Department of Legislative Services

Maryland General Assembly
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FISCAL AND POLICY NOTE
Enrolled - Revised

House Bill 1385 (Delegate Morhaim, *et al.*)
Health and Government Operations Finance

Public Health - Advance Directives - Procedures, Information Sheet, and Use of Electronic Advance Directives

This bill makes multiple changes to the laws related to advance directives. The bill (1) alters witness requirements for an electronic advance directive; (2) expands the required contents of a specified advance directive information sheet; (3) expands the scope of educational and outreach efforts; (4) makes changes to requirements for the distribution of the advance directive information sheet and the availability of electronic advance directives; (5) renames the Advance Directive Registry within the Department of Health and Mental Hygiene (DHMH) to be the Advance Directive Program; and (6) establishes requirements related to accessing electronic advance directives by health care providers and in health care facilities. The bill also authorizes the use of funds from the Spinal Cord Injury Research Trust Fund to administer the Advance Directive Program, codifies current practice regarding the use of an electronic advance directives service to connect with health care providers at the point of care, and makes conforming changes.

Fiscal Summary

State Effect: Special fund expenditures increase for the Maryland Health Benefit Exchange (MHBE) to print and mail copies of specified documents on request. Special fund expenditures from the Spinal Cord Injury Research Trust Fund may increase for DHMH to administer the Advance Directive Program, as discussed below. The Maryland Department of Aging (MDoA) can handle the bill's requirements with existing resources. As DHMH does not currently collect fees from users of the electronic Advance Directive Registry, revenues are not affected.

Local Effect: The bill is not anticipated to materially impact the finances or operations of local governments.

Small Business Effect: None.

Analysis

Bill Summary: Notwithstanding any other provision of law, in the absence of a validly executed or witnessed advance directive, any authentic expression made by an individual, while competent, of the individual's wishes regarding his or her own health care, must be considered.

Witness Requirements for Electronic Advance Directives

A witness *is not required* for an electronic advance directive if the declarant's identity has been established in accordance with specified standards established by the National Institute of Standards and Technology (NIST).

The State-designated health information exchange (the Chesapeake Regional Information System for our Patients (CRISP)) is authorized to accept as valid an unwitnessed electronic advance directive in the form of a video record or file to state the declarant's wishes regarding health care for the declarant or to appoint an agent. However, the video record or file has to be dated and stored in an electronic file by an electronic advance directives service recognized by the Maryland Health Care Commission (MHCC).

Information Sheet Requirements

The advance directive information sheet developed by DHMH in consultation with the Office of the Attorney General (OAG) has to (1) educate the public on the use of electronic advance directives; (2) encourage the use of electronic advance directives; (3) provide information about developing an electronic advance directive; (4) describe how electronic advance directives are made available at the point of care; (5) indicate that the use of an electronic advance directive is not required; and (6) indicate that individuals do not have to pay to have their electronic advance directives honored. The information sheet may not promote an electronic advance directive technology or service.

Dissemination of the Advance Directive Information Sheet

By January 1, 2017, DHMH must develop the new information sheet and implement a plan to make it widely available as well as make it available in a conspicuous location within local health departments, local departments of social services, and community health centers. With regard to the Medicaid program, DHMH also has to offer (1) the information sheet as part of the monthly enrollment packet that is mailed to a recipient by the enrollment broker and (2) the use of electronic advance directives to a recipient through an advance

directives service that is approved by MHCC and DHMH and meets the technology, security, and privacy standards established by MHCC.

MHBE is required to provide the advance directive information sheet (1) in MHBE consumer publications; (2) on MHBE's website; and (3) at the request of an applicant.

Required Educational and Outreach Efforts

DHMH has to encourage the use of electronic advance directives and carry out appropriate educational and outreach efforts to increase public awareness of electronic advance directives. DHMH must also encourage the following persons and entities to engage in outreach efforts about electronic advance directives:

- MDoA;
- county ombudspersons;
- local health departments;
- senior living facilities;
- academic institutions;
- religious organizations;
- hospitals; and
- any similar person or entity.

Advance Directive Program

Within the Advance Directive Program, "registrant" means an individual who registers an advance directive with an electronic advance directives service recognized by MHCC.

DHMH must contract with an electronic advance directives service to connect with health care providers at the point of care through CRISP to facilitate the use of cloud-based technology for electronic advance directives. The electronic advance directives service must be approved by MHCC and DHMH and meet the technology, security, and privacy standards set by MHCC. DHMH must carry out appropriate educational and outreach efforts to increase public awareness of an electronic advance directives service recognized by MHCC.

