SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2019 - 2020 Regular

Bill No:	AB 538	**Hearing Date:**	June 11, 2019
Author:	Berman		
Version:	May 30, 2019		
Urgency:	No	**Fiscal:**	Yes
Consultant:	MK		

Subject: ***Sexual Assault: Medical Evidentiary Examinations and Reporting***

HISTORY

Source: California Sexual Assault Forensic Examiners Association

Prior Legislation: AB 334 (Cooper) Not heard Senate Public Safety 2017
AB 107 (Corbett) Chapter 148, Stats. 2013

Support: California Hospital Association; Canby Family Practice Clinic; Circle of SAFE-T; County of Santa Clara; Eisenhower Health; Enloe Medical Center; Forensic Nurse Specialists, Inc., Highland Hospital Sexual Assault Response Team; International Association of Forensic Nurses Southern California Chapter; Monterey County Health Department; Monterey County Sexual Assault Response Team; Red Bluff Police Department; Riverside County Board of Supervisors; Riverside Sheriffs' Association; Riverside University Health System Medical Center SAFE Clinic; Safe Harbor Ventura County; Santa Clara County; SART Center at San Gabriel Valley Medical Center; Students Against Sexual Assault; Tehama SART; UCSB Lobby Corps

Opposition: CALCASA; Project Sanctuary; RISE; Sure Helpline Crisis Center; WEAVE

Assembly Floor Vote: 77 - 0

PURPOSE

The purpose of this bill is to provide that a nurse practitioner and a physician assistant may perform a medical evidentiary examination, and updates terminology, documentation procedures and training curriculum for medical evidentiary examinations in cases of sexual assault and makes changes to the reimbursement for the examinations.

Existing law provides that a state or local government is not entitled to federal funds to combat violent crimes against women unless the state or another governmental entity incurs the full out-of-pocket cost of forensic medical exams, as described, for sexual assault victims. (42 U.S.C. § 3796gg-4(a).)

Existing law provides that federal law shall not be construed to permit the state or local government to require a victim to participate in the criminal justice system or cooperate with law enforcement in order to be provided with a forensic medical examination or reimbursed for its cost. (42 U.S.C. § 3796gg-4(d).)

Existing law requires the Office of Emergency Services to establish a protocol for the examination and treatment of victims of sexual assault and attempted sexual assault, including child molestation, and the collection and preservation of evidence therefrom, which includes recommended methods for meeting the standards specified in Pen. Code, § 13823.11. (Penal Code § 13823.5(a).)

Existing law requires the Office of Emergency Services, to adopt a standard and a complete form or forms for the recording of medical and physical evidence data disclosed by a victim of sexual assault or attempted sexual assault, including child molestation. (Penal Code § 13823.5(c).)

Existing law requires a "qualified health care professional," as specified, who conducts an examination for evidence of a sexual assault or an attempted sexual assault, including child molestation, use the standard form or forms adopted as specified. (Penal Code § 13823.5(c).)

Existing law defines a "qualified health care professional" to include:

1) A physician and surgeon currently licensed pursuant to Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code; and

2) A nurse currently licensed pursuant to Chapter 6 (commencing with Section 2700) of Division 2 of the Business and Professions Code and working in consultation with a physician and surgeon who conducts examinations or provides treatment as described in Section 13823.9 in a general acute care hospital or in a physician and surgeon's office. (Penal Code § 13823.5(e).)

Existing law provides that the standard form established to report sexual assault shall be used to satisfy the reporting requirements specified in Penal Code Sections 11160 and 11161 in cases of sexual assault, and may be used in lieu of the form specified in Section 11168 for reports of child abuse. (Penal Code § 13823.5(c)(4)).)

Existing law sets forth the minimum standards for the examination and treatment of victims of sexual assault or attempted sexual assault, including child molestation and the collection and preservation of evidence. (Penal Code § 13823.11.)

Existing law provides that in conducting the physical examination, the specified procedures shall be followed, and includes obtaining consent for a physical examination, treatment, and collection of evidence shall be obtained as specified, and provides that a victim of sexual assault shall be informed that they may refuse to consent to an examination for evidence of sexual assault, including the collection of physical evidence, but that a refusal is not a ground for denial of treatment of injuries and for possible pregnancy and sexually transmitted diseases, if the person wishes to obtain treatment and consents thereto. (Penal Code § 13823.11(b) and (c).)

