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10/6/03
Date

2003 HOUSE HUMAN SERVICES

HB 1487

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10/16/03
Date

2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1487

House Human Services Committee

☐ Conference Committee

Hearing Date February 10, 2003

Tape Number	Side A	Side B	Meter #
1	x		39.9 - 61.6
1		x	0.0 - 5.7
Committee Clerk Signature <i>Sharon Kenfrew</i>			

Minutes:

Rep. Gulleason appeared in support as prime sponsor and is offering some amendments to basically take out Sections 2, 3 & 4 in its entirety, stating this bill is about "your health care information ought to be able to heal you, not reveal you".

Rep. Potter questioned Sec 1 subsection 1, part c under marketing, the very end and wanted an explanation.

Answer: This just says communication between the patient and physician, a physician can speak to a specific product in that setting. That section there is the definition of marketing as laid out in the Federal code in State statute.

Rep. Price: wouldn't this basically exclude a care provider from marketing a particular drug, for example is they receive some special compensation for it?

Answer: Right

No opposition

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10/6/03
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House Human Services Committee

Bill/Resolution Number HB 1487

Hearing Date February 10, 2003

Mike Mullen, of the Attorney General's Office appeared neutral with written testimony.

Rep. Potter: asked if 3rd party receives direct or indirect, exactly what indirect might be or involve from a 3rd party?

Answer: Under HIPPA, it has a limitation on marketing and they have a detailed definition and then they have a narrow exception of what is not covered by marketing. Basically what is permitted is that when a physician or other health care provider has a face to face meeting with a patient and they are explaining something and they are saying I think you should take this or you might benefit, that's considered to be marketing, because person can say they are not sure that they want to do that. What are the other alternatives.

Galen Jordre of the ND Pharmaceutical Assoc. appeared in opposition stating the definition of marketing is in conflict with the HIPAA definition. HIPPA does define marketing but it does allow a provider to convey information about health products, or in our case, pharmaceuticals as part of treatment. HIPPA does allow a payment for that. This would be more strict in what HIPPA allows in some areas.

Darlene Bartz appeared in opposition with written testimony.

Mike Mullen states that there is a definition of marketing in the Federal Privacy Rule, that definition is contained in one of the definitions in Section 164-501. Also is another section relating to authorizations 164-508A and this contains a specific statement of when an authorization is required in connection with marketing. Will bring a copy down for the committee.

Closed the hearing.

2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HBO 1487

House Human Services Committee

☐ Conference Committee

Hearing Date February 11, 2003

Tape Number	Side A	Side B	Meter #
1	x		31.0 - 44.4
Committee Clerk Signature <i>Sharon Renshaw</i>			

Minutes: Committee Work

Rep. Price e-mailed & asked Mr. Mullen if the T & A were necessary and he said no also said that some of the language that is already in 1487 was at the recommendation of T & A. Also asked if marketing already is handled in T & A. Mr. Mullen reminded her of page 12 , section 1 covered some organizations that would not be covered under the original bill. If we were to retain Section 1 and avoid an overlap with the big bill. Page 1, line 20, after university we should insert, that is not a covered entity and again on page 2 , line 3 the same thing. So that we don't have a conflict within the bill.

Rep. Pollert had question on Mr. Jordre's opposition and that was for a definition of marketing.

Rep. Porter stated that if we delete section 2 and leave section 1 in with that wording, it still exceeds what HIPAA regulations are and has a different definition of marketing of what the Federal HIPAA has so we're picking one portion of the HIPAA regulation and making it more strict than what the Federal govt. has mandated back on top of it. Doesn't like Section 1 either.

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10/16/03
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Page 2

House Human Services Committee

Bill/Resolution Number HBO 1487

Hearing Date February 11, 2003

Rep. Kreidt made a motion to DO NOT PASS, second by Rep. Porter.

Rep. Sandvig would like to amend with covered entity especially with universities.

Rep. Potter assumed that HIPAA would cover the universities/students.

Rep Price stated they use that information to sell for marketing purposes, much like they sell their student lists for credit card companies.

Rep. Porter noted that regarding Rep. Sandvig's question on universities, this bill exceeds what HIPAA has already done.

VOTE: 9 - 3 - 1

Rep. Porter will carry the bill.

