CONNECTICUT HOSPITAL ASSOCIATION

TESTIMONY OF
CONNECTICUT HOSPITAL ASSOCIATION
SUBMITTED TO THE
PUBLIC HEALTH COMMITTEE
FRIDAY, FEBRUARY 20, 2015

SB 73, An Act Concerning Medical Records

The Connecticut Hospital Association (CHA) appreciates this opportunity to submit testimony concerning **SB 73, An Act Concerning Medical Records**. CHA opposes subsections (1), (2), and (4) of SB 73 because they will cause substantial confusion due to conflicts with federal HIPAA law. We support subsection (3), but seek certain clarifications.

Before commenting on the bill, it's important to point out that Connecticut hospitals treat everyone who comes through their doors 24 hours a day, regardless of ability to pay.

This is a time of unprecedented change in healthcare, and Connecticut hospitals are leading the charge to transform the way care is provided. They are focused on providing safe, accessible, equitable, affordable, patient-centered care for all, and they are finding innovative solutions to integrate and coordinate care to better serve their patients and communities.

CHA believes that subsections (1), (2) and (4) of SB 73 will have the unintended consequence of causing substantial confusion because many of the terms either conflict with the requirements of federal law, primarily HIPAA, or are required already under both current Connecticut law and federal law. Our concerns are outlined below, by subsection.

The bill has four main subsections. Subsection (1), which CHA opposes, would require a healthcare provider or healthcare institution to:

> *"(1) Furnish a patient's health record to the patient's personal representative, including (A) the patient's parent, guardian or other person with authority to act on behalf of the patient, and (B) the executor, administrator or other person authorized to act on behalf of a deceased patient;"*

All of the elements of this subsection are required already by federal law under HIPAA. If there is a problem with access to records by an individual's appropriately assigned or designated representative, it is not whether the representative is entitled to the records (since the representative is already entitled to them); rather, the problem is in determining exactly who is a personal representative. It is not always obvious that a person has "authority to act on behalf of the patient." Many family members and close friends assume that they are the correct party to act on a patient's behalf when, in fact, they lack either legal standing, or proof of it, to validate their representative capacity. Because HIPAA requires a provider or healthcare institution to validate that an individual is authorized legitimately by a patient to access records, when such proof is not produced (or does not exist), records cannot be disclosed pursuant to federal law. Subsection (1) of SB 73 would not change that, as federal law would preempt such a state law change.

Subsection (2) of SB 73, which CHA opposes, would require a provider to:

> *"(2) produce a patient health record pursuant to a subpoena or court order;"*

The nature of subpoenas and court orders are different, and are addressed separately here.

With respect to subpoenas, HIPAA does not allow a provider to disclose a medical record in response to a subpoena alone. Subsection (2) of SB 73 would not change that, and federal law would preempt such a change. The reason HIPAA does not allow a subpoena alone to cause the disclosure of medical records is because a subpoena can be issued by any lawyer, and would allow access to all medical records, without the patient's knowledge. HIPAA recognizes that a subpoena alone, potentially issued by any lawyer, is a very poor way to protect patient rights. Accordingly, HIPAA requires that a subpoena also be accompanied either by the patient's authorization, a court order, or "satisfactory assurances" per 45 CFR 164.512.

With respect to court orders, under both federal and state law, an entity is required already to produce a record consistent with a court order. Obviously, an entity subject to a court order has the right to appeal the order, and presumably the patient whose medical records are the subject of such order would have knowledge of the proceedings. Subsection (2) of SB 73, however, appears to intend to extinguish that right to appeal (and potentially the patient's rights regarding who has access to his or her records), which would be a significant departure from Connecticut's Rules of Court and centuries of common law.

Subsection (3) of SB 73, which CHA supports with clarification, seeks to change the current permitted fees charged for copies of medical records to:

> *"(i) Sixty-five cents per page; (ii) a research and handling fee of twenty dollars, except if requested by a patient or personal representative for which there shall be no research and handling fee; and (iii) a certification fee of ten dollars, if certification is requested, which fees shall be increased based on changes in the consumer price index;"*

We agree that 65 cents per page is insufficient to compensate providers for the costs of copying records, and we further agree that a per-request fee of $20 is appropriate. However, this section would conflict with other Connecticut statutes. We seek clarification that the fees may be charged in every instance other than those expressly carved out by this subsection, including that the 65 cents per page is meant to apply to both paper and electronic record copies.

The third requirement in subsection (3) that an additional $10 be added "if certification is requested," is unclear. There is no current, universally accepted certification process for providers' medical records in Connecticut. As such, if that added fee is allowed, it would be important to explain what "certification" means.

Subsection (4) of SB 73, which CHA opposes, seeks to require a provider to:

> *"(4) produce records in an electronic format if the request is for records in an electronic format and the requested records are maintained and can be transmitted in an electronic format."*

Federal law, through HIPAA, allows currently for a patient's request for records in an electronic format pursuant to 45 CFR 164.524. The federal authorities, through HIPAA guidance, have provided many specifics to clarify operational issues that are not found in this bill. For example, is the word "transmitted," as used in subsection (4) of SB 73, meant to apply to sending the materials via e-mail? Would "transmitted" include static copying such as on a digital disc or flash drive? The HIPAA rules provide extremely detailed official guidance and requirements for these and similar issues. Having a state law without the detail and experience that the federal rules and guidance provide seems likely to cause more confusion, and is unlikely to improve access.

Additionally, subsection (4) of SB 73 would require that third parties, not just patients or their representatives, be given electronic access to a patient's record, even absent the express authorization of, or the opportunity to object by, the patient. That is not consistent with protecting patient rights, and is likely preempted by HIPAA.

Thank you for your consideration of our position. For additional information, contact CHA Government Relations at (203) 294-7310.