Additionally, MHCC must develop criteria for recognizing electronic advance directives services that are authorized to connect to CRISP. To be authorized to connect to CRISP, an electronic advance directives service has to:

- be recognized by MHCC;
- be established in accordance with specified standards established by NIST;

- be responsible for all costs associated with connecting to CRISP; and
- store electronic advance directives that are received by facsimile or other electronic means.

CRISP is authorized to charge electronic advance directives services recognized by MHCC a fee for connecting to it. CRISP must ensure that electronic advance directives services do not have access to information stored on the information exchange.

The bill repeals obsolete requirements related to the security of, and access to, electronic advance directives within a registry maintained by DHMH, and it repeals the authority of the Secretary of Health and Mental Hygiene to set user fees.

Funding to Administer the Advance Directive Program

The bill authorizes the use of funds in the Spinal Cord Injury Research Trust Fund to administer the Advance Directive Program.

Current Law: Generally, any competent individual may, at any time, make a written or electronic advance directive regarding the provision of health care to that individual, including the withholding or withdrawal of health care from that individual. A written or electronic advance directive must be dated, signed by or at the express direction of the declarant, and subscribed by two witnesses. The suggested living will form included in statute includes, above the witness signature line, "the declarant signed or acknowledged signing this document in my presence and, based upon personal observation, appears to be emotionally and mentally competent to make this advance directive." With specified exceptions, any competent individual may serve as a witness to an advance directive.

Electronic Signatures

An electronic signature has the same effect as a manual signature if the electronic signature (1) uses an algorithm approved by NIST; (2) is unique to the individual using it; (3) is capable of verification; (4) is under the sole control of the individual using it; (5) is linked to data in such a manner that, if the data are changed, the electronic signature is invalidated; (6) persists with the document and not by association in separate files; and (7) is bound to a digital certificate.

Electronic Advance Directives

An electronic advance directive, created in compliance with the electronic witness protocols of the registry of DHMH, must be recognized as satisfying the witness requirement for an advance directive.

Advance Directive Information Sheet

Specified health care facilities are required to provide each patient information concerning the rights of the individual to make decisions concerning health care, including the right to accept or refuse treatment, and the right to make an advance directive, including a living will.

DHMH, in consultation with OAG, must develop an information sheet that provides information relating to advance directives. The information sheet must contain numerous statements, as specified, which include the legality, usefulness, and revocation of advance directives. The information sheet must be provided by, under specified circumstances, DHMH, the Motor Vehicle Administration, and specified carriers. DHMH must also make the information sheet available in a conspicuous location in each local health department, in each local department of social services, and in community health centers.

All carriers are required to provide the advance directive information sheet developed by DHMH (1) in the carrier's member publications; (2) on the carrier's website; and (3) at the request of a member.

Advance Directive Registry

For the purposes of the Advance Directive Registry, "registrant" means an individual who registers an advance directive with DHMH. An individual may, but is not required to, register with the department an advance directive. When an individual amends or revokes a registered advance directive, the individual must notify the registry. Also, a health care provider that becomes aware that a registrant has amended or revoked a registered advance directive must, at the request of the registrant, provide the registrant with information on how to notify the registry.

The Secretary of Health and Mental Hygiene must, by regulation, set a fee for any service of the registry, including an initial fee to utilize the services of the registry and renewal fees. The fees set may not, in the aggregate, exceed the department's total costs to establish and operate the registry. No such fees have been established.

DHMH may, by contract, obtain from any person services related to the establishment and operation of the registry. However, DHMH is ultimately responsible for the registry, and the department must carry out appropriate educational and outreach efforts to increase public awareness of the registry.

The registry consists of a secure, electronic database to which authorized access is available at all times. The Secretary of Health and Mental Hygiene must specify in regulations those

individuals who are authorized to access the registry and procedures for accessing confidential information.

Before accepting an advance directive into the registry, DHMH must review and verify that the advance directive includes specified information.

A health care provider is not subject to criminal prosecution or civil liability or deemed to have engaged in unprofessional conduct for failure to access the registry or for relying on information provided by the registry**.**

Spinal Cord Injury Research Trust Fund

The Spinal Cord Injury Research Trust Fund is overseen by the State Board of Spinal Cord Injury Research and consists of insurance premium tax money transferred to the fund under a specified provision of the Insurance Article or received from any other lawful source. The Insurance Article requires that $500,000 be transferred to the fund each year. Money in the fund must be used to make grants for spinal cord injury research that is focused on basic, preclinical, and clinical research for developing new therapies to restore neurological function in individuals with spinal cord injuries.

