Legislative Analysis

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MEDICAL RECORDS ACCESS ACT

House Bill 4706 as enrolled
Public Act 47 of 2004

House Bill 4755 as enrolled
Public Act 48 of 2004

Sponsor: Rep. Barb Vander Veen
House Committee: Health Policy
Senate Committee: Health Policy

Third Analysis (4-16-04)

BRIEF SUMMARY: House Bill 4706 would create the "Medical Records Access Act", which would protect a patient's access to his or her medical records and establish a maximum fee amount that could be charged for copies of the medical records. House Bill 4755 would require administrative sanctions to be levied against a health care provider or health facility that did not comply with provisions of the Medical Records Access Act.

FISCAL IMPACT: House Bill 4706 would have no significant fiscal impact on the state and House Bill 4755 would increase costs to the state.

THE APPARENT PROBLEM:

The federal Health Insurance Portability Act (HIPPA) grants patients the right to obtain copies of their medical records, but states only that copies be supplied at a "reasonable cost". The result has been a wide disparity in the amount of fees charged to patients. Reportedly, per page charges currently range from under a dollar to several dollars per page. Some health care providers charge a flat fee (one specialist charged a patient $50 for a request for a medical record that was one page); some charge sliding fees depending on how many pages the records contain (e.g., $25 for up to 10 pages, $50 for 11 to 25 pages, and $126 for 26 pages or more). In addition, many also tack on retrieval or search fees and shipping and handling fees. Even a moderately sized record file can cost an individual several hundreds of dollars. Moreover, some patients have had to wait months to receive copies of the records. When this occurs, needed medical care and treatment is delayed, potentially increasing a patient's risk of an adverse outcome.

This situation is particularly devastating to low-income individuals and those living on fixed incomes. Those working with low-income individuals maintain that the high copying fees for medical records create a barrier that prevents some from obtaining benefits that they may otherwise qualify for because copies of medical records are needed in order to apply for needs-based programs such as Medicaid, Supplemental Security Income (SSI), and Social Security Disability Benefits (RSDI). Advocates for the poor

also believe that the state could save money if those who could qualify for federal assistance were moved out of state-funded programs and into federally-funded programs.

Further complicating the matter is the HIPPA privacy component that recently went into effect. Instead of copies of visits to specialists or records from hospitalizations being included in the copies of records from a primary care physician's file, patients are now being directed to request records from each treating physician or health facility separately. Since so many providers charge a flat fee or a sliding fee, this can greatly increase the amount an individual must pay to obtain the necessary medical records.

Legislation has been introduced to address these concerns.

THE CONTENT OF THE BILLS:

House Bill 4706. The bill would create a new act, the Medical Records Access Act, to establish the right of a patient or his or her authorized representative to examine or obtain copies of the patient's medical records from a health care provider or health facility. A health care provider or facility would be prohibited from asking questions as to why a patient was requesting access to his or her files.

Exclusions. The bill would not apply to copies of medical records provided to a third party payer (e.g., a health insurer, BCBSM, an HMO, a PPO, Medicaid or Medicare, or a nonprofit dental care corporation), an insurer as defined in Section 106 of the Insurance Code, or a self-funded plan.

Definitions: A "medical record" would be defined as information that was oral or recorded in any form or medium that pertained to a patient's health care, medical history, diagnosis and prognosis, or medical condition and that was maintained by a health care provider in the process of the patient's health.

"Patient" would be defined in the bill as an individual who received or had received health care from a health care provider or health facility. "Patient" would include a guardian, if appointed, and a parent, guardian, or person acting in loco parentis, if the individual was a minor. However, if the minor had lawfully obtained health care without the consent or notification of a parent or guardian, the minor would have the exclusive right to exercise the rights of a patient under the bill with respect to those medical records relating to that care.

An "authorized representative" would mean either a person empowered by the patient by explicit written authorization to act on the patient's behalf to access, disclose, or consent to the disclosure of the patient's medical record, in accordance with the act or, if the patient were deceased, his or her personal representative, his or her heirs at law, or the beneficiary of the patient's life insurance policy, to the extent provided by Section 2157 of the Revised Judicature Act. (Under Section 2157 of the RJA, a patient is considered to have waived the physician-patient privilege if he or she brought a malpractice action against a physician and produced another physician as a witness who had treated him or

her for the injury or for any disease or condition for which the malpractice was alleged. If a patient had died, his or her heirs at law or the beneficiary of the patient's life insurance policy are considered personal representatives of the patient for the purpose of waiving the privilege.)

