



Legislative Fiscal Bureau

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Joint Committee on Finance

Paper #502

Sexual Assault Forensic Examination Compensation Program (Justice)

Base Agency

[LFB 2007-09 Budget Summary: Page 375, #13]

CURRENT LAW

Under 2005 Wisconsin Act 25, the Legislature created a PR annual appropriation under the Department of Justice (DOJ) and provided \$37,500 annually to fund sexual assault forensic exams. The appropriation is supported by the \$8 crime laboratories and drug law enforcement surcharge and by the \$250 DNA surcharge. Sexual assault forensic exams are utilized to collect forensic evidence from victims of sexual assault. In addition to providing funding for sexual assault forensic exams, these surcharge revenues support: (a) the state's DNA databank; (b) DNA evidence prosecution efforts; (c) the crime laboratories; and (d) drug law enforcement efforts.

GOVERNOR

Delete the PR annual sexual assault forensic exams appropriation, which provides reimbursement for the costs associated with sexual assault forensic exams. Instead, create a GPR-funded sum sufficient reimbursement for forensic examinations appropriation to provide funding for sexual assault forensic exams, estimated at \$37,500 GPR annually. Create a sexual assault forensic examination compensation subchapter under Chapter 949 (awards for the victims of crimes) of the statutes to govern administration of the program, including a provision capping annual expenditures under the program at \$50,000 annually.

Effective Date. The provisions creating a new reimbursement for forensic examinations sum sufficient appropriation and statutory language creating a new sexual assault forensic examination compensation subchapter would first apply to examinations conducted on the day after publication of the budget act.

DISCUSSION POINTS

Creation of a Sexual Assault Forensic Examination Compensation Subchapter

1. The provisions of 2005 Wisconsin Act 25 did not provide any administrative language directing or limiting DOJ's administration of the new sexual assault forensic examination program. Instead, Act 25 created a PR annual sexual assault forensic exams appropriation funded at \$37,500 PR annually, and provided in the appropriation language that the funding could be utilized by the Department to provide reimbursement for the costs associated with sexual assault forensic exams.

2. The provisions of SB 40 would delete this appropriation and create a sexual assault forensic examination compensation subchapter to specify program administration. The provisions of the subchapter would address: (a) general administrative issues; (b) applications for awards; (c) computation of awards; (d) limitations on awards; (e) victim confidentiality; (f) relationship to awards under the crime victim compensation program; (g) state or local agency cooperation; (h) criminal offenses related to fraudulent applications or claims for an award under the program; (i) Department authority to issue subpoenas for investigations or hearings conducted under the program; (j) hearing procedures under the program; and (k) a biennial reporting requirement. It may be worth noting that the statutory language under SB 40 is reflective of the award process that has developed under current law for this program.

3. *Administration.* The Department of Justice would be required to administer the program. The Department would be required to appoint a program director to assist in administering the program. The Department would be further required to promulgate rules for the implementation and operation of the program. The rules would include procedures to ensure that any limitation of an award was calculated in a fair and equitable manner.

4. *Application for Awards.* Any health care provider who conducted an examination to gather evidence regarding a sex offense could apply for an award under the program. DOJ would be required to prescribe application forms for awards under the program and furnish health care providers with the forms. A "health care provider" would be defined as any person providing health care services. A "sex offense" would mean an act committed in Wisconsin that, if committed by a competent adult, would be a criminal act constituting: (a) sexual assault; (b) sexual assault of a child; (c) engaging in repeated acts of sexual assault of the same child; (d) sexual exploitation of a child; (e) incest with a child; (f) soliciting a child for prostitution; or (g) sexual intercourse with a child age 16 or older.

5. In applying for an award, a health care provider would be required to submit to DOJ reports from any physician, physician's assistant, or nurse who treated or examined the victim to gather evidence regarding a sex offense, performed any procedure during that treatment or examination that tested for or prevented a sexually transmitted disease, or provided or prescribed any medication to prevent or treat a sexually transmitted disease. A health care provider could not submit to DOJ any other records than those pertaining to the examination, treatment, procedure, or

medication for which the provider was seeking an award under the program. A "sexually transmitted disease" would mean syphilis, gonorrhea, chlamydia, and other diseases included by rule by the Department of Health and Family Services.

