HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1097 Electronic Health Records
SPONSOR(S): Grimsley
TIED BILLS: **IDEN./SIM. BILLS:**

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Health Care Regulation Policy Committee	7 Y, 0 N, As CS	Lowell	Calamas
2)	Civil Justice & Courts Policy Committee			
3)	Health & Family Services Policy Council			
4)	Health Care Appropriations Committee			
5)				

SUMMARY ANALYSIS

The bill clarifies that a patient's records held by a hospital may be disclosed without the consent of the patient, or his or her legal representative, to health care practitioners and providers currently involved in the care or treatment of the patient. The bill clarifies that lab results may be provided by a clinical laboratory to other health care practitioners and providers involved in the care or treatment of the patient for use in connection with the treatment of the patient.

The bill also creates the Florida Electronic Health Records Exchange Act and defines several common health information technology terms such as certified electronic health record technology, health record, and qualified electronic health record. The bill provides civil immunity for a health care provider who, in good faith, releases or accesses a patient's health record without the patient's consent for the treatment of an emergency medical condition when the provider is unable to obtain the patient's consent due to the patient's condition. In addition, the bill requires AHCA to create a universal patient authorization form that may be used by a health care provider for the release of health records. The bill states that anyone who forges a signature on such form or obtains the form or health record of another person under false pretenses may be liable for compensatory damages plus attorney's fees and costs. The bill also provides civil immunity for a health care provider who releases a health record in reliance on information provided to the provider on a properly-completed form.

Finally, the bill creates the Electronic Health Records System Adoption Loan Program, subject to a specific appropriation.

The loan program established by the bill is subject to a specific appropriation. Absent this specific appropriation, the bill would have minimal fiscal impact on the agency. If specific appropriation is provided for the loan program, the bill has an indeterminate fiscal impact on the agency.

The bill takes effect upon becoming a law.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Terminology

Discussions of health information technology often contain numerous technical terms that are difficult to understand for those who are not familiar with such usage. In addition, there is very little agreement amongst organizations in the health information technology community regarding the definitions of these terms. However, for the purposes of this analysis, the following terms are used:

- Electronic Health Record (EHR). Also known as an electronic medical record, an electronic health record is a computer-based record of one or more clinical encounters between a healthcare provider and a specific patient. An EHR may include a number of data items, from patient demographics to diagnostic images.

- Electronic Health Records System (EHR system). An electronic health record system is a software program that allows computer-based management of clinical information documenting the delivery of health care to multiple patients. An EHR system may include multiple functionalities, such as management of procedure results and electronic entry of clinical and prescription data.

- Electronic Prescribing System (E-Prescribing System). An electronic prescribing system is a software program for electronically creating and transmitting a prescription to a participating pharmacy. An e-prescribing system maintains a record of a patient's prescriptions and notifies a health care practitioner of conflicting medications. EHR systems generally include e-prescribing functionality; however, an e-prescribing system may also be purchased and operated independently.

- Health Information Exchange (HIE). A health information exchange is an electronic system used to acquire, process, and transmit electronic health records, which can be shared in real-time among authorized health care providers, health care facilities, health insurers, and other recipients to facilitate provision of health care services.

- The Health Insurance Portability and Accountability Act (HIPAA). The federal Health Insurance Portability and Accountability Act of 1996 established baseline health care privacy requirements

for protected health information and established security requirements for electronic protected health information.

- Regional Health Information Organization (RHIO). A regional health information organization is a neutral organization with a defined governance structure which is composed of and facilitates collaboration among its stakeholders in a given medical trading area, community, or region through secure electronic health information exchange to advance the effective and efficient delivery of healthcare for individuals and communities. The geographic footprint of a RHIO can range from a local community to a large multi-state region.

Rate of Adoption of Health Information Technology

Widespread adoption of EHR and e-prescribing systems holds the promise of improving patient safety and reducing the cost of health care by preventing unnecessary procedures. However, in a 2005 report, the National Center for Health Statistics (NCHS) within the United States Centers for Disease Control and Prevention noted that adoption of information technology within the health care sector is trailing behind other sectors in the economy of the United States.[1] The adoption of EHRs by hospitals and physicians has been particularly slow. As part of its annual National Health Care Survey, NCHS found that, from 2001 through 2003:

- The most frequent IT application used in physician offices was an electronic billing system. Nearly three-fourths (73 percent) of physicians submitted claims electronically. Electronic submission of claims was more likely among physicians in the Midwest and South, in nonmetropolitan areas, among physicians under 50 years of age, and for physicians with 10 or more managed care contracts. Physicians in medical specialties such as psychiatry, dermatology, or sports medicine (among others) were least likely to submit claims electronically.