"Guardian" would mean an individual appointed under provisions of the Estates and Protected Individuals Code (EPIC) to the extent that the scope of the guardianship included the authority to act on the individual's behalf with regard to his or her health care. "Guardian" would include guardians of minors appointed under EPIC or the Mental Health Code to the extent that the scope of the guardianship included the authority to act on the individual's behalf with regard to his or her health care.

Obtaining medical records. Under the bill, a patient or his or her authorized representative could submit a written request to examine or obtain a copy of the patient's medical record. The request would have to be signed and dated by that individual not more than 60 days before the request was submitted to the health care provider or health facility that maintained the records.

A "health care provider" would include licensed or registered health care professionals but would not include pharmacists or psychiatrists, psychologists, social workers, or professional counselors who provide only mental health services. A "health care facility" would include facilities and agencies licensed under Article 17 of the Public Health Code or any other organized entity where a health care provider provided health care to patients. "Maintained" would be defined as holding, possessing, preserving, retaining, storing, or controlling health care information.

Within 30 days of receiving the request for information (or within 60 days if the medical record were not kept or were not accessible on-site), the provider or facility would have to do one of the following:

- Make the medical record available for inspection or copying, or both, at the provider's or facility's place of business during regular business hours, or, provide a copy of the requested material to the patient or authorized representative.

- If the provider or facility contracted with another person or a medical records company to maintain patients' medical files, the provider or facility would have to 1) transmit the request and retrieve the requested material from the company and then make it available to the patient or authorized representative or 2) require the person or medical records company maintaining the record to make it available to the patient or his or her representative. A "medical records company" would mean a person who stored, located, or copied medical records for a health care provider or facility under a contract or agreement with that provider or facility and who charged a fee for providing medical records to a patient or authorized representative for that health care provider or health care facility.

- Inform the patient or authorized representative if the medical records cannot be found or do not exist.

- If the medical records are held by a company that the provider or facility does not have a contract with, the patient or authorized representative would have to be informed and provided with the name and address, if known, of the company holding the information.

- If the health care provider or facility received a request for a medical record that had been obtained under a confidentiality agreement from someone other than a health care provider or health facility, access to that medical record could be denied if access would be reasonably likely to reveal the source of the information. However, the person requesting the record would have to be provided with a written denial.

- A treating health care provider or health facility who determined that disclosure of the requested medical record were likely to have an adverse effect on the patient would have to provide a statement supporting his or her determination and then provide the medical record to another provider, facility, or legal counsel designated by the patient or his or her authorized representative.

- Reasonable steps would have to be taken by the health care provider, facility, or medical records company to verify the identity of the person making the request to examine or obtain a copy of the records.

- If a provider, facility, or medical records company could not respond within the specified 30-day time frame, but instead provided the patient with a written statement indicating the reasons for the delay within that 30-day time period, the provider or facility could extend the response time for no more than 30 days. Only one extension would be allowed per request.

Fees. A health care provider, health facility, or medical records company that received a request for copies of a patient's records could charge the patient or his or her authorized representative a fee, but could not charge more than the following amounts:

- An initial fee of $20 per request for a copy of the record; however, a patient could not be charged an initial fee for his or her medical record.

- Paper copies as follows: $1 per page for the first 20 pages; 50 cents per page for pages 21 through 50; and 20 cents per page for pages 51 and over.

- The actual cost of preparing a duplicate if the medical record were in a form or medium other than paper;

- Any postage or shipping costs incurred by the health care provider, facility, or the medical records company in providing the copies; and,

- Any actual costs incurred by the health provider, health facility, or medical records company in retrieving records seven years old or older and that were not maintained or accessible on-site.

Payment of the charges could be required before the information was retrieved or copied. All fees would have to be waived for patients deemed to be "medically indigent" as defined by Section 106 of the Social Welfare Act. Proof that the patient was a recipient of assistance may be required by the health care provider, health facility, or medical records company. However, a medically indigent individual would be limited to one set of copies per health care provider, facility, or medical records company. Additional requests for the same records would be subject to the bill's fee provisions.

Beginning two years after the bill's effective date, the Department of Community Health would have to adjust on an annual basis the fees by an amount determined by the state treasurer to reflect the cumulative annual percentage change in the Detroit Consumer Price Index.

House Bill 4755 would amend the Public Health Code (MCL 333.16221 et al.) to require a health facility or agency to comply with the Medical Records Access Act created by House Bill 4706. The code allows the Department of Consumer and Industry Services to investigate activities related to the practice of a health profession by a licensee, registrant, or an applicant for licensure or registration. Findings are reported to an appropriate disciplinary subcommittee. The disciplinary subcommittee must impose sanctions for specified violations. Under the bill, a violation of the Medical Records Access Act would be grounds for a reprimand; license or registration probation, denial, suspension, revocation, or limitation; restitution; community service; or a fine.

