House
Legislative
Analysis
Section

Olds Plaza Building, 10th Floor
Lansing, Michigan 48909
Phone: 517/373-6466

House Bill 5217
Sponsor: Rep. Michael J. Bennane
Committee: Public Health

Complete to 3-19-92

A SUMMARY OF HOUSE BILL 5217 AS INTRODUCED 10-3-91

The bill would create a new act, the health care information act, to require and regulate the disclosure of health care information to patients and others and to prescribe penalties for refusing to disclose such information and for unlawfully disclosing such information. Among other provisions, the bill would make the information in a patient's health care records the property of the patient, while leaving ownership of the physical files with the health care provider or facility, and would establish patients' right of access to their medical records.

Article 1: Definitions

The first article of the bill would define terms used in the bill, including "health care," "health care provider," "health care facility,," and "health care information" or "medical record."

"Health care" would mean "any care, service, or procedure provided by a health care provider or health care facility to diagnose, treat, or maintain a patient's physical condition, or that affects the structure or any function of the human body."

"Health care provider" would mean someone who was licensed or registered under the Public Health Code to provide health care "in the ordinary course of business or practice of a health profession." It would not include sellers of drugs or medical devices or those (psychiatrists, psychologists, social workers, and counselors) who provided mental health services.

"Health care facility" would mean a health care facility or agency licensed under the Public Health Code "or any other organized entity where a health care provider provide[d] health care to patients."

"Health care information" or "medical record" would mean any information (regardless of the form it was in) that identified a patient and that was about the patient's health care. It would include, but not be limited to, medical histories, records, reports, summaries, diagnoses and prognoses, treatment and medication ordered and given, notes, entries, and imaging records (including X-rays). It would not include ordinary business records of patients' accounts, various kinds of audits (nursing, physician, audits by the Department of Public Health), peer review documents, mental health records, evaluations or reviews used only for in-service education or quality assurance programs or required for accreditation for federal programs, in-house health facility administrative evaluations, or

records, reports, or data under the Public Health Code sections governing testing for human immunodeficiency virus (HIV) and the sections on substance abuse treatment and rehabilitation.

Article 2: Disclosure of Health Care Information

The second article of the bill would establish each patient's right to control access to the information contained in his or her medical record.

More specifically, the bill would, with certain exceptions, prohibit disclosure of health care information without written authorization from the patient, and would allow patients (or their legal guardians or patient advocates) to authorize health providers to disclose the patient's medical record. Providers and facilities generally would have to honor such requests for disclosure.

Health care providers and facilities would have to keep for a minimum of three years a record of everyone who has had access to a patient's medical records. They could charge reasonable fees for providing the information (though not more than the actual costs involved, unless the request were for copies of the information, in which case the fee could not be more than 20 cents per page), and could withhold requested information until the copying and retrieval fees were paid. However, health care providers and facilities would not be able withhold information in order to force payment of an unpaid fee for medical or health care services.

Disclosure authorizations. A disclosure authorization (including a written release or written waiver of confidentiality) would have to meet certain requirements: it would have to be in writing, identify the nature of the information to be disclosed and to whom, specify the purpose for which the information could be used, and contain a specific expiration date and a written explanation of the patient's right to copy or look at the disclosed information. Disclosure authorizations (and any revocations) would have to be kept with the patient's health care information (or at least be kept available for inspection). Except for third party payers, disclosure authorizations would not allow access past the expiration date, which, unless otherwise specified, would be six months after the date of the authorization.

Release to third party payers. Health care information released to a third party payer for purposes of reimbursement could be limited in certain ways and would last only for one year (unless specified otherwise). Third party requests for further information would have to say what more was needed and why. With certain exceptions (for claims adjudication, fraud investigation, postpayment review, audit review, or peer review), third party payers could not release, without the patient's written consent, any information released to them. If a patient refused to release more than the required minimum, the third party payer could not cancel the patient's benefits or refuse to accept an application for, or to renew, benefits.

Disclosure revocation. Unless disclosure were necessary for payments for services rendered (or other lawful action had been taken by the provider before receiving the revocation) patients could revoke, in writing and at any time, a disclosure authorization.

The bill also would allow providers to release information "based upon a reasonable, good faith reliance" on a disclosure authorization if they did not have actual notice of the revocation when they released the information.