- EHRs were used more frequently in hospital settings (31 percent in emergency departments) than in physician offices (17 percent). Among physician office practices, there were no statistically significant differences in EMR use by region, metropolitan status, specialty, physician age, type of practice, or number of managed care contracts.

A more recent 2007 NCHS report indicates that physician office use of EHR systems continues to grow; roughly 29 percent use full or partial (i.e., part paper) EHR systems, a 22 percent increase since 2005, and a 60 percent increase since 2001.[2] The report also noted that EHR system use was higher in health maintenance organizations than among private practice physicians.[3]

Federal Health Information Technology Efforts

The federal government has embarked upon three recent initiatives to incentivize the adoption of health information technology. The first initiative is an incentive payment program for the adoption of an EHR system and reporting and performance on 26 quality measures.[4] The program began in 2008 and will operate over a five-year period in two phases in 12 locations. The first phase will begin on June 1, 2009.[5] The second phase includes six counties in the Jacksonville area, namely Baker, Clay, Duval, Nassau, Putnam and St. Johns counties.[6]

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[1] C.W. Burt and E. Hing, *Use of Computerized Clinical Support Systems in Medical Settings: United States, 2001–03,* Advance Data from Vital and Health Statistics no. 353, March 15, 2005.
[2] E. Hing, C.W. Burt, and D. Woodwell, *Electronic Medical Record Use by Office-Based Physicians and Their Practices:United States, 2006,* Advance Data from Vital and Health Statistics no. 393, October 26, 2007.
[3] *Id.*
[4] Centers for Medicare and Medicaid Services, "ELECTRONIC HEALTH RECORDS (EHR) DEMONSTRATION," http://www.cms.hhs.gov/DemoProjectsEvalRpts/downloads/EHR_DemoSummary.pdf (visited March 20, 2009).
[5] *Id.*
[6] *Id.*

The second initiative is the E-Prescribing Incentive Program, which, beginning January 1, 2009, provides incentive payments to health care practitioners for e-prescribing.[7] A "successful" e-prescriber under the program will gain an incentive payment of 2 percent in calendar years 2009 and 2010; 1 percent in calendar years 2011 and 2012; and .5 percent in calendar year 2013.[8] Health care practitioners who do not qualify as successful e-prescribers will be penalized beginning in 2012; the penalty is 1 percent in 2012; 1.5 percent in 2013; and 2 percent in 2014.[9]

The third initiative is part of the "American Recovery and Reinvestment Act of 2009," (ARRA) which was signed into law by President Barack Obama on February 17, 2009. Included in the ARRA is the "Health Information Technology for Economic and Clinical Health Act."[10] Approximately $19 billion is appropriated to incentivize the adoption of EHR systems, including:

- State planning and implementation grants to promote health information technology. Grants require state match beginning in fiscal year 2011.[11]

- Competitive state grants to establish loan programs to facilitate the adoption and improvement of EHR systems by health care providers, as well as training personnel and improving the secure exchange of health information. Loans must be paid back within 10 years and the interest rate may not exceed the market rate. Each state must provide $1 of non-federal funds as match for each $5 of federal funds received. Each state is allowed to use 4 percent of the grant funds to pay the reasonable costs of administering the loan program.[12]

- Medicare incentive payments over a five-year period to healthcare professionals for "meaningful" use[13] of EHR systems, beginning in 2011 and ending in 2016. Incentives range from a maximum of $48,400 for those who adopt in 2011 to no payment for those adopting EHR systems after 2015. Health care professionals who do not adopt meaningful use of an EHR system by 2015 will be penalized according to the following schedule—1 percent in 2016; 2 percent in 2017; and 3 percent in 2018 and thereafter.[14]

State Health Information Technology Efforts

Florida Health Information Network Grants Program

In 2006, the Legislature authorized the Agency for Healthcare Administration (AHCA) to administer a grants program to advance the development of a health information network.[15] According to the agency, grants are currently awarded to regional health information organizations (RHIOs) in three categories:[16]

- Assessment and planning grants, which support engaging appropriate healthcare stakeholders to develop a strategic plan for health information exchange in their communities.

