

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 569 Medical Records
SPONSOR(S): Health Innovation Subcommittee, Fitzenhagen
TIED BILLS: IDEN./SIM. **BILLS:** SB 826

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health Innovation Subcommittee	13 Y, 2 N, As CS	Siples	Poche
2) Health Care Appropriations Subcommittee			
3) Health & Human Services Committee			

SUMMARY ANALYSIS

Under both federal and state law, a health care facility or health care practitioner is authorized to charge a patient for the costs associated with the reproduction of the patient's medical records. Federal law provides that a reasonable, cost-based fee may be charged. Florida law specifies the fee that certain health care facilities may charge. However, it does not specify the fee that health care practitioners may charge but provides that it may be no more than the actual cost of copying, including labor costs. Additionally, the Department of Health (DOH) and regulatory boards are authorized to specify a fee by administrative rule.

CS/HB 569 establishes guidelines for fees a licensed health care facility and a health care practitioner may charge for the reproduction of patient medical records, aligning Florida law with federal law. As a result, the bill repeals the current statutory fee a licensed health care facility may charge for the reproduction of medical records. The bill also repeals the authority of the health care practitioner regulatory boards or DOH to promulgate rules establishing a fee for the reproduction of medical records or reports.

Under the bill, licensed facilities, health care practitioners, or entities fulfilling requests on behalf of a facility or practitioner may charge a reasonable fee based on the actual costs of copying a patient's medical records, including labor, supplies, postage, and preparing a summary or explanation of a patient's medical records. For standard types of requests, the bill authorizes a health care facility, health care practitioner, or an entity fulfilling a request on behalf of a facility or practitioner to develop a schedule of charges for the cost of labor to produce medical records, so long as the schedule only charges for those labor costs that are permissible under the bill.

A licensed facility, health care practitioner, or an entity fulfilling a request on behalf of a facility or practitioner has the option to charge a flat fee of no more than \$6.50 to provide an electronic copy of patient records and reports that are maintained electronically. The flat fee includes all labor, supplies, and applicable postage. The bill authorizes a health care practitioner to include the cost of labor and postage in its fee for reproducing or for the digital scanning of medical records.

The bill authorizes a health care practitioner to release copies of medical records or reports to a patient's guardian, curator, attorney, or personal representative, or in the absence of such person, to the next of kin of a decedent or the parent of the minor, or to any other person designated in writing by the patient or those authorized to access medical records on behalf of a patient.

The bill may have an indeterminate, insignificant fiscal impact on the DOH, and no fiscal impact on local government.

The bill provides that the act shall take effect upon becoming a law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Health Insurance Portability and Accountability Act

The federal Health Insurance Portability and Accountability Act (HIPAA), enacted in 1996, protects personal health information (PHI).¹ In 2000, the U.S. Department of Health and Human Services promulgated privacy rules which established national standards to protect medical records and other PHI.² These rules address, among other things, the use and disclosure of an individual's PHI.

Only certain entities are subject to HIPAA's provisions. These "covered entities" include:

- Health plans;
- Health care providers;
- Health care clearinghouses; and
- Business associates of any of the above.³

HIPAA requires the disclosure of an individual's PHI to the individual who is the subject of the PHI information or his or her personal representative,⁴ upon his or her request.⁵ Under HIPAA, if an individual requests a copy of his or her PHI or a summary or explanation of such information, a covered entity may charge a reasonable, cost-based fee, provided the fee includes only the cost of:

- Labor for copying the PHI, whether in paper or electronic form;⁶
- Supplies for creating the paper copy or electronic media if the individual requests that the electronic copy be provided on portable media;
- Postage, when the individual has requested the copy, or summary or explanation, be mailed; and
- Preparing an explanation or summary of the PHI.⁷

The fee may not include costs associated with verification; documentation; searching for and retrieving personal health information; maintaining systems; or recouping capital for data access, storage, or infrastructure or other costs not listed above, even if such costs are authorized by state law.⁸ In lieu of calculating the actual cost of labor individually for each request, a covered entity may develop a schedule of costs for labor based on the average labor costs to fulfill standard types of requests, as

¹ Pub. L. No. 104-191 (1996). Protected health information includes all individually identifiable health information held or transmitted by a covered entity or its business associate.