Existing law provides that each adult and minor victim of sexual assault who consents to a medical examination for collection of evidentiary material shall have a physical examination, as specified. (Penal Code § 13823.11(f).)

Existing law requires the collection of physical evidence to conform to the specified procedures, as specified. (Penal Code § 13823.11 (g).)

Existing law requires the evidence be turned over to the proper law enforcement agency. (Penal Code § 13823.11 (h)(4).)

This bill provides that the standard from may be issued in paper and/or electronic versions.

This bill includes a nurse practitioner or physician assistant in the definition of qualified health care professional who may perform an exam for evidence of sexual assault.

This bill defines "sexual assault forensic examiner" as "a qualified health care professional who has been trained on the standardized sexual assault forensic medical curriculum as specified.

This bill requires every public or private general acute hospital, clinic, sexual assault forensic

This bill authorizes data from a medical evidentiary examination, with the patient's identity removed, to be collected for health and forensic purposes in accordance with state and federal privacy laws.

This bill repeals the provision limiting the amount that may be charged to $300, and would instead require the Office of Emergency Services to determine the amount that may be reimbursed to offset the cost of a medical evidentiary exam once every five years.

This bill authorizes a minor to consent, or withhold consent, to a sexual assault forensic medical examination without the consent of a parent or guardian.

This bill requires baseline testing for sexually transmitted infections to be done for a child and a person with a disability, or a person who is residing in a long-term care facility, if forensically indicated.

This bill requires, for victims of sexual assault with an assault history of strangulation, best practices to be followed for a complete physical examination and diagnostic testing to prevent adverse outcomes or morbidity and documentation on a supplemental medical evidentiary examination form.

This bill changes the term "child molestation" to "child sexual abuse" and makes other technical changes.

COMMENTS

1. Need for This Bill

According to the author:

> After experiencing sexual violence, survivors are asked to undergo a highly sensitive and detailed exam performed…
>
> The proper collection of evidence is integral for crime laboratories to upload DNA profiles from exams into the Combined DNA Index System (CODIS), for law enforcement to identify and apprehend offenders, for district attorneys to successfully prosecute defendants, and for survivors to seek justice in court.

Due to evidence degradation, timely access to exams is critical. Unfortunately, access to qualified health care professionals that conduct exams is limited, and some survivors must travel long distances to receive an exam. Recruitment and retention of qualified health care professionals is a problem faced by sexual assault forensic exam teams (exam teams). Currently, there are 49 exam teams serving all 58 counties in California. Some are hospital-based, while others operate out of outpatient clinics and other emergency medical facilities.

To improve access to exams, AB 538 would add nurse practitioners and physician assistants to the definition of a "qualified health care professional" that may perform an exam.

Reimbursement for VAWA Exams:

Prior to 2011, law enforcement was billed for the cost of an exam, but had discretion over when to request or authorize an exam. Under the federal Violence Against Women Act (VAWA), a sexual assault victim must be given the option to have an exam without participating in the criminal justice system. This option, referred to as a non-investigative report (NIR) exam, gives victims time to manage the emotional and physical trauma following sexual assault without having to engage with law enforcement. SB 534 (Ch. 360, Stats. 2011) helped bring California into compliance with VAWA by providing this option. SB 534 maintained that the cost of a NIR exam shall be charged to the local law enforcement agency and allows the local law enforcement agency to seek reimbursement from the California Office of Emergency Services (CalOES) for the cost of conducting a NIR exam. Unfortunately, SB 534 arbitrarily capped the amount that may be charged by a qualified health care professional, hospital, or other emergency medical facility to perform an NIR exam at $300 and requires CalOES to use discretionary funds from federal Office of Violence Against Women, specifically the STOP (Services, Training, Officers, and Prosecutors) Violence Against Women Formula Grant Program, to reimburse law enforcement for the cost of a NIR exam. Approximately 4% (325) of the total (6500) adult exams done in the state annually are NIR exams. Cal OES reports that few police agencies have submitted reimbursement requests for the cost of the NIR exams (50) in the first four years the law was in effect.

Unfortunately, the current law has been frequently misinterpreted by law enforcement to mean the maximum amount to be billed for any/all exams is $300. The reality is that exam teams cannot afford to operate at $300 for any/all exams. As a result, exam teams – that do not receive any direct state or federal support – are at risk of shutting down, which would limit access to the availability of exams and be counter-productive to public safety.