30367.0101
Title.

Prepared by the Legislative Council staff for
Representative Guleson
February 5, 2003

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1487

Page 1, line 1, remove "; to provide an effective date; and to"

Page 1, line 2, remove "declare an emergency"

Page 2, remove lines 11 through 31

Page 3, remove lines 1 through 31

Page 4, remove lines 1 through 30

Page 5, remove lines 1 through 31

Page 6, remove lines 1 through 8

Renumber accordingly

Page No. 1

30367.0101

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Yolanda Richardson
Operator's Signature

10/16/03
Date

Date:
Roll Call Vote #:

2003 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. ~~H.R. 1487~~ 1487

House HUMAN SERVICES Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken DNP

Motion Made By Rep Kreidt Seconded By Rep Porter

Representatives	Yes	No	Representatives	Yes	No
Rep. Clara Sue Price - Chair		✓	Rep. Sally Sandvig		✓
Rep. Bill Devlin, Vice-Chair	✓		Rep. Bill Amerman		✓
Rep. Robin Weisz	✓		Rep. Carol Niemeier A		
Rep. Vonnie Pietsch	✓		Rep. Louise Potter	✓	
Rep. Gerald Uglem	✓				
Rep. Chet Pollert	✓				
Rep. Todd Porter	✓				
Rep. Gary Kreidt	✓				
Rep. Alon Wieland	✓				

Total (Yes) 9 No 3

Absent 1

Floor Assignment Rep Porter

If the vote is on an amendment, briefly indicate intent:

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Richard Costa
Operator's Signature

10/16/03
Date

REPORT OF STANDING COMMITTEE (410)
February 11, 2003 9:49 a.m.

Module No: HR-26-2222
Carrier: Porter
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE
HB 1487: Human Services Committee (Rep. Price, Chairman) recommends DO NOT
PASS (9 YEAS, 3 NAYS, 1 ABSENT AND NOT VOTING). HB 1487 was placed on the
Eleventh order on the calendar.

(2) DESK, (3) COMM

Page No. 1

HR-26-2222

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Operator's Signature

Richard Price

Date

10/6/03

2003 TESTIMONY

HB 1487

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Yolanda Richardson
Operator's Signature

10/16/03
Date

TESTIMONY OF THE OFFICE OF ATTORNEY GENERAL
ON HOUSE BILL 1487, REGARDING CONSENT
FOR THE DISCLOSURE OF HEALTH INFORMATION

BEFORE
HOUSE COMMITTEE ON HUMAN SERVICES
FEBRUARY 10, 2003

MICHAEL J. MULLEN
ASSISTANT ATTORNEY GENERAL

Chairman Price and Members of the Committee, I am pleased to be here on behalf of Attorney General Stenehjem, and on behalf of the Department of Health, the Department of Human Services, and the State Veterans Home who asked me to present testimony on section 2 of House Bill 1487, which requires written consent of a patient before any individually identifiable health information may be used or disclosed by a health care provider for the "treatment" of a patient or "payment" for services the patient has received. Before I address the provisions of House Bill 1487, let me briefly outline the background and purpose of the federal HIPAA privacy rule regarding consent.

Background on the HIPAA Rule for the Privacy of Health Information

The federal regulation entitled *Standards for Privacy of Individually Identifiable Health Information* (the Privacy Rule) was promulgated by the Department of Health and Human Services (HHS) on December 28, 2000. [The regulations are found at 45 CFR [Code of Federal Regulations] Parts 160 and 164.] The Privacy Rule is the first comprehensive federal protection for the privacy of health information.

The privacy rule came about as a result of the Health Insurance Portability and Accountability Act [commonly called "HIPAA"], 29 U.S.C. §§ 1181 – 1191c (enacted in 1996), which established a number of rules to provide greater access to health

insurance regardless of a person's health status. Title II, subtitle F sections 261-264 of HIPAA, 42 U.S.C. §§ 1320d -- 1320d-8, sets forth a program for "administrative simplification," which requires all health care providers and insurers to establish uniform billing and coding systems in order to simplify and reduce the administrative costs of the health care system. Congress also recognized, however, that a uniform electronic billing system, which would necessarily include detailed information about the diagnosis and treatment received by individual patients, would also greatly increase the capacity for accidental or intentional disclosure of *individually identifiable* health information. Therefore, Congress required the Secretary of Health and Human Services to establish regulations to protect the privacy and security of health information.

The proposed rule on the privacy of individually identifiable health information, which was published on November 3, 1999, permitted the use and disclosure of protected health information without the consent of an individual for the purpose of "treatment, payment, or health care operations [quality review, etc.]."

On December 28, 2000, after extensive review of written comments, the final rule on the privacy of individually identifiable health information was published. (*To permit covered entities sufficient time to prepare for operations under the privacy rule, a "compliance date" allowing slightly more than two years to prepare for the rule was established.*) The final rule generally required a health care provider to obtain the "written consent" of a patient before the provider could "use or disclose" the patient's health information.