² U.S. Department of Health and Human Services, *Health Information Privacy*, available at <https://www.hhs.gov/hipaa/for-professionals/privacy/index.html> (last visited March 23, 2017). The rules were modified in 2002.

³ U.S. Department of Health and Human Services, Office for Civil Rights, *Summary of the HIPAA Privacy Rule*, (last rev. May 2003), available at <https://www.hhs.gov/sites/default/files/privacysummary.pdf>.

⁴ Supra, FN 2. A personal representative is generally a person with authority under state law to make health care decisions on behalf of an individual.

⁵ Supra, FN 3. HIPAA limits the access to psychotherapy notes, certain lab results, and information compiled for legal proceedings. A covered entity may also deny access to personal health information in certain situations, such as when a health care practitioner believes access could cause harm to the individual or others.

⁶ U.S. Department of Health and Human Services, *Individuals' Right under HIPAA to Access their Health Information 45CFR§ 164.524*, available at <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/#maximumflatfee> (last visited March 23, 2017).

Examples of the type of labor included is the labor to photocopy PHI, scanning paper PHI into an electronic format, converting electronic PHI into the format requested, transferring PHI from the covered entity's system to another delivery mechanism, such as a web portal or e-mail, or creating and executing a mailing or e-mail with the responsive PHI.

⁷ 45 C.F.R. s. 164.524(c)(4).

⁸ Supra, FN 6.

long as the types of labor costs include only those costs permitted under HIPAA and are reasonable.⁹ A per page fee may be charged only when the PHI is maintained in paper format and the individual requests a paper copy of the PHI or asks that the paper PHI be scanned into electronic format.¹⁰

A covered entity may charge individuals a flat fee for all requests for electronic copies of PHI maintained electronically, inclusive of all labor, supplies, and any applicable postage. The flat fee may not exceed \$6.50.¹¹ The flat fee is an option for entities that do not want to go through the process of calculating actual or average allowable costs for requests for electronic copies of PHI maintained electronically.

A covered entity must inform an individual of the approximate fees to be charged, in advance of completing the request.¹² Access to the individual's personal health records must be provided in a form or format requested by the individual if it is readily producible in such form or format, and must generally be provided within 30 days of the request.¹³ Under HIPAA, a covered entity must generally obtain an individual's written authorization to disclose PHI; however, there are circumstances in which a covered entity may release records without authorization.¹⁴

In general, HIPAA privacy rules preempt any state law that is contrary to its provisions.¹⁵ However, if the state law is more stringent, the state law will apply.

Access to Medical Records in Florida

Medical Records Held by Licensed Facilities

Licensed hospitals, ambulatory surgical centers, and mobile surgical centers must timely provide a true and correct copy of a patient's records in its possession upon the request of the patient for such records, in writing, after the patient's discharge.¹⁶ The records may also be released to the patient's guardian, curator, or personal representative, or in the absence of one of those persons, to the next of kin of a decedent or the parent of the minor, or to any other person designated in writing by such patient.

The fee a licensed facility may charge for the reproduction of medical records is determined by statute.¹⁷ For reproduction of paper records, the fee is limited to \$1.00 per page, plus sales tax and actual postage. A licensed facility may charge no more than \$2.00 for a non-paper record. A fee of up to \$1.00 may be charged for each year of records requested. These charges apply to all records furnished directly from the licensed facility or by a copy service on behalf of the facility. If a patient requests medical records so that he or she can continue receiving medical care, a licensed facility may not charge a patient for copying or searching for the records.¹⁸ A licensed facility must also allow a patient to review his or her original records in a manner that will ensure records will not be damaged, destroyed, or altered.

Although patient medical records are confidential, licensed facilities may disclose patient medical records without the patient's consent in certain circumstances, such as pursuant to a subpoena, to

⁹ Id.

¹⁰ Id. Per page fees for copies of PHI maintained electronically are not considered reasonable under HIPAA.

¹¹ Id.

¹² Supra, FN 2.

¹³ 45 C.F.R. s. 164.524.

¹⁴ Supra, FN 3. For example, PHI may be released without a patient's authorization for public health activities, law enforcement purposes, or for certain victims of abuse, neglect, or domestic violence.