Unauthorized disclosure. Health care providers would be allowed to release information without written authorization from the patient under a number of specified circumstances. If the information released were limited to only that necessary to achieve the purpose of the party requesting the information, the bill would allow disclosure without authorization to the following parties under the following circumstances:

(1) To someone who was providing health care to the patient when the disclosure was made;

(2) To someone who needed the information (a) for health care education; (b) for services to the health care provider (e.g. for planning, quality assurance, risk management, peer review, or administrative, financial, or actuarial services); (c) for legal action (including litigation) on behalf of the provider; or (d) for helping the provider deliver health care (where the provider "reasonably believes" that the person to whom the information is given would take "appropriate steps" to protect the information);

(3) To other providers who had given the patient care, to the extent necessary to give the patient care (and if the patient had not given written instructions to withhold information);

(4) To parents or legal guardians of minors;

(5) To patient advocates (under durable power of attorney for health care) to the extent that the information was needed for the patient advocate to make the necessary health care decisions for the patient;

(6) To legal guardians of adults, to the extent that they had the power to make health care decisions for the patient;

(8) To successor ("in interest") health care providers (unless the patient had said otherwise in writing);

(9) For research, if either no patient identifiers are used or if the project had been approved by an institutional review board that had considered certain requirements (such as the importance of the project, the presence of reasonable safeguards against patient identification in research reports, and provisions for destroying identifying material at the earliest opportunity);

(10) To someone conducting an audit, if there were protection against identifying materials;

(11) To state or county correctional officers;

(12) To federal, state, or local public health authorities legally obligated or allowed to report health care information, or if needed to protect the public health;

(13) To federal, state, or local law enforcement officers;

(14) To licensed adult foster care providers if the patient has no legal guardian to make his or her health care decisions;

(15) For "directory information" (which the bill defines as information disclosing the presence and general health condition of a particular patient who is either an inpatient at a health care facility, receiving emergency health care, or an outpatient receiving care that involved a stay of more than eight hours), unless the patient had specified otherwise; and

(16) Under compulsory legal process as detailed in the bill (see below).

Health care providers would have to disclose patient information without written authorization cases of health care provider licensing investigations under the Public Health Code and for federal and state medical assistance programs.

Discovery or compulsory legal process. Except for license investigations and state and federal medical assistance programs, health care providers would not be able to disclose information under compulsory legal process or discovery in any judicial, legislative, or administrative proceeding unless one of a number of circumstances applied:

(1) The patient had given written consent to the release of information in response to compulsory process or a discovery request;

(2) The patient executed a written waiver of his or her right to confidentiality;

(3) The patient was party to a proceeding in which his or her physical or mental condition was at issue;

(4) The patient's physical or mental condition were relevant to the execution or witnessing of a will;

(5) The physical or mental condition of a dead patient was at issue in an inheritance claim or dispute;

(6) The patient's health care information was to be used in his or her commitment proceeding;

(7) The information was for a law enforcement investigation or proceeding in which a provider was the subject or a party (the information couldn't be used against the patient except in cases relating to payment for the patient's health care or unless otherwise decided by a court);

(8) The information was relevant to a proceeding under the bill's provisions regarding civil remedies and criminal and administrative penalties; or

(9) A court decided that particular information was subject to compulsory legal process or discovery because the party seeking the information had demonstrated that the interest in access outweighed the patient's privacy interest.

A health care provider or facility served with compulsory legal process or discovery requests also would have to be given -- and keep as part of the patient's medical record -- a written certificate with certain kinds of information (such as the signature of the person seeking access to the information, the category under which the information was being sought, and assurance that all notification requirements had been met).

Disclosure without the patient's authorization would be allowed to third party payers or outside auditors if the third party payer agreed to remove or destroy, at the earliest possible time, any information that would identify the patient and agreed to restrict disclosure of the information to do the audit or to report unlawful conduct (including fraud) by the health care provider or facility. Health care providers could disclose certain dental information to auditors (relating to fees for services) without prior patient authorization.

Article 3: Examination and copying of record

The bill would require that health providers and facilities respond "promptly" to patients' written requests to access to the patient's medical records.

More specifically, within ten business days of receiving a written request from a patient to examine or copy all or part of his or her medical record, the health care provider or facility would have to take whichever of the following actions that was most appropriate:

(1) Make the information available for examination during regular business hours and, if requested, provide a copy of the requested information (deleting any information that would identify anyone who had provided information in confidence);

(2) Tell the patient if the information did not exist or could not be found;

(3) Tell the patient if the health care provider or facility to whom the request was directed did not have the information and who did have it (if the provider or facility knew);

(4) Tell the patient if the information was being used or if "unusual circumstances" had delayed handling the request, and say in writing why there was a delay and when the information would be available;

(5) Deny the request under provisions of the bill detailed below.

If a health care provider were not available during the ten business days, as soon as he or she did become available he or she would have to immediately notify the patient and complete the request within ten business days.

Article 4: Amendment of Medical Record

Patients could ask, in writing, to have their medical records corrected both for accuracy and for completeness. Health care providers and facilities would have to respond to such requests "as promptly as required under the circumstances," but at least within ten business days of the request. As in the case of requests to examine or copy records, health care providers and facilities could take a number of actions. They could make the requested change in the medical record, so inform the patient, and tell the patient of his or her right to have the change sent, within 14 days, to whomever had copies of the uncorrected medical record. They could tell the patient if they couldn't find the record or if it no longer existed. If they didn't have the record, they could tell the patient, as well as telling who did have it (if they knew). If the record were in use or "unusual circumstances" delayed the handling of the request, the health care provider or facility could tell the patient, explain why, and say when the record would be available. Or they could refuse to make the change, in which case they would have to explain why (in writing), and tell the patient of his or her right to have a "statement of disagreement" added to his or her records and sent to anyone who had copies of the record.