Because of concern that the privacy rule had certain unintended consequences that could have impaired the treatment of patients and made practical compliance with

the rule difficult, on August 14, 2002, the Secretary of Health and Human Services made several changes to the rule. (Thus, the changes will be effective on the primary compliance date, April 14, 2003.) Among the most significant changes contained in the revised final privacy rule is removal of a requirement that a provider obtain "written consent" from a patient to "use or disclose" protected health information "for treatment, payment, or health care operations." The Department of Health and Human Services had received numerous comments from health insurance companies, hospitals, pharmacists, emergency medical service providers, and other organizations that the consent requirement would impose substantial burdens, and in some situations delay or prohibit a health care provider from initiating treatment. In place of consent, the revised final rule requires a provider to make a good-faith effort to obtain an "acknowledgment" from a patient that the patient has received a copy of the provider's privacy policy, including information about a patient's rights regarding the privacy of health information.

Let me now turn to the substantive provisions of House Bill 1487.

House Bill 1487

Section 2 of House Bill 1487 generally requires a health care provider to obtain written consent from a patient before the provider "may use or disclose protected health information" to carry out "treatment, payment, or health care operations." See section 2(2). Exceptions are authorized in the case of emergency treatment, if the health care provider attempts to obtain consent "as soon as reasonably practicable after the delivery of such treatment;" or, if a health care provider is "unable to obtain such consent due to substantial barriers to communicating with the individual... and the individual's consent is clearly inferred from the circumstances." See section 2(2)(b)(1)

and (3) (emphasis added). The requirement that the individual's consent be "clearly inferred from the circumstances" is inherently indefinite.

Another exception permits a health care provider to use or disclose protected health information without consent "if the health care provider uses the protected health information in the course of filling or dispensing a prescription..." See section 2(2)(d). And, another exception permits a health care provider to use or disclose protected health information to initiate health care treatment, if "the individual and a health care provider have not had in person communication regarding such treatment; obtaining consent would be impracticable; and the health care provider determines that the individual's consent is clearly inferred from the circumstances..." See section 2(2)(e) (emphasis added).

"Consent" under section 2 of House Bill 1478 must be in plain language and meet several detailed specifications. See section 2(4). Second, a consent is not valid "if the document [the consent] lacks an element required under subsection 4..." See section 2(5). This requirement makes "consent" an essential and legally significant requirement. This is a primary concern of state agencies: if there is any technical defect in a consent form, the form is invalid and any use or disclosure of protected health information is [or may be construed as] a violation of the privacy rule. See 45 C.F.R. § 164.506(b). There is also the problem of "tracking" all revocations of consent.

The second problem with a consent requirement is that its numerous (and necessary) exceptions make the rule complex. That is one of the reasons that the Secretary of Health and Human Services concluded that consent should not be required

under the privacy rule. (Any health plan or health care provider may, of course, voluntarily, choose to use a consent form if they wish to; but it is not required.)

The third issue regarding section 2 is a practical one. Many state agencies that are covered entities under the HIPAA privacy rule have been developing their privacy policies for several months. Some agencies have completed their privacy policies and related forms and documents; others are about to send their documents to the printer. Finally, many organizations have developed written or PowerPoint type materials for privacy training based on the current version of the privacy rule. If section 2 of House Bill 1487 is enacted, these government agencies would be required to expend a significant effort to rewrite their policies, forms, revise their training materials, and some covered entities would have to revise their privacy notice before April 1, in order to allow time for mailing the notice to plan members prior to April 14, 2003 -- the compliance date for most organizations, which is just 9 weeks away.

Each of these issues will be a concern to covered state agencies if section 2 of House Bill 1487 is enacted into law.

Chairman Price, thank you for providing me an opportunity to discuss the provisions of House Bill 1487 requiring the consent of a patient before a health care provider may use or disclose health information. I will be pleased to answer any questions you or other members of the committee have regarding the bill, which as I indicated, would impose additional requirements on several state and local agencies as they move toward achieving compliance with the federal HIPAA privacy rule.

#

Testimony

House Bill 1487

House Human Services Committee

February 10, 2003

9:45 a.m.

North Dakota Department of Health

Madam Chair and members of the committee, my name is Darleen Bartz and I am the Health Resources Section Chief with the North Dakota Department of Health. I also am responsible for coordinating implementation of the federal Health Insurance Portability and Accountability Act within the Department. I am here to provide testimony in opposition of Section 2 of House Bill 1487.

Section 2 of House Bill 1487 requires that consent be obtained from an individual prior to using or disclosing protected health information to carry out treatment, payment or health care options. In addition, it provides numerous exemptions and criteria for consent. The language contained in House Bill 1487 is not consistent with the federal Health Insurance Portability and Accountability Act requirements, is more stringent than those requirements, and is complicated to implement. For these reasons, the Department of Health believes House Bill 1438 is a better bill to address Health Insurance Portability and Accountability Act requirements.

The Department of Health respectfully requests a do-not pass recommendation for House Bill 1487. I am happy to answer any questions you may have.