



State of Wisconsin
Department of Health and Family Services

Jim Doyle, Governor
Karen E. Timberlake, Secretary

MEMORANDUM

DATE: October 3, 2008

TO: All Interested Parties

FROM: Cheryl McIlquham, Director, Office of Policy Initiatives and Budget
John Easterday, Administrator, Division of Mental Health and Substance Abuse Services
Otis Woods, Administrator, Division of Quality Assurance

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SUBJECT: Guidance on 2007 Wisconsin Act 108 Relating to Treatment Records and Patient Health Care Records

1. Purpose

The purpose of this memo is to provide guidance on recent statutory changes under 2007 Wisconsin Act 108 relating to disclosure of health care information for treatment purposes without patient consent.

Health information exchange (HIE) is necessary to improve the quality and safety of health care. Variations in health information privacy law can result in limitations on the development of HIE in Wisconsin. Act 108 is an important step in addressing certain of these limitations. It provides physicians and patients with more complete and timely information as they make important decisions about what health care treatment is best and safe for patients. In addition, Act 108 better aligns Wisconsin law with federal Health Insurance Portability and Accountability Act (HIPAA) confidentiality and privacy laws.

Extensive dialogue and collaboration with a wide range of stakeholders resulted in passage of this law. Specifically, the changes to Wis. Stat. s. 51.30 were developed by a workgroup convened by the Department of Health Services (the Department) with representation from many key advocacy and provider organizations. Changes to Wis. Stat. s. 146, related to general health records, were discussed with many stakeholder groups as well. On December 4, 2007, the eHealth Care Quality and Patient Safety Board reviewed and approved proposed statutory changes. The Assembly and Senate passed legislation in early March 2008. Governor Doyle signed the legislation on March 17, 2008. Changes to Wis. Stat. s. 51.30 are effective October 1, 2008. Changes to Wis. Stat. s. 146 were effective April 1, 2008.

2. Wis. Stat. s. 51.30 Prior to October 1, 2008 – Mental Health, Developmental Disability and Alcohol and Other Drug Abuse (AODA) Treatment Records

Certain provisions of Wis. Stat. s. 51.30 prior to October 1, 2008, create limitations on health information exchange because in most circumstances the patient's written consent is required to disclose information to another health care provider.

- Prior to October 1, 2008, only certain elements (e.g. the individual's name, address, and date of birth; the name of the individual's mental health treatment provider; the date of mental health service provided; the individual's medications, allergies, and diagnosis; and other relevant demographic information necessary for the current treatment of the individual) of a patient's treatment record could be released without informed written consent.
- Further, these elements could only be released for the current treatment of an individual to health care providers in a "related health care entity" which generally means a clinically integrated care setting. For example, prior to October 1, 2008, a physician from one clinic was not allowed to share a patient's health information with a physician treating the patient in a different clinic without the written informed consent of the patient.

These limitations make the exchange of health care information in a non-emergency situation, outside of a related health care entity difficult. Physicians have expressed a need to have quick and ready access to clinical information to make well-informed decisions about the best way to care for a patient. Also, the consent requirement under Wis. Stat. s. 51.30 is more stringent than federal HIPAA privacy law and Wisconsin laws governing other types of health care information which permit disclosure of health care information for treatment purposes without patient consent.

3. Changes to Wis. Stat. s. 51.30: Effective October 1, 2008

Under Act 108, providers are permitted to release treatment records without informed written consent to a health care provider or to any person acting under the supervision of the health care provider who is involved with an individual's care, if necessary for the current treatment of the individual. Information that may be released in this section of the law is limited to:

- Individual's name, address, date of birth;
- Name of the individual's provider of services for mental illness, developmental disability, alcoholism, or drug dependence;
- Date of any of those services provided;
- Individual's medications, allergies, diagnosis, diagnostic test results and symptoms; and
- Other relevant demographic information necessary for the current treatment of the individual.

The specific changes are:

- Adding "diagnostic test results" and "symptoms" to the list of elements that may be exchanged without patient written consent.