Background:

Advance Directives

Generally, an advance directive protects an individual's right to choose or to refuse various forms of health care (especially in the face of an incapacity to make decisions) by transferring a critical health care decision point from the time of a patient's decisional incapacity to an earlier time when the person is fully competent.

An advance directive may address an individual's preferences related to mental health services. An advance directive for mental health services may also contain a provision that waives the right of the declarant to revoke any or all of the advance directive for mental health services during a period when the declarant has been certified as being incapable of making an informed decision.

Electronic advance directives eliminate the need to find or carry paper documents before going to the hospital or the need to create and recreate the documents every time a person enters a facility.

Advance Directive Registry

Chapter 549 of 2013 required DHMH to take all steps necessary to make a registry of advance directives operational in the State by October 1, 2014. MHCC was tasked with implementing the registry. MHCC contracted with AD Vault Inc., the operator of MyDirectives.com, a free, secure, web-based system that allows individuals to document and store advance directives in a secure database to serve as the State's registry. Within MyDirectives.com, electronic advance directives may be created, signed, witnessed, stored, and shared electronically. The database was subsequently linked to CRISP, the State-designated health information exchange, enabling practitioners using CRISP to be able to access electronic advance directives along with a patient's other medical records. Today, when an individual creates an advance directive on MyDirectives.com, that individual is asked to enter the email addresses of two potential witnesses, who then receive an automated email requesting that they serve as witnesses. A potential witness who accepts is permitted to review the electronic advance directive and then electronically sign the document. MHCC advises that it has not established standalone electronic witness protocols and that the protocols put in place by MyDirectives.com are, thus, the *de facto* standard.

State Board of Spinal Cord Injury Research

The State Board of Spinal Cord Injury Research was established by Chapters 512 and 513 of 2000 to award grants from the Spinal Cord Injury Trust Fund. No grants have been awarded since fiscal 2009. Budget reconciliation legislation transferred $1.6 million from the fund to the general fund in fiscal 2010, $1.0 million in fiscal 2011, and $500,000 in fiscal 2012. In fiscal 2013, the fund received no revenues; in fiscal 2014, revenues were provided but were not classified as special funds and, thus, reverted to the general fund. Budget reconciliation legislation in 2015 transferred $1.0 million ($500,000 in fiscal 2015 and $500,000 in fiscal 2016) from the fund to the general fund. As a result, the board has not met regularly since fiscal 2010 due to lack of funding. However, the fiscal 2017 State budget includes $500,000 for the fund within the Prevention and Health Promotion Administration.

State Expenditures: MHBE advises that it interprets the requirement to provide the specified information sheet "at the request of an applicant" to require sending printed copies of the document by mail. As a result, special fund expenditures increase to pay a contractual fulfillment provider to print and mail copies of the information sheet at a per unit rate. Because it is unknown how many requests may be received for printed materials, it is not possible to reliably quantify the impact of the bill at this time.

Special fund expenditures from the Spinal Cord Injury Trust Fund may increase for DHMH to administer the Advance Directive Program, to the extent that funds are available and

necessary to support additional activities. The timing and amount of any funding that may be needed are unknown. As noted above, the fund has not been capitalized since 2010. Additionally, it is not clear, based on the language of the bill, how the use of funds to administer the program will be allocated related to the use of funds to make grants for spinal cord injury research. Thus, even if the fund is capitalized, it is not clear what funds, if any, will be reserved for the administration of the program. If special funds are not available, general funds may be required. However, this analysis assumes that no general funds will be needed.

Because DHMH does not currently collect any fees from users of the registry, repealing the Secretary's authority to establish fees for any service provided by the registry does not impact State revenues.

The Medicaid program and MHCC can handle the bill's requirements with existing resources. Likewise, because the bill encourages, but does not require, MDoA to engage in outreach efforts about electronic advance directives, MDoA can handle the bill's requirements with existing resources.

Local Expenditures: Because the bill encourages, but does not require, county ombudspersons and local health departments to engage in outreach activities, local government finances and operations are not materially affected.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Department of Health and Mental Hygiene, Maryland Health Benefit Exchange, Maryland Department of Information Technology, Maryland Department of Aging, Department of Budget and Management, Maryland Insurance Administration, Maryland Association of County Health Officers, Chesapeake Regional Information System for our Patients, Department of Legislative Services

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