

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3672/P1dn
DAK:cjs:pg

January 8, 2008

To Cheryl McIlquham and Kathy Farnsworth:

This bill is drafted in preliminary form, because many issues arose in the course of drafting. The first item, below, is a recapitulation of questions I asked in my e-mail of December 27, 2007.

1. I have drafted several of your proposed changes to s. 51.30 (4) (b) 8g., stats., and have these questions or comments:

a. The term "treatment records" is defined under s. 51.30 (1) (b), stats., to be "registration and all other records that are created in the course of providing services to individuals for mental illness, developmental disabilities, alcoholism, or drug dependence" Nevertheless, s. 51.30 (4) (b) 8g. (intro.), stats., refers only to an individual's "mental health treatment provider" and "mental health service" provided. Do you want this expanded to refer to treatment or services for developmental disabilities, alcoholism, or drug dependence?

b. Your proposal is that the definition of "diagnostics" be created under s. 51.30 (1), stats.; the effect of placement of the definition here is to apply it wherever the term is used throughout s. 51.30, stats. Yet it is in fact used only in s. 51.30 (4) (b) 8g. I believe it should be defined for that subdivision only; if, at a later date, the term is used in another part of the section, it can then be renumbered to be defined for the section as a whole.

c. As to the wording of the definition:

I. It is unnecessary to include "for the purposes of this section"; that is usually handled by the words "in this section [subsection, paragraph, subdivision, etc.]".

II. It seems to me that "diagnostics," as used in the context proposed, does not mean "testing"; instead, it means the results of testing. And, in looking at other statutes in which the term is used, it seems more appropriate to use the term "diagnostic evaluation." Please review.

III. The proposed language used the term "electrocardiograms"; did you mean "electroencephalograms," as drafted?

2. As requested, I have repealed ss. 146.82 (2) (d) and 146.83 (3) (c), stats. As you explain in your instructions, the effect of the repeal of these provisions is to have

HIPAA's documentation requirements prevail under preemption. Please note that another effect of the repeal is to make prosecution of violations of the documentation requirements only possible in federal court, and not also in state court. In addition, because only federal law specifies the right of a patient to request an "accounting" of the disclosures that are required to be tracked, a patient with access to Wisconsin statutes but not federal statutes may have no knowledge that this right may be pursued. Lastly, please note that the repeal of s. 146.82 (2) (d) and (3) (c), stats., necessitates the amendment of s. 146.81 (4), stats. (the definition of "patient health care records"), which refers to these paragraphs. That means that, under Wisconsin law, unless s. 146.81 (4), stats., is further amended to refer to redisclosure, any record of a redisclosure made will not be considered a "patient health care record." Is this the result you want? Is it possible that this may make federal prosecution of violations of HIPAA's documentation requirements more difficult?

3. I have repealed s. 146.82 (2) (b), stats., as requested, and have created s. 146.82 (5), regarding redisclosure. (Note the definition of "covered entity" created under s. 146.82 (5) (a).) However, the repeal of s. 146.82 (2) (b), stats., raises these problems, which must be resolved:

a. Section 146.82 (2) (b), stats., currently excepts s. 610.70 (3) and (5), stats., from its requirements. Section 610.70 (3), stats., permits an individual or an authorized representative of an individual access to the individual's recorded personal medical information in the possession of an insurer. Section 610.70 (5), stats., permits redisclosure to others of an individual's personal medical information under certain circumstances. The language of s. 146.82 (5) (b), as proposed and drafted, permits redisclosure "if the purpose for the redisclosure is otherwise permitted *under this section*" (i.e., s. 146.82, stats.); deleting reference to s. 610.70 (5), stats., without more, may not allow redisclosure under that statute because no mention of it otherwise occurs in s. 146.82, stats., and because not all of the purposes listed under s. 610.70 (5), stats., may be purposes permitted by s. 146.82, stats. Please advise.

b. Section 655.275 (8), stats. (the injured patients and families compensation fund council) currently must keep patient health care information confidential "as required by s. 146.82 (2) (b)." I have assumed that the council is not a "covered entity" under the definition in 45 CFR 160.103; correct? Please review my amendment of s. 655.275 (8), stats. As drafted, this means that, for redisclosure of the information the council receives, s. 146.82 (5) (c), as created in this draft, applies. However, I'm not actually sure what s. 146.82 (5) (c) means in this context and whether the language of that paragraph is appropriate. Yet another problem is that nowhere in s. 146.82, stats., is the council permitted to have access to this information in the first place. Should a new exception in s. 146.82 (2), stats., be created for this purpose?

c. Please note that I have used the term "patient's health information" throughout this subsection. Is that what you intended? Note that I have drafted a definition of "health information" under s. 146.81 (1g), referring to the federal regulations; the definition is also applicable under s. 146.82 (4) in this draft.

4. Please review s. 146.82 (4). I did not draft this as s. 146.82 (2) (am), as proposed, because s. 146.82 (2) (intro.) *requires*, rather than *permits*, release of patient health

care records. I also did not include the material proposed as s. 146.82 (2) (am) 2. ("Releases with the patient present") because it echoes current law under s. 146.82 (1), stats.; in fact, s. 146.82 (1), stats., is more broad than the material proposed. I have these questions:

a. Why is a "person authorized by the patient" not required to be consulted for consent before the health care provider releases the health information?

b. As s. 146.82 (4) (b) (intro.) is written, the health care provider is authorized to release the patient's health information (if other requirements are met) if a patient "is not present." That phrase is not limited and is, therefore, vague. Is there a way to qualify this nonpresence somehow?

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