



To: Senate Ways and Means Committee

From: Jerry Slaughter
Executive Director

Date : May 1, 2012

Subject: SB 469; amending the Kansas Health Information Technology and Exchange Act

The Kansas Medical Society would first like to express our appreciation to this committee for introducing SB 469 at this point in the session. I know the timing of this is a bit unusual, but this issue has just arisen in the past few weeks.

As you may recall, the health information exchange (HIE) legislation which started out as SB 133 (and ended up in HB 2182) last year “harmonized” the state’s health care privacy and confidentiality laws with the federal privacy standard which is known as the HIPAA Privacy Rule (or just “HIPAA”). Among other things, HIPAA established detailed rules and procedures regarding access, safeguards, uses and disclosures, and authorizations of an individual’s personal health information.

Prior to passage of our legislation last year the Kansas health care privacy protections were confusing and inconsistent. Licensing statutes and regulations required providers to maintain patient confidentiality, but provided few specific parameters. The courts recognized a provider’s duty to maintain confidentiality, but case law was not sufficiently developed to provide a predictable set of rules for providers. Over a period of several years the legislature passed laws and state agencies promulgated regulations which established specific rules for use and disclosure of particular types of “sensitive” health information, such as diagnosis and treatment of mental health conditions and certain contagious diseases. But there was not a unifying, consistent approach, and as a result, a complex, uncoordinated, and sometimes contradictory system of laws and regulations developed over time.

For health care providers, these complex, often contradictory rules created an administrative nightmare which often hindered the disclosure of health information for appropriate purposes such as treatment. Under K-HITE, the Kansas confidentiality and privacy laws were made consistent, which allows patients and providers to operate under the predictability of one set of well-defined rules. There is widespread support for finally having one uniform standard governing privacy, which is beneficial for both patients and providers. There was no opposition to this legislation last year, and K-HITE passed overwhelmingly in both chambers.

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Since that time, an issue has arisen as it relates to one of the provisions that was a part of K-HITE. When HB 2182 was in conference last year, the original language of what is now KSA 65-2828 contained a reference to KSA 60-427, the physician-patient evidentiary privilege statute. In an effort to make its application clearer, the “physician-patient privilege” language was changed to read “any statutory health care provider-patient privilege”. Unfortunately, that had the unintended effect exempting certain mental health treatment facility privacy provisions, and leaving them as they were, thus not bringing them under the uniform HIPAA standard which Kansas adopted. We truly believe this was an inadvertent error, and was not intended by the legislation which the legislature enacted. The KHIE Board would like to correct the legislation, and if it is possible, do it this year to avoid further confusion as the state moves rapidly towards electronic health information exchange.

This amendment would correct this confusion in the statutes and reinforce the original intent of the bill, which was to harmonize Kansas’ privacy and security laws with HIPAA. The harmonization simplifies the administrative burden on health care providers, clarifies patient protections, eliminates the confusion caused by the old patchwork of privacy laws, and paves the way for effective electronic exchange of health information within a secure, cohesive privacy structure.

After consulting with the attorneys who were involved in the drafting of the original bill, it was determined that the best way to fix this issue and remove uncertainty would be to amend the statute by just striking the language “or any statutory health care provider-patient privilege”, as SB 469 now reads. However, after further discussion with some of the treatment facilities it was felt that the amendment needed to be clearer that K-HITE would not affect any statutory evidentiary privilege protections. In other words, with the further amendment we are offering today, any evidentiary privilege protections in legal proceedings would be exempted from the provisions of the act, while the health care privacy and confidentiality requirements would be made consistent with HIPAA. In order to accomplish this, SB 469 needs to be further amended as shown below:

Section 1. K.S.A. 2011 Supp. 65-6828 is hereby amended to read as follows: 65-6828. To the extent any provision of state law regarding the confidentiality, privacy, security or privileged status of any protected health information conflicts with the provisions of this act, the provisions of this act shall control, except that: (a) Nothing in this act shall limit or restrict the effect and application of the peer review statute, K.S.A. 65-4915, and amendments thereto; ~~or the risk management statute, K.S.A. 65-4921, and amendments thereto; or any statutory health care provider-patient privilege; or any statutory health care provider-patient evidentiary privilege applicable to a judicial or administrative proceeding;~~ and (b) nothing in this act shall limit or restrict the ability of any state agency to require the disclosure of protected health information by any person or entity pursuant to law.

Again, we want to express our appreciation to this committee for its willingness to hear this important issue at this point in the session. Thank you for your consideration, and we urge your support for SB 469, as amended above.