¹⁵ 45 C.F.R. s. 160.203.

¹⁶ S. 395.3025, F.S. This does not apply to facilities that primarily provide psychiatric care or certain clinical records created at any licensed facility concerning certain mental health or substance abuse services.

¹⁷ S. 395.3025(1), F.S.

¹⁸ Id.

facility personnel involved in the care or treatment of the patient, or to certain state agencies required to review patient medical records to fulfill a statutory obligation.¹⁹

Medical Records Held by Health Care Practitioners

A licensed health care practitioner²⁰ who provides care or treatment to an individual must provide a copy of the patient medical records it has in its possession to the patient upon the request of the patient or his or her legal representative.²¹ The patient's medical records must be released without delay for legal review.

Although patient medical records are confidential, a practitioner may disclose patient medical records without the patient's consent in certain circumstances, such as pursuant to a subpoena, to a person who has furnished such care or treatment with the patient's consent, or to a regional poison control center for the purpose of treating and managing a poison episode.²²

Although Florida law does not specify the fee a health care practitioner may charge for the reproduction of patient medical records, it does provide that a practitioner may charge no more than the actual costs of copying, including reasonable staff time, or the amount specified in administrative rule by the appropriate regulatory board, or the Department of Health (DOH) if there is no board. This applies regardless of whether it is a paper record or the record is made available for digital scanning.²³ The Board of Medicine (Allopathic Board) and the Board of Osteopathic Medicine (Osteopathic Board) have promulgated rules related to the fees its licensees may charge for the duplication of patient medical records.

Florida Board of Osteopathic Medicine Rule

The Osteopathic Board promulgated a rule that limits the fee an osteopathic physician may charge to \$1.00 per page for the first 25 pages, and no more than 25 cents for each subsequent page, regardless of the requestor.²⁴ The rule further requires that a physician must comply with a patient's written request for records within 30 days of such request unless, there are circumstances beyond the physician's control that prevents such compliance. The rule authorizes a physician to charge the actual cost for reproducing certain documents, such as x-rays and other special kinds of records.²⁵ Actual costs include the materials, supplies, labor, and overhead costs associated with such duplication.

Florida Board of Medicine Rule

The Allopathic Board promulgated a rule that encourages allopathic physicians to provide patients with a copy of their medical records free of charge, especially if the patient is disadvantaged.²⁶ However, the Allopathic Board recognizes that the cost to reproduce some medical records may be financially burdensome on the physician and therefore, limits the fee that may be charged to a patient or governmental entity for medical records to \$1.00 per page for the first 25 pages, and no more than 25

¹⁹ S. 395.3025(4), F.S.

²⁰ A health care practitioner is any person licensed under ch. 457, F.S., (acupuncture); ch. 458, F.S., (medical practice); ch. 459, F.S., (osteopathic medicine); ch. 460, F.S., (chiropractic medicine); ch. 461, F.S., (podiatric medicine); ch. 462, F.S., (naturopathy); ch. 463, F.S., (optometry); ch. 464, F.S., (nursing); ch. 465, F.S., (pharmacy); ch. 466, F.S., (dentistry, dental hygiene, and dental laboratories); ch. 467, F.S., (midwifery); part I, part II, part III, part V, part X, part XIII, or part XIV of ch. 468, F.S., (speech language pathology and audiology, nursing home administration, occupational therapy, respiratory therapy, dietetics and nutrition practice, athletic trainers, or orthotics, prosthetics, and pedorthics); ch. 478, F.S., (electrolysis); ch. 480, F.S., (massage practice); part III or part IV of ch. 483, F.S., (clinical laboratory personnel or medical physicists); ch. 484, F.S., (dispensers of optical devices and hearing aids); ch. 486, F.S., (physical therapy practice); ch. 490, F.S., (psychological services); or ch. 491, F.S., (clinical, counseling, and psychotherapy services).

²¹ S. 456.057, F.S. In lieu of copies of certain medical records related to psychiatric or psychological treatment, a practitioner may release a report of examination and treatment.

²² S. 456.057(7)-(9) F.S.

²³ S. 456.057(17), F.S.