The bill is tie-barred to House Bill 4706.

FISCAL INFORMATION:

House Bill 4706 as enacted does not have direct cost implications for the state outside of regulatory notification, education and awareness for affected licensed health professionals and facilities. The waiving of fees for indigent persons may expedite enrollment into appropriate state and federal assistance programs, and therefore may affect state costs.

There are cost implications of House Bill 4755 as enacted to the Department of Community Health to monitor compliance with the act by health professionals and facilities, investigate, and take appropriate regulatory action as necessary.

ARGUMENTS:

For:

Many complaints by patients have surfaced through the years regarding access to their medical records. Some report lengthy delays of weeks or months when requesting copies of records needed when seeing multiple providers, changing providers or obtaining

copies of records for insurance purposes. Others complain of excessively high copying fees charged by the provider, facility, or medical records company.

House Bill 4706 would address these concerns by creating the Medical Records Access Act. The act would establish in state law the right of a patient to examine or obtain copies of his or her medical record. It would also establish timelines that must be followed by providers, facilities, and medical records companies when receiving a request from a patient or his or her authorized representative to obtain copies of his or her medical record. If the provider, facility, or medical records company charged a fee for providing the records requested, the bill would set a maximum amount that could be charged as an initial fee (though, in order to comply with federal HIPPA regulations, the bill as enacted specifies that a patient cannot be charged an initial fee) and maximum per page charge. The bill would also restrict fees to the actual costs for copying older documents that may be on microfiche or other non-electronic format, retrieving off-site records over seven years old, and mailing the records. For those who meet the criteria for being medically indigent, one free copy would be provided, though additional copies would be assessed a fee. (However, once one copy was obtained, the person could make additional copies at a lower cost at any copy center.) A health care provider or health facility who overcharged, denied a request, or failed to provide the copies within the stated time frame could face administrative sanctions under House Bill 4755.

Faced with the high cost of providing medical services these days and often low insurance reimbursements, health care providers and health facilities shouldn't be expected to bear the brunt of providing copies of records to patients. Under the bill, regardless of where in the state a provider was located, a patient, his or her authorized representative, or his or her heirs would know the procedure by which to request a copy, that copying fees would be capped to the maximum levels listed in the bill, and the time frame for a request to be filled. Therefore, the bill represents a much fairer approach than that currently practiced by many health care providers, facilities, and medical records companies.

For:

Some people have been confused as to what the provisions of House Bill 4706 would and would not do. In short, the bill protects the right of every patient to view or obtain copies of his or her own medical records. A health care provider, health facility, or medical records company receiving a request for copies of a medical record from a patient or his or her own authorized representative would have to provide those copies and provide them within the bill's timelines. If the provider, facility, or medical records company has a policy of charging for copies of records, fees imposed on a patient or an authorized representative could only be charged for those services listed in the bill and could not exceed the listed amounts. The bill would not require fees to be imposed. If the records were requested by a patient, an initial fee could not be imposed; however, an initial fee, in addition to the other fees, could be charged for requests made by the patient's authorized representative.

Furthermore, the bill pertains only to medical records for "physical" health care provided to a patient, and protects the rights of a patient to request records from those health care providers and facilities that provide health care to diagnose, treat, or maintain the patient's physical condition or that affects the structure or function of the human body. The fee restrictions and timelines for filling requests would not apply to accessing medical records for care or services provided by pharmacists and those who provide only mental health services. The fees and timelines in the bill also do not apply to copies of medical records that are provided by physician offices, health facilities, and medical record companies to insurance companies, third party payers, or self-funded plans.

Response:

It has long been the practice of most health care providers, facilities, and medical record companies to provide complimentary copies of patients' medical records to other providers and facilities as a professional courtesy. However, the bill could indirectly and inadvertently affect this practice. As written, the bill does not require any fees to be imposed for providing copies of medical records to patients or their authorized representatives but merely establishes a procedure to be followed, maximum fee amounts if fees are charged, and timelines for responding to requests.

The concern lies in the fact that provider-to-provider requests make up the majority of requests for copies of patient records. If providers, facilities, and medical record companies are restricted in the fees that they can charge for copies provided directly to patients or their authorized representatives, they may seek to recoup "lost" revenue by shifting these fees to the copies provided to other health care professionals and facilities.