6. *Computation of Awards.* A health care provider seeking an award under the program could not seek payment for any examination costs from the victim or any guardian of the victim. A health care provider seeking an award under the program could also not seek payment for any examination costs from insurance or another available source of payment, unless the victim, or any guardian of the victim, authorized the health care provider to seek payment from such third parties. In seeking payment under the program, DOJ would be required to reimburse a health care provider for the examination costs to gather evidence regarding a sex offense, as follows: (a) if the provider was not authorized to seek payment from insurance or another available source of payment, the award under the program would be for examination costs, regardless of whether the victim, or any guardian of the victim, cooperated with a law enforcement agency regarding the sex offense; and (b) if the provider was authorized to seek payment from insurance or another available source of payment and the victim, or any guardian of the victim, did not cooperate with a law enforcement agency regarding the sex offense, the award under the program would be examination costs, reduced by any payment to be received from insurance or another available source of payment.

7. The Department would not be authorized to make an award under the program if: (a) the health care provider was authorized to seek payment for any examination costs from insurance or another available source of payment; and (b) the victim, or any guardian of the victim, cooperated with a law enforcement agency. The Department could not refuse to make an award under the program because the victim or the guardian of the victim did not cooperate with a law enforcement agency regarding the sex offense, or due to lack of an investigation or prosecution of the sex offense.

8. "Cooperate with a law enforcement agency" would mean to report a sex offense to a law enforcement agency or to aid a law enforcement agency in the investigation of a sex offense. "Examination costs" would mean the cost of an examination that is done to gather evidence regarding a sex offense, any procedure during that examination process that tests for or prevents a sexually transmitted disease, and any medication provided or prescribed, during that examination process, that prevents or treats a sexually transmitted disease that the person performing the examination or procedure believes could be a consequence of the sex offense. "Examination costs" would not include any processing or administrative costs, attorney fees, or other expenses. A "guardian of the victim" would mean either: (a) if the victim was under 18 years of age, the parent, guardian, or legal custodian of the victim; and (b) if the victim had been determined to be incompetent under Chapter 54 of the statutes (guardianships and conservatorships), the guardian of the victim.

9. *Limitation on Awards.* No award under the program could be made unless the application for an award was made within one year after the date of the examination. Further, DOJ could not make an award under the program: (a) that exceeded the examination costs of the victim;

(b) for any part of the examination costs of the victim for which the health care provider seeking the award had received compensation from any other source; and (c) if the total dollar amount awarded under the program in any year was greater than \$50,000.

10. *Confidentiality.* If a health care provider sought an award under the program, any personally identifiable information of the victim who received the examination would be required to remain confidential unless written consent for the release of any personally identifiable information was provided by either the victim or the guardian of the victim.

11. *Crime Victim Compensation Program.* Any award to a victim under the crime victim compensation program would be reduced by any award provided under this program.

12. *State or Local Agency Cooperation.* At the request of DOJ, any state or local agency, including a district attorney or law enforcement agency, would be required to make available all reports, files, and other appropriate information which the Department requested in order to make a determination that a health care provider was eligible for an award under the program.

13. *Offenses.* In connection with an award under the program, no person could do any of the following: (a) submit a fraudulent application or claim for an award; (b) intentionally make or cause to be made any false statement or representation of a material fact; or (c) intentionally conceal or fail to disclose information affecting the amount of or the initial or continued right to any such award when reasonably requested to provide such information by DOJ. Any person committing such an offense could be fined not more than \$500, or imprisoned not more than six months, or both. Any person committing such an offense would be required to forfeit any benefit received and would be required to reimburse the state for payments received. The state would have a civil cause of action for relief against any person who committed such an offense for the amount of damages that the state sustained by reason of the offense and, in addition, for punitive damages not more than double the amount of damages that the state could have sustained, together with interest, and the cost of the suit. The Attorney General could bring any such action and would have such powers as would be necessary to enforce these provisions.

14. *Subpoenas.* The Department or any of its authorized agents could issue subpoenas for persons or records for any investigation or hearing conducted under the program and could enforce compliance with such subpoenas.