When a health provider or facility did change a medical record, they would have to both add the correction to the record and mark the amended entries. If the provider or facility refused to make the requested change to the medical record, they would have to let the patient file with his or her record a statement of the requested change and why the change had been requested. The provider or facility also would have to mark the challenged parts of the record.

When patients so requested in writing, health providers or facilities would have to provide copies of amended information (or a statement of disagreement) to everyone identified as having copies of the original record. Unless an error were the health provider's

or facility's, providers or facilities could charge the patient a "reasonable fee" of up to 20 cents a page for distributing amended information (or statements of disagreement).

Article 5: Notice of Information Practices

Health care providers and facilities that kept medical records would have to create and post a "notice of information practices" which included information about any administrative costs for getting a copy of a medical record as well as substantially the following information:

"We keep a record of the health care we provide you. You may ask us to see and copy that record. The cost to you of copying that record is 20 cents per page. You may also ask us to amend that record. We will not disclose your record to others unless you direct us to do so or unless the law authorizes or compels us to do so. You may see your record or get more information about it at _____."

When asked, providers and facilities would have to give copies of this notice to patients or prospective patients. The Department of Licensing and Regulation or its successor agencies would enforce this section with regard to health care providers, while the Department of Public Health would enforce it with regard to health care facilities. Both departments could impose administrative penalties for violations.

Article 6: Persons authorized to act for patient

Someone authorized to act for a patient would be able to exercise the patient's rights necessary to carry out their duties and would be required to "act in good faith to represent the best interests of the patient." In the case of emancipated minors (and others less than 18 who were authorized to consent to health care without parental consent), only the minor would be able to make decisions about his or her health care information. In the case of dead patients, the dead patient's personal representative could exercise all of the patient's rights under the bill. If there were no personal representative, anyone legally authorized to act for the dead patient could also exercise the patient's rights under the bill.

Article 7: Security safeguards and record retention

Health care providers and facilities would have to use "reasonable safeguards" for the security of all of the health care records they kept. Providers and facilities would not have to keep medical records (including imaging records, such as X-rays, and their interpretations) for more than 7 years after the care had been given (in the case of minors, for at least 7 years or until the minor turned 18, whichever were longer).

After 7 years, a provider or facility could destroy the medical records (by shredding, burning, or other approved means), but would have to keep certain "basic" information from each record for at least 25 years. For health care providers, this information would consist of the patient's name, birth date, social security number, and list of diagnoses and invasive procedures (including dates), chronic illnesses (including mental illness), and genetic diseases. For health care facilities, this basic information would consist of the patient's

name, birth date, social security number, dates of admission and discharge, name of attending physician, operative reports, surgical pathology reports, and discharge summaries.

Before closing or otherwise stopping provision of health care to patients, providers and facilities would have to take a number of actions to ensure that their medical records were appropriately stored by someone else and were accessible to patients. Closing providers and facilities would have to arrange to have their medical records kept in compliance with the bill's provisions, publish a newspaper notice containing certain information and at least two months before the pending closure, and contract with someone to store the medical records. (If they could not find such alternative storage, the Department of Public Health would be required to store the records, but could request that the records be computerized or miniaturized.)

Article 8: Civil remedies and criminal and administrative sanctions

In addition to the administrative fines allowed under the notification part of the bill (Article 5), the bill would impose criminal penalties and allow civil lawsuits for violations of the bill's provisions.

The following violations would be misdemeanors punishable by a fine of up to $10,000 and imprisonment for up to one year:

(1) Willfully disclosing information that the individual knew (or should have known) was not to be revealed;

(2) Examining or getting health care information which was held by a health provider or facility and which had been obtained through bribery, theft, misrepresentation, or trespass;

(3) Willfully presenting a false disclosure authorization or certificate of disclosure under compulsory legal process or discovery;

(4) Health care providers or facilities destroying medical records without attempting to notify patients as required by the bill; and

(5) Health care providers or facilities failing to keep a record of each patient who chose to get his or her original medical records.

Health care providers or facilities who denied allowable requests for health care information would be subject to administrative penalties under the Public Health Code, but would not be subject to civil, administrative, or criminal liability for allowable disclosure or denial of access to health care information. Health care providers and facilities would be prohibited from entering into any contracts that would alter the bill's provisions, and would not be liable for any good faith disclosures made in response to a certificate served as part of compulsory legal process or discovery requests.

Someone could sue health care providers and facilities for violations of the bill; if a patient alleged that health care information was improperly withheld when he or she had asked to see or copy it, the burden of proof would be on the health provider or facility to show that the information had properly been withheld.

Courts could order health providers and facilities to comply with the bill, assess reasonable attorney's fees and all other expenses to the prevailing party in litigation, and would order any other appropriate relief. If a court decided in a civil suit that a violation had occurred, the aggrieved person could recover damages for pecuniary losses and, in cases of willful or grossly negligent conduct, exemplary damages of up to $5,000.