

SESSION OF 2011

SUPPLEMENTAL NOTE ON SENATE BILL NO. 133

As Recommended by Senate Committee on
Public Health and Welfare

Brief*

SB 133 would create the Kansas Health Information Technology and Exchange Act. The state purpose of the Act would be to harmonize state law with HIPAA privacy rules with respect to individual access to protected health information, safeguarding protected health information, and the use and disclosure of protected health information to facilitate the development and use of health information technology and health information exchange.

The Act would take effect upon publication in the *Kansas Register*.

Definitions (New Section 2)

Among the applicable definitions in the Act would be the following:

- “Approved HIO” means a health information organization operating in the state which has been approved by the Corporation;
- “Covered entity” means a health care provider, a health care component of a hybrid entity, a health plan or a health care clearinghouse;

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

- “Health care provider” means a health care provider, as that term is defined by the HIPAA privacy rule, that furnishes health care to individuals in the state; and
- “Health information technology” means an information processing application using computer hardware and software for the storage, retrieval, use and disclosure of health information for communication, decision-making, quality, safety and efficiency of health care. Health information technology includes, but is not limited to: an electronic health record; a personal health record; health information exchange; electronic order entry; and electronic decision support.

Duties of Covered Entity (New Section 4)

The bill would require a covered entity to:

- Provide an individual or the individual's personal representative with access to the individual's protected health information which is maintained by the covered entity in a designated record set in compliance with HIPAA privacy rules; and
- Implement and maintain appropriate administrative, technical and physical safeguards to protect the privacy of protected health information in a manner consistent with HIPAA rules.

Disclosure of Information (New Section 5)

A covered entity would be prohibited from the use and disclosure of protected health information, with certain exceptions as follows:

- The use and disclosure is consistent with an authorization that satisfies HIPAA requirements;

- The use and disclosure without authorization is permitted under applicable sections of the HIPAA privacy rules; or
- The use and disclosure is as required under 45 C.F.R. 164.502 of the HIPAA privacy rules.

Further, notwithstanding the above conditions, the Act would not permit the disclosure of protected health information by a covered entity to an approved health information organization (HIO) without an authorization which satisfies HIPAA, unless:

- A current participation agreement exists between the covered entity and the approved HIO;
- The disclosure to the approved HIO is done in a manner consistent with the approved HIO's established procedures;
- Prior to disclosure to the approved HIO, the covered entity must provide the individual (whose information is to be disclosed), or the individual's representative, with notice required under Section 16 of this Act relating to participation agreements; and
- The covered entity restricts disclosure to the approved HIO of any protected health information concerning the individual that is the subject of a written request by the individual, or the personal representative, for reasonable restrictions on disclosure of all or any specified categories of the individual's protected health information (found in Section 16 of the Act), following the covered entity's receipt of the written request.

A covered entity that uses or discloses protected health information in compliance with Section 5 of this act would be immune from any civil or criminal liability or adverse administrative action as a result or related to the disclosure.

Authorization Form (New Section 6)

The Act would require that, within six months of the effective date of the Act, the Secretary of the Kansas Department of Health and Environment (KDHE) develop and adopt by rules and regulations a standard authorization form for the use and disclosure of protected health information which meets HIPAA requirements for use and disclosure. A properly completed standard authorization form would be considered valid authorization for the disclosure requested.

Fees for Copies (New Section 7)

Under the Act, the covered entity would be allowed to charge fees for furnishing copies of the protected health information record, with the fees established and updated by the Secretary of KDHE. No fees would be charged for disclosures between a covered entity and an approved HIO.

Conflicts with State Law (New Section 8)

Any provision of state law contrary to, inconsistent with or more restrictive than the rules set forth in the Act, would be superseded by the rules set out in the Act, except that the Act could not limit or restrict the application and effect of the Kansas statutes regarding peer review, risk management, or the statutory physician-patient privilege. Provisions in state law relating to protected health information in the possession of a state agency would not be superseded by the Act.

Personal Representative Authorization (New Section 9)

A person who qualifies as a personal representative would be authorized under the Act to act on behalf of an individual for specific purposes. Among those purposes are: consent to treatment; consent to an autopsy; disposition of decedent's remains; informed consent for research protocol;

the individual's exercise of individual rights under HIPAA privacy rule; and the individual's authorization for use or disclosure of protected health information.

**Priority List for Personal Representatives
(New Sections 10 and 11)**

Incapacitated Adult or Deceased Individual

When a personal representative is needed to act on behalf of an incapacitated or deceased individual, the Act would first require reasonable inquiry as to whether a durable power of attorney for health care or a legal guardian has been designated or appointed. If a power of attorney for health care or a legal guardian has not been appointed or designated, or is incompetent or unavailable, the person or entity requiring a personal representative for an individual must make a reasonable inquiry as to the availability of another individual to serve as the personal representative following the priority list set out in the Act.

The Act also would establish the procedures to follow when there are multiple personal representatives at the same level of hierarchy on the priority list, or in the event a person of higher priority to the individual's identified personal representative becomes available and is willing to serve.

A personal representative's authority to act on behalf of an incapacitated adult would end when the individual gains capacity.