15. *Hearings.* The procedure of Chapter 227 of the statutes (Administrative Procedure and Review) for contested cases would generally apply to hearings under the program. The Department of Administration's Division of Hearings and Appeals would be required to appoint hearing examiners to make findings and orders under the program. All hearings would be required to be open to the public unless in a particular case the examiner determined that the hearing, or a portion of the hearing, would have to be held in private, respecting the fact that either: (a) the offender had not been convicted; or (b) the interest of the victim. In a proceeding under the program, there would be no legal privilege, except legal privileges arising from the attorney-client

relationship, as to communications or records relevant to an issue of the physical condition of the victim in a proceeding in which that condition would be an element.

16. *Biennial Report.* The Department of Justice's biennial report requirement to the Legislature would be modified to require a report of its activities under this program, including all of the following: (a) an explanation of the procedures for filing and processing claims under the program; (b) a description of the programs and policies instituted to promote awareness about the awards under this program; (c) an analysis of future needs and suggested program improvements; (d) a copy of the forms used by the program; and (e) a complete statistical analysis of the cases handled under the program, including all of the following: (1) the number of claims filed; (2) the number of claims approved and the amount of each award; (3) the number of claims denied and the reasons for rejection; and (4) a breakdown of claims by geographic area and month.

17. The recommended sexual assault forensic examination compensation subchapter under Chapter 949 of the statutes would provide substantive guidance to DOJ as to how this program should be administered. If the Committee approves of the administrative guidance as developed under this recommended subchapter, the Committee could consider adopting the language of this subchapter.

18. Alternatively, it could be argued that there are significant public policy choices reflected in the administrative language of the recommended subchapter. These public policy choices include such issues as: (a) the extent to which a victim should be encouraged to cooperate with law enforcement through the development of the program; (b) the circumstances under which health care providers would be required to seek payment from insurance or other available sources of payments; (c) reimbursable costs under the program; (d) the relationship between awards under this program and awards under the crime victim compensation program; (e) the severity of criminal offenses for submitting fraudulent claims under the program, and whether the offenses should be civil or criminal; and (f) balancing the offsetting interests and rights of parties and the public affected by hearings under the program.

19. It could be argued that the Legislature might delete, amend, or modify some of these public policy choices if the administrative language of the program were to be developed outside of the budget process as separate legislation. As a result, the Committee could consider: (a) deleting the sexual assault forensic examination compensation subchapter; and (b) amending the GPR-funded reimbursement for forensic examinations appropriation to eliminate the reference to the subchapter and specifically provide that funding could be utilized to reimburse for costs associated with sexual assault forensic exams.

20. Department staff has indicated that if the subchapter language was deleted that the Department could not provide reimbursement for prescription costs incurred for any medication to prevent or treat a sexually transmitted disease. If the Committee wishes to delete the subchapter but permit reimbursement for these prescription costs, the GPR appropriation could be further amended to specifically permit DOJ to reimburse such prescription costs.

21. On the other hand, if the Committee deletes the recommended subchapter language from the bill, the Department will not have detailed language to guide their administration of the program during the upcoming biennium until such time as administrative language for the program is adopted by the Legislature and signed into law by the Governor. If the subchapter language is deleted (and until such time as detailed administrative language is enacted into law), DOJ would have to continue to administer the program as it has under current law (although DOJ could be specifically permitted to reimburse for prescription costs as identified above).

Appropriation Changes

22. Under current law, reimbursements for the cost of sexual assault forensic exams are provided from a PR annual appropriation funded at \$37,500 annually. Funding for the appropriation is provided by the \$8 crime laboratories and drug law enforcement surcharge and by the \$250 DNA surcharge.

23. The provisions of the bill would delete this appropriation and replace it with a GPR sum sufficient appropriation. Language of the sexual assault forensic examination compensation subchapter would limit DOJ to awarding no more than \$50,000 annually under the program.

24. Under current law, the estimated annual cost of reimbursements under the program is \$37,000 PR annually. Department staff estimates that expanding eligible reimbursement costs under the program to include prescription costs for medication to prevent or treat a sexually transmitted disease would likely increase the annual reimbursement costs under the program to the \$50,000 ceiling specified in the recommended sexual assault forensic examination compensation subchapter. In remarks to the Committee, the Attorney General expressed concerns about the cap on reimbursement payments under the program and recommended deleting the cap to permit the program to reimburse all eligible claims under the program, regardless of total value in a given fiscal year.