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[7] Centers for Medicare and Medicaid Services, "E-Prescribing Incentive Program Overview," http://www.cms.hhs.gov/ERXincentive/ (visited March 20, 2009).
[8] Centers for Medicare and Medicaid Services, "Medicare's Practical Guide to the E-Prescribing Incentive Program," http://www.cms.hhs.gov/ERxIncentive/Downloads/erx_incentive_program_simple_factsheet.pdf (visited March 20, 2009) (In order to be a "successful" e-prescriber, a health care practitioner must "report the e-prescribing quality measure through [his or her] Medicare Part B claims on at least 50% of applicable cases during the reporting year").
[9] *Id.*
[10] H.R. 1, 111th Congress, §13001 (2009).
[11] *Id.* at §13301.
[12] *Id.*
[13] *Id* at §4101 ("Meaningful" use of an EHR system means (a) using EHR technology in a meaningful manner, such as e-prescribing; (b) the EHR technology is connected in a manner that provides for the electronic exchange of health information to improve the quality of health care, such as promoting care coordination; and (c) reporting clinical quality measures).
[14] *Id.*
[15] Section 408.05(4)(b), F.S.
[16] Agency for Health Care Administration, "FY 2007-2008 Grants Program Requirements," http://ahca.myflorida.com/dhit/FHINgrantsProgram/FGPSched0708.pdf (visited March 21, 2009).

- Operations and evaluation grants, which support projects that demonstrate health information exchange among two or more competing provider organizations.

- Training and technical assistance grants, which support practitioner training and technical assistance activities designed to increase physician and dentist use of electronic health record systems.

From Fiscal Year 2005-2006 through Fiscal Year 2007-2008, a total of $5.5 million has been appropriated by the legislature to fund the grants program. No funding was appropriated in Fiscal Year 2008-2009.

Approximately half of the RHIOs that have received state grants are operational in exchanging data within their region, but on a very limited basis. The scope of the exchange and number of users participating in the exchange is still relatively small. The remaining RHIOs that have received state grants are pre-operational and continuing to develop and test various elements of their health information exchange. The RHIOs and their aggregate funding levels include:

- Big Bend RHIO – $810,422
- Central Florida RHIO – $200,000
- Community Health Informatics Organization – $222,384
- Healthy Ocala – no funding sought
- Northeast Florida Health Information Consortium – $406,944
- Northwest Florida RHIO – $776,589
- Palm Beach County Community Health Alliance – $692,812
- South Florida Health Information Initiative – $742,151
- Tampa Bay RHIO – $1,043,957
- Veterans' Health Information Exchange Network – $70,614

Electronic Prescribing Clearinghouse

In 2007, the Legislature created the Electronic Prescribing Clearinghouse within AHCA.[17] The stated intent of the clearinghouse is to "promote the implementation of electronic prescribing by health care practitioners, health care facilities, and pharmacies in order to prevent prescription drug abuse, improve patient safety, and reduce unnecessary prescriptions."[18] AHCA is required to annually publish a report by January 31 regarding the progress of implementing electronic prescribing.

The latest report, published in January 2009, provided several findings, including:

- The annual e-prescribing rate for all prescriptions that could have been e-prescribed grew from 1.6 percent in 2007 to 4.3 percent in 2008.
- The monthly e-prescribing rate was 6.9 percent in December 2008, compared to the national rate of approximately 7 percent.[19]

Privacy and Security of Health Records

Health Insurance Portability and Accountability Act

The Health Insurance Portability and Accountability Act of 1996 (HIPAA), among other requirements, required the Secretary of the United States Department of Health and Human Services (HHS) to issue privacy regulations governing individually identifiable health information, if Congress did not enact privacy legislation within three years of the passage of HIPAA. Congress did not enact privacy

[17] Chapter 2007-156, L.O.F.
[18] *Id.*
[19] Agency for Health Care Administration, "Second Annual Florida 2008 Electronic Prescribing Report," http://www.fhin.net/eprescribe/ePandHIEinFL/Florida2008ePrescribeRptv5.3finalCorr030209.pdf (visited March 20, 2009).

legislation and thus, HHS drafted a rule ("the Privacy Rule") that became final on December 28, 2000.[20] According to HHS, the primary purpose of the Privacy Rule is to "assure that individuals' health information is properly protected while allowing the flow of health information needed to provide and promote high quality health care and to protect the public's health and well being. The Rule strikes a balance that permits important uses of information, while protecting the privacy of people who seek care and healing."[21]

Generally, the Privacy Rule set forth the circumstances under which a "covered entity"[22] (and its business associates) may use and disclose "protected health information."[23] A covered entity may disclose protected health information, without a patient's authorization, for the following purposes:

- Treatment, Payment, and Health Care Operations.
- Opportunity to Agree or Object.
- Incident to an otherwise permitted use and disclosure.
- Public Interest and Benefit Activities.
- Limited Dataset for the purposes of research, public health or health care operations.

