

Department of Legislative Services
Maryland General Assembly
2017 Session

FISCAL AND POLICY NOTE
Enrolled

House Bill 1468 (Delegate Valentino-Smith, *et al.*)

Health and Government Operations

Finance

Medical Records - Disclosure of Directory Information and Medical Records

This bill alters the circumstances under which a health care provider may disclose directory information and medical records without the authorization of the person in interest, including information that was developed primarily in connection with mental health services.

Fiscal Summary

State Effect: The bill is not expected to materially affect State operations or finances.

Local Effect: None.

Small Business Effect: Minimal.

Analysis

Bill Summary: Unless the patient has restricted or prohibited the disclosure of directory information, a health care provider may disclose directory information to an individual who has asked for the patient by name.

A health care provider must inform a patient of the health care information that the provider may include in a directory and the persons to whom such information may be disclosed, and as soon as practicable, provide the patient with the opportunity to restrict or prohibit disclosure of directory information. If an opportunity to restrict or prohibit disclosure is not practicable because the patient is incapacitated or in need of emergency care or treatment, the health care provider may still disclose directory information if the disclosure

is consistent with a prior expressed preference of the patient that is known to the provider and is determined to be in the patient's best interest.

A health care provider may disclose a medical record without the authorization of a person in interest to immediate family members of the patient or any other individual with whom the patient is known to have a close personal relationship, if the disclosure is limited to information that is directly relevant to the individual's involvement in the patient's health care and other conditions are met. Specifically, if the patient is available before the disclosure and has the capacity to make health care decisions, the patient must have been provided with an opportunity to object *and* either not done so or the health care provider must be able to reasonably infer that the patient does not object. Alternatively, if the patient is not available before the disclosure is made, or objection is not practicable because the patient is incapacitated or in need of emergency care, the provider must determine, based on the provider's professional judgment, that the disclosure is in the patient's best interest.

The bill also expresses the intent of the General Assembly that provisions in State law relating to the confidentiality of medical records (1) may not be interpreted to be more restrictive than the federal privacy regulations adopted under the federal Health Insurance Portability and Accountability Act (HIPAA); (2) are not intended to be in conflict with HIPAA; and (3) are to be interpreted in a way that is consistent with any federal regulations, policy guidance, and judicial decisions relating to HIPAA.

Current Law/Background: Health care providers may disclose specified directory information about a patient, without the authorization of a person in interest, unless the patient has instructed the health care provider in writing not to do so or the information was developed primarily in connection with mental health services. Additionally, unless the patient instructs otherwise or the records were developed primarily in connection with the provision of mental health services, health care providers may disclose medical records without the authorization of the person in interest to immediate family members of the patient or any other individual with whom the patient is known to have a close personal relationship, if made in accordance with good medical or other professional practice.

“Directory information” means information regarding the presence and general health condition of a patient admitted to or receiving emergency treatment at a health care facility. Information related to mental health services is specifically barred from disclosure.

“Person in interest” means:

- an adult on whom a health care provider maintains a medical record;
- a person authorized to consent to health care for an adult;
- a personal representative of a deceased person;

- a minor, if the medical record concerns treatment to which the minor has the right to consent and has consented; or a parent, guardian, custodian, or representative of the minor designated by a court, in the discretion of the attending physician who provided the treatment to the minor, under specified circumstances;
- a parent of the minor generally, except if the parent's authority to consent to health care for the minor has been specifically limited by a court order or a valid separation agreement entered into by the parents of the minor, or another person authorized to consent to health care for the minor; or
- an attorney appointed in writing by a person meeting another definition of person in interest.

Federal Health Insurance Portability and Accountability Act

In addition to restrictions in State law, federal law and regulations restrict the ability of a health care provider to disclose a medical record (also referred to as protected health information) without the authorization of the person in interest. Generally, federal law and regulations preempt state law with respect to protected health information confidentiality. However, HIPAA and its standards do not preempt state law if the state provision (1) relates to the privacy of individually identifiable health information and (2) is "more stringent" than HIPAA's requirements.

HIPAA permits disclosure of protected health information without an individual's authorization under certain circumstances, including if the individual is given an opportunity to agree, acquiesce, or object to the disclosure. If the individual is incapacitated, in an emergency situation, or unavailable, a health care provider may generally still disclose the information if the disclosure is determined to be in the best interests of the individual. For directory information, a health care provider may rely on an individual's informal permission to list specified information about the individual in the directory and may disclose the individual's condition and location in the facility to anyone asking for the individual by name. A health care provider may also rely on an individual's informal permission to disclose protected health information to the individual's family, relatives, friends, or other persons identified by the individual, if the information is directly relevant to that person's involvement in the individual's care or payment for care.

Under HIPAA regulations, a health care provider is required to treat a personal representative of an individual *as the individual* for the purposes of disclosure of protected health information and may be required to disclose an individual's protected health information to a personal representative without the individual's consent. For example, if a person has the authority to act on behalf of an individual who is an adult or an emancipated minor with respect to making health care decisions, a health care provider is required to treat the person as a personal representative and disclose the protected health information. Likewise, generally, when a parent, guardian, or other person acting in place

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of the parent has the authority to act on behalf of an unemancipated minor in making health care decisions, a health care provider must treat that person as the personal representative of the individual and disclose the protected health information. However, if a person is not authorized to make health care decisions, that person likely does not qualify as a personal representative for purposes of the disclosure of protected medical information.

Additionally, a health care provider is authorized, under exigent circumstances, to use or disclose protected health information if the health care provider believes in good faith that the use or disclosure is “necessary to prevent or lessen a serious or imminent threat to the health or safety of a person or the public” and the disclosure is made to a person “reasonably able to prevent or lessen the threat.”

Generally, HIPAA applies uniformly to all protected health information, including mental health information. However, psychotherapy notes (notes recorded by a mental health professional that document or analyze the contents of a counseling session and that are separate from the rest of the patient’s medical record) receive special protections under HIPAA. Such notes may only be disclosed with the patient’s authorization, except for disclosure required under other law (such as mandatory reporting of abuse or situations regarding threats of serious or imminent harm).

Additional Information

Prior Introductions: None.

Cross File: SB 584 (Senator Rosapepe, *et al.*) - Finance.

Information Source(s): Department of Health and Mental Hygiene; U.S. Department of Health and Human Services; Department of Legislative Services

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