Minors

Under the Act, a person who has authority to consent to the provision of health care to a minor would be authorized to act as a personal representative. If no parent or legal guardian of a minor with authority to consent to health care is

available (by any means, personally, by telephone or electronically), or is incompetent to provide consent, the person or entity requiring a personal representative for an individual must make a reasonable inquiry as to the availability of another individual to serve as the personal representative following the priority list set out in the Act. When an individual reaches the age of majority or is emancipated, access or exercise of control by a parent or legal guardian would cease.

No civil or criminal liability would be imposed on any person who relied on a personal representative to act on behalf of a minor.

Appealing and Amending Other Laws (New Section 12)

The Act would not amend or repeal laws related to the Kansas Durable Power of Attorney Act for Health Care Decisions, the Kansas Natural Death Act, or laws related to do-not-resuscitate directives. A personal representative would not have the power to revoke certain valid advance directives which have been properly executed by an individual, regardless of the individual's subsequent incapacity. The Act would not alter any existing law regarding the need to obtain consent for provision of health care, informed consent for research protocol or determination of adult impairment, or minor emancipation.

Public Health Purpose for Disclosure (New Section 13)

The Act would allow a health care provider to disclose protected health information without authorization to any state agency for any public health purpose permitted or required by law.

Setting of Standards of HIO's (New Section 14)

The Kansas Health Information Exchange, Inc. (Corporation) would establish and revise standards for the approval and operation of statewide and regional HIO's operating in the state as approved HIO's. Among these standards would be those needed for satisfaction of certification standards for health information exchanges promulgated by the federal government and adherence to nationally recognized standards for interoperability.

Approval Process (New Section 15)

The Corporation would be required by the Act to establish and implement processes for the approval of an HIO, the re-approval of HIO's at appropriate intervals, and for the investigation of reported concerns and complaints regarding approved HIO's and measures to address the deficiencies.

Participation Agreement Requirements (New Section 16)

The Corporation also would establish requirements for participation agreements. Among the requirements are procedures to allow a covered entity to disclose protected health information to an approved HIO, to allow the covered entity access to health information from the HIO, and to establish specifications of the written notice to the individual before disclosure of information. The written notice may be incorporated into the covered entity's notice of privacy practices required under the HIPAA privacy rule. The information required in the written notice is set out in this section of the Act.

HIO Receipt of Financial Support (New Section 17)

The Act would require an HIO to be approved to be eligible for financial support from the state, or assistance or support from the state in securing any other source of funding.

HIO Immunity for Use or Disclosure (New Section 18)

An approved HIO that uses or discloses protected health information in compliance with rules adopted by the Corporation would be immune from civil or criminal liability or any adverse administrative action resulting from such use or disclosure.

Uniform Electronic Transactions Act (Section 19)

The Act would amend part of the Uniform Electronic Transactions Act to allow the definition of “transaction” to include actions or sets of actions occurring between two or more persons relating to the conduct of health care. With this amendment, transactions among entities and persons covered in the Act would fall under the Uniform Electronic Transactions Act.

Statutes Repealed (Section 20)

The Act would repeal statutes dealing with persons authorized to dispose of decedent's remains, persons allowed to make anatomical gifts, access to health care records, enforcement, rules and regulation authority, and research protocols.

Background

SB 133 was introduced by the Senate Committee on Public Health and Welfare at the request of the Kansas Health Information Exchange, Inc. Proponents of the bill testifying before the Committee included representatives of the Kansas Health Information Exchange, Inc., Spencer Fane Britt Browne, the Kansas Hospital Association, and the Kansas Medical Society. Written testimony in favor of the bill was provided by representatives of the Kansas Optometric Association, the Kansas Department of Health and Environment, the Salina Area Chamber of Commerce, the Kansas City Quality Improvement Consortium, the Kansas Foundation for Medical Care, the Kansas Association of Osteopathic Medicine, the Sedgwick County Health Department, AARP Kansas, the Kansas Academy of Family Physicians, Blue Cross and Blue Shield of Kansas, the Wichita Health Information Exchange, the Kansas Association of Local Health Departments, and the Kansas Pharmacists Association. A representative of the Kansas Health Information Exchange, Inc. stated the purpose of the bill is to bring harmony to the laws and to provide health care providers clarity as to how health information may be shared reliably and securely. The representative further stated the bill would give providers the road map they need to use the electronic highway to effect efficient rendition of care without fear of legal reprisal.

The eHealth Advisory Council charged a Legal Work Group to study Kansas and federal law and develop a proposal that would eliminate legal and business barriers and provide the governance structure (the Kansas Health Information Exchange) that would develop the policy and standards under which health information exchanges would operate. The Kansas Health Information Exchange, Inc. was created by Executive Order 10-06 to manage ARRA (American Recovery and Reinvestment Act) funding incentive expenditures. This bill is the result of that effort.

There were no opponents to the bill at the Senate Committee hearing.

The fiscal note prepared by the Division of the Budget states that passage of the bill would have no fiscal effect on the Insurance Department, the Health Policy Authority or the Kansas Department of Health and Environment.