HIPAA generally preempts state privacy laws, unless they provide a stronger level of protection. This may include prescription drug monitoring programs, to the extent that they require covered entities to provide protected health information to the state database. However, the Secretary of HHS may determine that the law is not preempted if he or she determines that "the state law has as its principal purpose the regulation of the manufacture, registration, distribution, dispensing, or other control of any controlled substances."[24]

Health Information and Security Privacy Collaboration Project

Many states vary on their application of HIPAA—some have not adopted policies stronger than HIPAA, while some have adopted policies that are stronger than HIPAA. The inconsistency in the way in which HIPAA is interpreted and applied and the differences between state privacy laws and HIPAA have caused great concern amongst those interested in a nationwide HIE.

RTI, Inc. (RTI), a private, nonprofit corporation, was awarded a contract from the United States Department of Health and Human Services in 2005 totaling $11.5 million. The purpose of the project was to asses variations in organization-level business practices, policies, and state laws that affect HIE and to identify and propose practical ways to reduce the variation to those "good" practices that will permit interoperability while preserving the necessary privacy and security requirements set by the local community.[25] RTI sub-contracted with 34 states and territories to complete the project. The state of Florida was among the sub-contract recipients.

The state teams were required to convene steering committees comprised of both public and private leaders and work groups with specific charges through which all research and recommendations would be made.

The project enabled states to engage stakeholders on a local level to identify the barriers to an HIE specific to their location. The final report issued by RTI in June of 2007, "Assessment of Variation and Analysis of Solutions," outlines issues that state project teams all identified as possibly affecting a

[20] Summary of the HIPAA Privacy Rule, Office for Civil Rights, United States Department of Health and Human Services http://www.hhs.gov/ocr/privacysummary.pdf (last updated May 2003).
[21] *Id.*
[22] Generally, health plans, health care providers, and health care clearinghouses.
[23] Protected health information includes information relating to (a) the individual's past, present or future physical or mental health or condition, (b) the provision of health care to the individual, or (c) the past, present, or future payment for the provision of health care to the individual,
[24] 45 C.F.R. §160.203(a)(2) (2007).
[25] Dimitropoulos, Linda L., "Privacy and Security Solutions for Interoperable Health Information Exchange, Assessment of Variation and Analysis of Solutions," June 30, 2007, 2-1.

private and secure nationwide HIE along with possible solutions to the identified challenges, both at the state and national levels.

Among the challenges identified were: differing interpretations and applications of HIPAA privacy rule requirements, misunderstandings and differing applications of the HIPAA security rule, trust in the security of health information exchange, fragmented and conflicting state laws relating to privacy and security of health information exchange, and disclosure of personal health information. Among the solutions to the challenges identified by the participating states were: creation of uniform state policy as it relates to the interpretation and application of the HIPAA rules, consolidation of state statutes related to health information exchange, creation of national standards for a master patient index or record locater to accurately match records to the appropriate patient, and education of consumers and healthcare professionals about federal and state privacy law.[26]

With regard to Florida law, the agency's Privacy and Security Project Legal Work Group identified several barriers to health information exchange in statutory law, including:

- Inconsistent language regarding the disclosure of patient records without consent in the hospital and physician patient records sections.[27]
- Lack of authority for treating physicians to access lab results directly from the clinical lab under chapter 483, F.S.[28]

Effect of Proposed Changes

The bill clarifies that a patient's records held by a hospital may be disclosed without the consent of the patient, or his or her legal representative, to health care practitioners and providers currently involved in the care or treatment of the patient. The bill clarifies that lab results may be provided by a clinical laboratory to other health care practitioners and providers involved in the care or treatment of the patient for use in connection with the treatment of the patient.

The bill also creates the Florida Electronic Health Records Exchange Act and defines several common health information technology terms such as electronic health records system, health information exchange, and health record. The bill provides civil immunity for a health care provider who, in good faith, releases or accesses a patient's health record without the patient's consent for the treatment of an emergency medical condition when the provider is unable to obtain the patient's consent due to the patient's condition. In addition, the bill requires AHCA to create a universal patient authorization form that may be used by a health care provider for the release of health records. The bill states that anyone who forges a signature on such form or obtains the form or health record of another person under false pretenses may be liable for compensatory damages plus attorney's fees and costs. The bill also provides civil immunity for a health care provider who releases a health record in reliance on information provided to the provider on a properly-completed form.

