3, Chapter 2020-31 of the Laws of Florida¹ (hereinafter the pelvic examination bill or the bill), which mandates an executed written informed consent agreement prior to performing pelvic exams on Florida patients. Their specific inquiries are substantially as follows:

a. Does the pelvic examination bill informed consent requirement apply to the examination of biologically male patients?

1. Chapter 2020-31, § 3, Laws of Florida, is codified in Section 456.51, Florida Statutes, (2020) but referred to in the actual petition as Florida Senate Bill (SB) 698.

b. Does the performance of surgery, a medical procedure or treatment on the vagina, cervix, uterus, fallopian tubes, ovaries, rectum, or external pelvic tissues or organs for non-diagnostic purposes constitute a pelvic exam as defined in pelvic examination bill?

c. Does a discrete visual examination of the vagina, cervix, uterus, fallopian tubes, ovaries, rectum, or external pelvic tissues or organs constitute a pelvic exam as defined in pelvic examination bill?

d. Does the pelvic examination bill require separate written informed consents identifying by name the person(s) performing the examination every time a pelvic exam is conducted during the course of treatment or care for which the patient has presented?

e. Does the pelvic examination bill require a written informed consent in emergent situations where the patient is unable to consent and there is no legal representative of the patient available to provide the necessary consent?

FINDINGS OF FACT

1. The facts set forth in the Petition are hereby adopted and incorporated herein by reference as the findings of fact of the Board.

2. The Petitioners are either physicians who perform pelvic examinations or are professional associations/trade organizations comprised of physicians who perform pelvic examinations. As such, they or their members are substantially affected through the application and enforcement of Section 3, Chapter 2020-31 of the Laws of Florida, and therefore, have the requisite standing to bring this Petition.

CONCLUSIONS OF LAWS

1. The Board of Medicine has authority to issue this Final Order pursuant to Section 120.565, Florida Statutes, and Rule 28-105, Florida Administrative Code.

2. Section 120.565, Florida Statutes, reads as follows:

120.565. Declaratory statement by agencies

(1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

(2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

(3) The agency shall give notice of the filing of each petition in the next available issue of the Florida Administrative Weekly and transmit copies of each petition to the committee. The agency shall issue a declaratory statement or deny the petition within 90 days after the filing of the petition. The declaratory statement or denial of the petition shall be noticed in the next available issue of the Florida Administrative Weekly. Agency disposition of petitions shall be final agency action

3. Rule 28-105.001, Florida Administrative Code, reads as follows:

A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used only to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person or for obtaining a policy statement of general applicability from an agency.

4. As a preliminary matter, the Board declines to answer Petitioners' inquiries generally described in paragraphs d. and e. above because they were not written in a manner that was conducive to an answer without significant re-wording and the Board was not inclined to undertake any reformation of the Petitioners' questions.

5. Subsection (1) of the pelvic examination bill, which purports to define the term "pelvic examination," reads as follows:

As used in this section, the term "pelvic examination" means 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 Board notes that the above quoted statutory language does not explicitly disclose whether it applies to the examination of both biologically male and female patients. The language of the statute itself refers to female anatomical features and genitalia but notably lacks any reference to exclusively male anatomical features.

6. An examination of the staff analyses from both the House of Representatives and the Senate versions of the pelvic examination bill reveal language that only addresses the treatment of biologically female patients. Staff analyses from both the House and the Senate use the following identical language to describe a "pelvic examination:"

A pelvic examination involves the visual examination of the external genitalia and an internal visual examination of the vaginal walls and cervix using a speculum and palpation of the pelvic organs. Health care practitioners often perform pelvic examinations as a part of the annual well woman visit. A health care practitioner may also perform a pelvic examination to diagnose specific health conditions, such as cancer and bacterial vaginosis.

(footnotes omitted)

Staff of Fla. H.R. Subcomm. on Health Quality, CS/HB 1286, CS/CS/SB 698, (2020) p. 3 (rev. July 6, 2020) and Staff of Fla. S. Comm. on Rules, CS/CS/SB 698, (2020) p. 8 (rev. Feb. 28, 2020).