25. In order to ensure that victims of sexual assault receive timely sexual assault forensic exams in order to assist with possible future criminal prosecutions, the Committee could consider eliminating the cap on expenditures under the program to permit the recommended GPR sum sufficient appropriation to be utilized to fully reimburse health care providers for their costs of providing such exams, including costs associated with preventing or treating a sexually transmitted disease.

26. On the other hand, there are many programs important to the Legislature (such as the crime victim compensation and crime victim services programs) that are not provided sum sufficient expenditure authority in recognition of: (a) limited state funding; and (b) the general need for certainty in identifying budgeted expenditures for a biennium in order to enable the state to better identify the need for offsetting revenues to pay for the budgeted expenditures.

27. In recognition of these latter considerations, the Committee could also consider providing \$50,000 annually to a GPR annual appropriation to provide reimbursements to health care

providers to reflect a DOJ estimate of funding needed if reimbursements were to be provided both for costs reimbursed under current law, as well as for costs associated with prescribing medications to prevent or treat a sexually transmitted disease.

28. Finally, the Committee could consider maintaining current law. Under this approach \$37,500 PR annually would be provided for reimbursements for sexual assault forensic exams funded from the \$8 crime laboratories and drug law enforcement surcharge and by the \$250 DNA surcharge. It may be worth noting that administration staff indicates that the Governor recommended converting the program to GPR funding to reflect the state's commitment to the program, and to permit the \$8 crime laboratories and drug law enforcement surcharge and the \$250 DNA surcharge revenues to be utilized for their original purposes. Under this latter alternative, funding would not be provided to reimburse health care providers for prescription costs associated with medications to prevent or treat sexually transmitted diseases.

ALTERNATIVES TO BASE

1. Approve the Governor's recommendations to: (a) delete the PR annual sexual assault forensic exams appropriation; (b) create a GPR-funded sum sufficient reimbursement for forensic examinations appropriation to provide funding for sexual assault forensic exams, estimated at \$37,500 GPR annually under the bill; and (c) create a sexual assault forensic examination compensation subchapter under Chapter 949 of the statutes to govern administration of the program, including a provision capping annual expenditures under the program at \$50,000 annually. Re-estimate expenditures under the program at \$50,000 GPR annually to reflect agency estimates of costs under the program if reimbursements are provided for prescription costs incurred for any medication to prevent or treat a sexually transmitted disease.

| ALT 1 | Change to Bill Funding | Change to Base Funding |
|--------------|-----------------------------------|-----------------------------------|
| GPR | \$25,000 | \$100,000 |
| PR | <u>0</u> | <u>- 75,000</u> |
| Total | \$25,000 | \$25,000 |

2. Modify the recommendations by deleting the provision capping expenditures under the program at \$50,000 annually. As a result, the Department would have the authority to fully reimburse all reimbursement claims of hospital providers in a given year for the costs of sexual assault forensic exams, regardless of the aggregate total of such claims.

| ALT 2 | Change to Bill Funding | Change to Base Funding |
|--------------|-----------------------------------|-----------------------------------|
| GPR | \$25,000 | \$100,000 |
| PR | <u>0</u> | <u>- 75,000</u> |
| Total | \$25,000 | \$25,000 |

3. Modify the recommendations by: (a) creating the GPR-funded forensic examinations appropriation as a GPR annual appropriation funded at \$50,000 annually, instead of a sum sufficient estimated at \$37,500 GPR annually; (b) specifying that this appropriation may reimburse for the costs associated with sexual assault forensic exams, including the prescription costs of providing medication to prevent or treat a sexually transmitted disease; and (c) deleting the language creating a sexual assault forensic examination compensation subchapter.

| ALT 3 | Change to Bill Funding | Change to Base Funding |
|--------------|-----------------------------------|-----------------------------------|
| GPR | \$25,000 | \$100,000 |
| PR | <u>0</u> | <u>-75,000</u> |
| Total | \$25,000 | \$25,000 |

4. Maintain current law.

| ALT 4 | Change to Bill Funding | Change to Base Funding |
|--------------|-----------------------------------|-----------------------------------|
| GPR | -\$75,000 | \$0 |
| PR | <u>75,000</u> | <u>0</u> |
| Total | \$0 | \$0 |

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