Finally, the bill creates an Electronic Medical Records System Adoption Loan Program, subject to a specific appropriation. The agency is required to provide one-time, no-interest loans to physicians or business entities whose shareholders are physicians for the initial costs of implementing an electronic medical records system. The agency is prohibited from providing a loan to an applicant who has:

- Been found guilty of violating s. 456.072(1) or been disciplined under the applicable licensing chapter in the previous 5 years.
- Been found guilty of or entered a plea of guilty or nolo contendere to a violation of ss. 409.920 or 409.9201, F.S. (Medicaid fraud).
- Been sanctioned pursuant to s. 409.913 for fraud or abuse (Medicaid fraud).

[26] *Id.* at ES-5 through ES-8.
[27] Sections 395.3025 and 456.057, F.S., respectively.
[28] Section 483.181, F.S.

The agency is authorized to distribute the loan in a lump-sum amount, and the loan proceeds may be used to purchase hardware and software, as well as subscription services, professional consultations, and staff training. The agency is required to provide loan recipients a list of electronic medical record systems recognized or certified by national standards-setting entities. The agency is further required to distribute a minimum of 25 percent of loan funds to physicians or business entities operating within a rural county. The loan must be repaid within 6 years and payments must commence within 3 months of the funding of the loan.

The physician or business entity must further provide the following security for the loan:

- An irrevocable letter of credit in an amount equal to the amount of the loan;
- An escrow account in an amount equal to the amount of the loan; or
- A pledge of the accounts receivable of the physician or business entity.

If a physician or business entity defaults, and the default continues for 30 days, the entire balance of the loan becomes due and payable, subject to an interest rate of 18 percent annually.

B. SECTION DIRECTORY:

Section 1. Amends s. 395.3025, F.S., relating to patient and personnel records; copies; examination.

Section 2. Creates s. 408.051, F.S., relating to the Florida Electronic Health Records Exchange Act.

Section 3. Creates s. 408.0512, F.S., relating to the electronic health records system adoption loan program.

Section 4. Amends s. 409.916, F.S., relating to the grants and donations trust fund.

Section 5. Creates s. 456.0393, F.S., relating to electronic prescribing.

Section 6. Amends s. 483.181, F.S., relating to acceptance, collection, identification, and examination of specimens.

Section 7. Provides an effective date of upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   AHCA has requested three positions to review and process loan applications, monitor loan repayments, and conduct outreach activities. This request is based on an estimated 300 loan applications, which represents approximately 1 percent of licensed physicians. AHCA has estimated a $252,222 fiscal impact in Fiscal Year 2009-10 and $160,102 fiscal impact in Fiscal Year 2010-11, exclusive of loan funding.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill will authorize AHCA to provide one-time, no-interest loans to physicians or business entities whose shareholders are physicians for the initial costs of implementing an electronic medical records system.

D. FISCAL COMMENTS:

The fiscal impact estimated by AHCA is based on implementing the loan program created in the bill. Since the loan program is subject to a specific appropriation, the fiscal impact appears to be indeterminate. In addition, if AHCA were to seek a federal grant under the ARRA to establish an EHR loan program, AHCA would be authorized to use up to 4 percent of the grant funds to pay the reasonable costs of administering the program. These administrative funds may ameliorate AHCA's estimated fiscal impact.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not require counties or municipalities to spend funds or take action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that municipalities have to raise revenues.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The agency is provided sufficient rulemaking authority to implement the provisions of this bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On March 25, 2009, the Health Care Regulation Policy Committee adopted one amendment to the bill. The amendment:

- Revised the health information technology definitions in the bill to conform to the federal American Recovery and Reinvestment Act of 2009.
- Deleted the Electronic Medical Records System Adoption Loan Program and replaced it with the Electronic Health Records System Adoption Loan Program. The new program authorizes the agency to create the loan fund subject to the availability of private or public donations and funding through s. 3014 of the federal Public Health Service Act. The amendment also made conforming changes to the agency's Grants and Donations Trust Fund to authorize the agency to deposit donations into the trust fund.
- Effective January 1, 2012, requires physicians, upon licensure renewal, to demonstrate the meaningful use of electronic prescribing software during the current licensure cycle.

The bill was reported favorably with a committee substitute. The analysis is drafted to the committee substitute.