7. Even though it was reported that some legislators, such as the bill sponsor Senator Lauren Book, believe that the pelvic examination bill consent requirement also applies to biologically male patients, the Board of is of the opinion that the language of the bill itself and the supporting staff analyses from both legislative bodies indicate otherwise.

<http://wusf.usfwusfnews.edu/post/floridas-new-pelvic-exam-law-causes-uncertainty>. The bill language provides an extensive listing of female anatomical features such as the vagina, uterus and fallopian tubes but fails to mention a single male anatomical feature such as the

penis, testicles, or scrotum. Furthermore, the staff analyses from both legislative chambers clearly indicate that the term pelvic examination refers to a healthcare procedure performed on biologically female patients to diagnose diseases and other conditions. And again, the analyses contain not a single reference to the treatment of biologically male patients.

8. The Board also notes that a pelvic examination, as generally and broadly understood within the medical community, is performed on biologically female patients to evaluate the reproductive organs as part of a regular checkup or if the patient is experiencing symptoms such as pelvic pain or vaginal discharge and involves the examination of the patient's vulva, vagina, cervix, ovaries, uterus, and rectum for any abnormalities. *See* <https://www.mayoclinic.org/tests-procedures/pelvic-exam/about/pac-20385135>.

Therefore, based on the foregoing, the Board is of the opinion that the pelvic examination bill informed consent requirement does not apply to the examination of biologically male patients.

9. The Board also notes that the aforementioned staff analyses describe a pelvic examination as a procedure used to examine and diagnose diseases and conditions of the reproductive organs. Such description notably does not include any treatments or procedures that incidentally involves one of the bill's referenced body parts such as the vagina, rectum, cervix or external pelvic tissues. Simply put, there is nothing in the legislation or the accompanying staff analyses indicating that routine non-diagnostic medical care, treatments, or surgical procedures involving the bill's designated body parts were meant to constitute a "pelvic examination."

10. Accordingly, the Board is of the opinion that the performance of surgery, a medical procedure or treatment on the vagina, cervix, uterus, fallopian tubes, ovaries, rectum, or external pelvic tissues or organs for non-diagnostic purposes does not constitute a pelvic

exam as defined in pelvic examination bill.

11. The same analysis applies to the Petitioners' inquiry set forth above in paragraph c. Nothing in the legislative language or the accompanying staff analyses seem to indicate that a mere visual "examination," as may occur when a physician is looking to see if there is a rash, wound, or other anomaly, that may be located on exterior tissue or organs in the pelvic area constitutes a "pelvic examination." Hence, the Board finds that a discrete visual examination of the vagina, cervix, uterus, fallopian tubes, ovaries, rectum, or external pelvic tissues or organs does not constitute a pelvic exam as defined in pelvic examination bill.

12. The Board's response to this Petition addresses solely the questions propounded by the Petitioners and only addresses issues regarding the practice of allopathic medicine. The Board's conclusions are based solely on its application of the specific factual circumstances outlined in the Petition to the pertinent statutory and rule provisions set forth above.

This Final Order shall become effective upon filing with the Clerk of the Department of Health.

DONE AND ORDERED this _____ day of _____, 2020.

BOARD OF MEDICINE

Claudia Kemp, J.D., Executive Director
For Zachariah P. Zachariah, M.D., Chair

NOTICE OF APPEAL RIGHTS

Pursuant to Section 120.569, Florida Statutes, Respondents are hereby notified that they may appeal this Final Order by filing one copy of a notice of appeal with the Clerk of the Department of Health and the filing fee and one copy of a notice of appeal with the District Court of Appeal within 30 days of the date this Final Order is filed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by **Certified Mail** to: The Florida Medical Association, Inc., and Doug Murphy, M.D., c/o Jeffery Scott, Esquire, and Mary Thomas, Esquire, 1430 Piedmont Drive East, Tallahassee, Florida 32308; and 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., c/o Christopher Nuland, Esquire, 4407 Herschel Street, Jacksonville, Florida 32210; to Edward A. Tellechea, Chief Assistant Attorney General, at ed.tellechea@myfloridalegal.com; and Louise R. St. Laurent, General Counsel, Department of Health, at Louise.StLaurent@flhealth.gov; on this _____ day of _____, 2020.