For example, the bill specifies that an initial fee for a request cannot be imposed on a patient who requests the records, but could be imposed on requests submitted by the patient's authorized representative. Typically, a patient is required to sign a release form allowing one of his or her health care providers to release copies of medical records to another provider or facility. This release form could be construed as empowering the provider seeking the copies to be an authorized representative of the patient. Therefore, under the bill, the provider, facility, or medical records company receiving the request could view the request in the same manner as one coming from a patient's attorney, person with durable power of attorney, or advocate working on the patient's behalf and so could choose to impose on the health care provider or facility requesting the copies an initial fee up to $20, in addition to the other fees allowed to be charged. If this were to occur, it is reasonable to assume these copying fees would be passed along to the patient who, if an initial fee for the request had been charged, would pay more for the copies than if he or she had submitted the request directly.

The same is true for people having power of attorney for a patient or advocates who work with senior citizens or other groups who make the requests for medical records on the behalf of clients. Therefore, the intent to spare the patient from being charged the initial fee could be undermined unless the patient or client were instructed to submit his or her own request directly.

Rebuttal:

It is true that the waiver for the initial fee per request applies only to requests made directly by the patients. However, to try to apply the waiver to requests made by some authorized representatives (elder law clinics, clinics for low-income individuals who are not medically indigent, those with durable power of attorney assisting Alzheimers patients, etc.) and not to others (beneficiaries seeking records for insurance purposes, etc.) would be overly cumbersome and problematic. A patient obtaining copies of records through a representative may end up paying up to $20 more per record request, but apparently, current fees are so high that many feel the savings from the fee caps in the bill will most likely offset any imposition of an initial fee per request.

As to health providers and facilities changing practices relating to complimentary copies provided as a professional courtesy to other providers and facilities, there is nothing in current law to prevent this from occurring. The bill in and of itself would not change current practice. It merely caps fees that can be charged to patients and their authorized representatives if fees are charged. No law can prevent some from trying to abuse provisions for their own gain. However, patient complaints and a possible loss of business from disgruntled clients may encourage any provider or medical records company that attempts to use provisions in the bill to shift costs unfairly or in a burdensome manner to rethink its policies.

For:

An earlier version of House Bill 4706 allowed patients or a "patient representative" to request copies of the patient's medical record and to obtain a free copy in the case of a medically indigent patient. However, the term did not specifically include attorneys or person working or volunteering with an organization that assists the indigent in filling out and filing claim forms. The concern was that this loophole could have inadvertently made it more difficult for the indigent to obtain the free copies.

The bill as enrolled, however, replaced "patient representative" with "authorized representative". Though attorneys and individuals working with the indigent are still not specifically mentioned in the new definition, the definition is broad enough to include such individuals as long as the patient authorized that individual, in writing, to act on his or her behalf in accessing the medical records.

For:

The bill package represents good public policy, especially as it could result indirectly in saving the state millions of dollars annually. Advocates for the poor and homeless report that many of these people meet the criteria for various federally funded assistance programs. However, the high cost to obtain the medical reports necessary to apply for the programs often delay or prohibit these individuals from obtaining these services. This means that a person either goes without medical care until a very expensive emergency situation arises (which means that a hospital may have to absorb the cost of providing the emergency service), or that the person is on a state-funded program longer than necessary.

If people were moved off the state disability assistance (SDA) – which pays only about $246 per month – and received benefits under the federal Supplemental Security Income (SSI) or Social Security Disability Benefits (RSDI), they would receive more per month and may become eligible for Medicaid, which is partially funded with federal funds. This would result in a savings for the state, and would also benefit the individual with increased monthly aid and medical benefits. In addition, through the State Medical Program (SMP), basic outpatient medical care is provided to residents whose income is at or below the SDA levels. The state would see a partial savings if these people received Medicaid instead of SMP because unlike SMP, which is wholly funded by the state, Medicaid is supported by both state and federal dollars.

For:

House Bill 4706 would require the Department of Community Health to make annual adjustments, beginning two years after the bill takes effect, based on the Detroit consumer price index so that the fees created in the bill could be adjusted for inflation and future increases in labor costs.

For:

House Bill 4706 would protect the privacy of minors and emancipated minors that have been established under federal law and court decisions. Under the bill, a parent would not have the right to examine or obtain the minor's medical records if the medical record in question was for a procedure or service for which parental consent was not required by law. For example, if a minor had sought reproductive health services, such as contraceptives, a parent could not ask to see his or her child's medical records without the minor's authorization.

Current federal case law has supported as valid the distribution of family planning devices to minors without notice to parents. In addition, Title X of the Public Health Service Act and the Medicaid Program require teens to be provided with confidential contraceptive services. Further, constitutional rights to privacy have been upheld by the courts as applying to an adolescent's decision to attempt to avoid an unwanted pregnancy.

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.