²⁴ Rule 64B15-15.003, F.A.C.

²⁵ Id.

²⁶ Rule 64B8-10.003, F.A.C.

cents for each subsequent page. For all other entities, a physician may charge up to \$1.00 per page. The rule authorizes a physician to charge the actual cost for reproducing certain documents, such as x-rays and other special kinds of records.²⁷ Actual costs include the materials, supplies, labor, and overhead costs associated with such duplication.

In 2012, the Allopathic Board proposed an amendment to its rule to address the costs of reproduction of medical records which were stored in electronic format.²⁸ The Allopathic Board issued proposed language in May 2013, which would have authorized a fee of \$1.00 per page, regardless of format in which the medical records were stored. The Allopathic Board held nine public hearings between June 2013 and January 2015, and subsequently published a notice of change to the proposed rule in March 2015.²⁹ The notice of change indicated that based on a written inquiry by the Joint Administrative Procedures Committee, the Board needed to revise its Statement of Estimated Regulatory Costs to require legislative ratification.³⁰ The notice of change also indicated that overhead costs were deleted from the definition of actual costs, postage was added to the definition of overhead costs, and a statement was added that accessing medical records through a patient portal does not constitute reproduction of medical records. Four petitions challenging the proposed rule as an invalid exercise of delegated legislative authority were filed with the Division of Administrative Hearings (DOAH) in response.³¹

The petitioners alleged the proposed rule increased the costs of reproducing records, violated HIPAA which limits the charge to the actual cost of producing copies of medical records, violated s. 457.057(17), F.S., which limits the charge to the actual cost of copying records, and creates a distinction based on the medium in which the copies are produced, was arbitrary and capricious, and failed to consider less costly alternatives that substantially accomplish the statutory objectives. A hearing on the merits of the case was held in September 2015.

DOAH upheld the proposed rule, finding that the petitioners failed to present evidence that the proposed rule was an invalid exercise of delegated legislative authority. Specifically, the court held that s. 457.057(17), F.S., allows a practitioner to charge no more than the actual cost of copying records or the amount specified in administrative rule by the appropriate board, or department when there is no board. Therefore, the Board was acting pursuant to its delegated legislative authority. Further, the court held that the evidence presented failed to establish that the Board exceeded its grant of rulemaking authority, that the proposed rule was vague, and that the rule is an invalid exercise of delegated legislative authority or is arbitrary or capricious.³² The decision was appealed to the First District Court of Appeals.

In August 2016, the Board filed a Motion to Close Case and Relinquish Jurisdiction in the appellate case.³³ According to the motion, the Board determined that the proposed rule should be withdrawn and the existing rule repealed based on guidance issued by the U.S. Department of Health and Human Services that clarified the fees that may be charged for the reproduction of medical records under

²⁷ Id.

²⁸ 38 Fla. Admin. Reg. 61 (October 30, 2012), available at https://www.flrules.org/Gateway/View_notice.asp?id=12212705 (last visited March 25, 2017).

²⁹ 41 Fla. Admin Reg. 49 (March 12, 2015), available at https://www.flrules.org/Gateway/View_notice.asp?id=15773963 (last visited March 25, 2017).

³⁰ Legislative ratification of agency rules is required if the proposed rule will likely have an adverse impact on economic growth, private sector job creation, or private sector investment in excess of \$1 million in the aggregate within 5 years of implementation; is likely to have an adverse effect on business competitiveness, productivity, or innovation in excess of \$1 million in the aggregate within 5 years of implementation; or is likely to increase regulatory costs, including transactional costs in excess of \$1 million in the aggregate within 5 years of implementation.

³¹ The cases were filed by Daniel R. Fernandez (DOAH Case No. 15-1774RP), Dax J. Lonetto, Sr., PLLC (DOAH Case No.15-1175RP), Florida Justice Association (DOAH Case No.15-1778RP), and Florida Consumer Action Network, Inc. (DOAH Case No. 15-1794RP). The four cases were consolidated into DOAH Case No. 15-1774-RP. The court granted BACTES Imaging Solutions, Inc., HealthPort Technologies, LLC and the Florida Medical Association permission to intervene in the case.