Additionally, some law enforcement agencies have been authorizing exams at the locally negotiated rate, only to retroactively lower payment for an exam (refusing to pay more than $300), if the victim becomes "uncooperative" OR if the case does not result in charges being brought.

In response, AB 538 contemplates requiring CalOES, every 5 years, to determine the amount that may be reimbursed to offset the cost of an NIR exam and attempts to clarify the NIR exam by replacing the phrase "does not participate in the criminal justice system" with "who is undecided at the time of an examination whether to report to law enforcement."

2. Expansion of who can perform a sexual assault forensic medical examination

Under existing law, the Office of Emergency Services (OES) is responsible for establishing protocol for the sexual assault forensic medical examination (SAFME) and treatment for the victims of sexual assault and attempted sexual assault. OES was required to establish an advisory committee, whom OES works with to establish a protocol for the examination and treatment of victims of sexual assault and attempted sexual assault, including child molestation, and the collection and preservation of evidence therefrom. (Penal Code § 13823.5(a).) As part of these protocols, existing law provides that only a "qualified health care professional," including a licensed doctor or surgeon, may conduct a SAFME. (Penal Code § 13823.5(e).)

This bill would explicitly expand the list of who may perform a SAFME to include a licensed nurse practitioner and a licensed physician's assistant. These two classifications have existing authority to perform many of the same procedures as a licensed doctor. Therefore, this expansion would allow additional qualified individuals to perform a SAFME. Existing law already requires they be trained on the minimum standards, protocols and guidelines for examining and treating victims of sexual assault.

3. Changes to costs and payment of sexual assault forensic medical examinations

Existing law provides that no victim of sexual assault shall be charged for the performance of a SAFME, nor may the performance of their SAFME be conditioned on their willingness to participate with the criminal justice system. Existing law also provides for the cost of a SAFME to be treated as a local cost and charged to the local law enforcement agency in whose jurisdiction the alleged offense was committed. The amount a qualified health care professional, hospital, or other emergency medical facility may charge for the performance of a SAFME cannot exceed $300. Under existing law, OES must use certain VAWA funds to cover the cost (not to exceed $300) of the medical evidentiary examination portion of a medical examination of a sexual assault victim. (Penal Code § 13823.95.)

This bill deletes the $300 maximum and provides instead that OES shall determine the amount that may be reimbursed to offset the cost of the SAFME exam every 5 years.

4. Argument in Support

According to the California Sexual Assault Forensic Examiners Association:

AB 538 seeks to correct several issues in current law that have created real or potential challenges to survivors seeking access to medical evidentiary exam in California and for SAFE teams that face excessive financial burdens as a result. First, it ensures that medical staff with correct advanced training are identified as qualified healthcare providers to perform sexual assault medical evidentiary exams.

Second, it strengthens the language to ensure that the California Clinical Forensic Medical training Center (CCFMTC) continues to update and implement the training required for qualified healthcare providers to operate utilizing current best practices.

Third, it allows the California Office of Emergency Services to develop electronic reporting forms that are connected to a database with the capability to generate deidentified aggregate data for professional education and training. Fourth, it seeks to require that forensic reports are preserved, and the confidentiality of the patient is maintained, even after a SAFE program ceases operation. Last, and of particular concern for the viability of exam teams in California, reimbursement and funding for a small subset of medical evidentiary exams as defined under the Violence against Women ACT (VAWA), to be applied to all medical evidentiary exams. Without the proposed changes, SAFE teams in California face a very real risk of having to shut down, a prospect that would impact not only survivors but public safety as well.

5. Argument in Opposition

The California Coalition Against Sexual Assault (CALCASA) opposes this bill stating:

CALCASA is strongly opposed to the provision of AB 538 that eliminates in statute the existing $300 reimbursement cap for an Abbreviated Adult/Adolescent Sexual Assault Examination (CAL OES 2-924) for medical professionals and hospitals that provide the exams, and instead allows it to be set by the California Governor's Office of Emergency Services. CALCASA opposes using Violence Against Women ACT (VAWA) Services-Training-Officers-Prosecutors (STOP) grants to fund any increased reimbursement forensic examinations, which removing this cap in statute would ultimately allow for. If the reimbursement cap is removed, and the funding for reimbursing these exams continue to come from VAWA STOP grants, then rape crisis center programs throughout the State of California would stand to lose vital funding resources.

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