- Act 108 defines diagnostic test results as the results of clinical testing of biological parameters, but does not mean the results of psychological or neuropsychological testing. Examples of biologic diagnostics include lab tests, EKGs and radiology tests.
- Removing the within a “related health care entity” requirement so that important health care information can be exchanged with any health care provider who is involved with the patient’s care and who needs the information to properly treat the patient, regardless of whether the provider is a part of the clinically integrated setting where the patient originally received care.
 - By allowing the specified health information data elements to be shared with providers outside a related health care entity, subsequent providers can have access to information that is important to their assessment and care of the patient presenting to them. This means re-disclosure of information received from one entity to another entity is allowed for treatment purposes.

Written informed consent of the patient is still required to disclose information other than the specified elements permitted for exchange. For example, a patient’s written consent is still required to disclose psychotherapy notes, assessments, progress notes or discharge summaries.

These changes do not pertain to substance use treatment programs which are governed by federal regulations at 42 CFR Part 2 and are more stringent than HIPAA and state statutes.

4. Wis. Stat. s. 146 Prior to April 1, 2008 – Confidentiality of Patient General Health Care Records

- Prior to April 1, 2008, Wis. Stat. s. 146 allowed health care providers to receive patient health care information without the patient’s consent for any purpose related to providing care to the patient other than what is covered under Wis. Stat. s. 51.30. However, Wis. Stat. s. 146.82 created a barrier to electronic exchange of health care information because it prohibited re-disclosure of information received by one entity to another entity.
- Wisconsin law also created administrative burdens by requiring documentation of *all* disclosures of health information. The federal HIPAA laws require documentation of some, but not all disclosures.
- Wisconsin law made sharing health information with a patient’s family, friend or other person involved in the patient’s care difficult because doing so required the written consent of the patient, which was often difficult because the patient was not available or otherwise not capable of providing written consent.

5. 2007 Wisconsin Act 108 Changes to Wis. Stat. s. 146: Effective April 1, 2008

Effective April 1, 2008, the following provisions of Wis. Stat. s. 146 apply:

- Allow re-disclosure of health information for treatment purposes and under other limited circumstances prescribed under current law. This change benefits electronic health information exchange while retaining some limitations on re-disclosure to protect confidentiality. The requirements in this section parallel the federal HIPAA regulations, with one important exception. HIPAA does not contain any prohibitions on entities that are not “covered entities” from re-releasing protected health information. However, under Act 108 an entity that is not a covered entity may re-

disclose a patient health care record it receives under this section only under one of the following circumstances:

- The patient or a person authorized by the patient provides informed consent for the re-disclosure.
 - A court of record orders the re-disclosure.
 - The re-disclosure is limited to the purpose for which the patient health care record was initially received.
- Eliminate the requirement to document all disclosures. Health care providers are still required to document the disclosures required to be tracked under federal HIPAA laws, such as disclosures related to child or elder abuse cases or public health reporting and disclosures to law enforcement and coroners. For example, HIPAA does require documentation of disclosures for state reporting purposes, such as the Wisconsin cancer registry, and HIPAA also provides patients with a right to request an “accounting” of these disclosures. HIPAA does not require an accounting for disclosures made for a number of other disclosures including those to carry out treatment, payment and health care operations.
 - Allow health care providers to disclose health information to a patient’s family, friend or another person identified by the patient and involved in the patient’s care:
 - If the patient provides informal permission (rather than formal written consent) to do so.
 - If the patient is not physically available or physically or cognitively able to grant informal permission, a health care provider is permitted to use his or her professional judgment to determine whether disclosing the information is in the best interests of the patient and the patient would otherwise allow such a disclosure.

Informed consent is still required for a health care provider to release copies of health care records to family and friends involved in the patient’s care.

6. Contacts

This memorandum only addressed the statutory changes under 2007 Wisconsin Act 108, and health care providers and organizations should use this guidance in the context of all applicable federal and state laws, regulations, and administrative rules. If you need further clarification or have questions, please contact one of the following individuals:

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