³² *Daniel R. Fernandez, et al. v. Department of Health, Board of Medicine*, Case No. 15-774RP (DOAH Dec. 8, 2015).

³³ On file with the Health Innovation Subcommittee.

HIPAA. In September 2016, the court denied the motion with leave to refile. Oral arguments were held on March 21, 2017.

Effect of Proposed Changes

CS/HB 569 repeals current law regarding the fees a licensed facility or a health care practitioner may charge for reproduction of patient medical records and reports. Under the bill, a facility, health care practitioner, or an entity fulfilling a request on behalf of a facility or health care practitioner may charge a reasonable fee based on the actual costs of copying, including:

- The labor required for copying such records and reports, whether on paper or in electronic format. Such labor is limited to the labor for creating and delivering the records or reports in the format requested or agreed upon by the requestor and does not include the cost of reviewing the request or searching for, retrieving, and otherwise preparing the records and reports for copying;
- Supplies used to create a paper copy, or the electronic media necessary to furnish an electronic copy on a portable media device;
- Postage, if the records are to be mailed at the request of the requestor; and
- Preparing an explanation or summary of the patient records, if agreed to by the person requesting the records.

In lieu of determining the labor costs individually for each request, a facility, health care practitioner, or entity fulfilling the request on behalf of a facility or practitioner may develop a schedule of costs based on the average labor costs to fulfill standard requests. However, the schedule may only include those labor costs allowed under the bill.

A facility, health care practitioner, or entity operating on behalf of the facility or health care practitioner may charge a flat fee of no more than \$6.50 to provide an electronic copy of patient records and reports that are maintained electronically. The flat fee includes all labor, supplies, and applicable postage. The fee may not include:

- Costs associated with the maintenance of systems or data;
- Capital for data storage and maintenance;
- Labor associated with complying with the HIPAA privacy rule and other applicable laws;
- Administrative costs;
- Costs associated with outsourcing responses to individual requests for patient records and reports; and
- Other costs not associated with the provision of patient medical records.

The bill authorizes a health care practitioner, or a business operating on behalf of the health practitioner, to release copies of medical records or reports to the patient that is the subject of such medical records or report. A health care practitioner may also release medical records or reports to the patient's guardian, curator, or personal representative, or in the absence of such person, the next of kin of a decedent or the parent of a minor, or to any designated in writing by an authorized individual.

The bill repeals the authority of the regulatory boards or the Department of Health to promulgate rules establishing a fee for the reproduction of medical records or reports.

The bill provides that the act shall take effect upon becoming a law.

B. SECTION DIRECTORY:

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

Section 2: Amends s. 456.057, F.S., relating to ownership and control of patient records; report or copies of records to be furnished; disclosure of information.

Section 3: Provides that the act shall take effect upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

To the extent that state entities that provide health care services charge for reproduction of medical records, the entities may receive revenue from providing copies of medical records and reports.

2. Expenditures:

The Department of Health may incur an insignificant negative fiscal impact to repeal the rules related to the fees that may be charge for the reproduction of medical records. To the extent that state entities that provide health care services charge for reproduction of medical records, the entities may lose revenue if the fee charged includes costs that are not allowed under the provisions of the bill.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

If a facility or health care practitioner charges a copying fee that is higher than what is allowable under the bill for the reproduction of patient records, this may have a negative economic impact on that facility or health care practitioner.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill repeals the rulemaking authority of the regulatory boards and the Department of Health to establish fees for the reproduction of medical records, which is no longer necessary as the bill defines, in statute, the fees that may be charged.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 27, 2017, the Health Innovation Committee adopted an amendment that:

- Removed attorneys from the list of individuals to whom a facility must provide the medical records of a patient, upon request and after discharge of the patient;
- Authorized a facility or health care practitioner to charge for the actual cost of preparing an explanation or summary of a patient's medical record, if requested;
- Authorized a facility or health care practitioner to develop a schedule of labor costs based on the average labor costs to fulfill standards types of requests, as long as the schedule includes those labor costs authorized under law;
- Clarified that the \$6.50 flat fee for electronic copies of medical records stored electronically may be charged in lieu of calculating the actual costs of labor, supplies, and postage; and
- Restructured the health care practitioner section for clarity and alignment with HIPAA guidelines.

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