What is the Mental Health Care Coordination/HIPAA Harmonization Bill?

Wisconsin mental health laws that were developed prior to the Federal HIPAA privacy and security laws place special restrictions on communications between a patient's treating psychiatrist and other physicians and providers that provide care to the patient.

The HIPAA Harmonization for Mental Health Care Coordination Bill, removes barriers in Wisconsin law to the coordination of care for persons with a mental health diagnosis that do not exist for persons that do not have a mental health diagnosis by aligning Wisconsin law with federal HIPAA law for disclosures made for treatment, payment, and health care operations.
What is the Mental Health Care Coordination/HIPAA Harmonization Bill?

- The bill was legislative priority for the Wisconsin Hospital Association and the WHA Behavioral Health Task Force.
- Drafting work began in the 2011–12 session.
- Gathered bi-partisan support in the Speaker’s Mental Health Task Force in 2013.
- Passed the Legislature in late January 2014.
- WHA is anticipating the Governor’s signature by the end of April.

What does the law do?

- If a disclosure is for treatment, payment, or health care operations purposes and the disclosure is permitted by HIPAA, then the disclosure is permitted by Wisconsin law.
- For mental health records, this means that mental health information (except for HIPAA psychotherapy notes…more on that later) may be disclosed without the patient’s consent to the patient’s other treating providers.
The new law does NOT:

- Require the disclosure of mental health records for TPO without consent (the law permits such disclosure).
- Change restrictions under 42 CFR Part 2 (AODA).
- Change anything for disclosures not made for TPO. §146.82 or §51.30 still regulate those disclosures.

Breaking down the new law…

**Creates a new §146.816, Wis. Stats.**

- The bill does not make amendments to §146.82 or §51.30…
- …But instead the new §146.816 preempts §51.30 and §146.82.

- Intentionally created a new section so that any future additional adoption of HIPAA standards as Wisconsin standards (e.g. disclosures to family members) can be placed in the new section.
Uses the HIPAA terminology rather than the §146.82 and §51.30 terminology

- §146.816(1) defines “covered entity,” “disclosure,” etc. as defined by HIPAA.

§146.816(2) preempts §51.30 and §146.82...

(2) Sections 51.30 (4) (a) and (e) and 146.82 and rules promulgated under s. 51.30 (12) do not apply to a use, disclosure, or request for disclosure of protected health information by a covered entity or its business associate that meets all the following criteria:

- What does 51.30(4)(a) say?
- What does 51.30(4)(e) say?
- What are the rules promulgated under s. 51.30(12)?
§146.816(2) preempts §51.30 and §146.82...

- What does 51.30(4)(a) say?

(a) *Confidentiality of records.* Except as otherwise provided in this chapter and ss. 118.125 (4), 610.70 (3) and (5), 905.03 and 905.04, all treatment records shall remain confidential and are privileged to the subject individual. Such records may be released only to the persons designated in this chapter or ss. 118.125 (4), 610.70 (3) and (5), 905.03 and 905.04, or to other designated persons with the informed written consent of the subject individual as provided in this section. This restriction applies to elected officials and to members of boards appointed under s. 51.42 (4) (a) or 51.437 (7) (a).

- What does 51.30(4)(e) say?

(e) *Notation of release of information.* Each time written information is released from a treatment record, a notation shall be made in the record by the custodian thereof that includes the following: the name of the person to whom the information was released; the identification of the information released; the purpose of the release; and the date of the release. The subject individual shall have access to such release data as provided in par. (d).

- But remember, apply the HIPAA rules on accounting of disclosures.
§146.816(2) preempts §51.30 and §146.82…

What are the preempted rules promulgated under s. 51.30(12)?

DHS 92 – Confidentiality of Treatment Records

DHS 92.03(h) No personally identifiable information in treatment records may be re-released by a recipient of the treatment record unless re-release is specifically authorized by informed consent of the subject individual, by this chapter or as otherwise required by law.

DHS 92.03(i) Any disclosure or re-release, except oral disclosure, of confidential information shall be accompanied by a written statement which states that the information is confidential and disclosure without patient consent or statutory authorization is prohibited by law.

...But only for uses and disclosures for treatment, payment, and health care operations...

(2) Sections 51.30 (4) (a) and (e) and 146.82 and rules promulgated under s. 51.30 (12) do not apply do a use, disclosure, or request for disclosure of protected health information by a covered entity or its business associate that meets all the following criteria:

(b) The covered entity or its business associate makes the use, disclosure, or request for disclosure in any of the following circumstances:
   1. For purposes of treatment.
   2. For purposes of payment.
   3. For purposes of health care operations.
Breaking down the new law...

§146.816(2) preempts §51.30 and §146.82...

...But only for uses and disclosures for treatment, payment, and health care operations...

...And only if the use or disclosure is in compliance with HIPAA.

(2) Sections 51.30 (4) (a) and (e) and 146.82 and rules promulgated under s. 51.30 (12) do not apply to a use, disclosure, or request for disclosure of protected health information by a covered entity or its business associate that meets all the following criteria:

(a) The covered entity or its business associate makes the use, disclosure, or request for disclosure in compliance with 45 CFR 164.500 to 164.534.

(b) The covered entity or its business associate makes the use, disclosure, or request for disclosure in any of the following circumstances:
   1. For purposes of treatment.
   2. For purposes of payment.
   3. For purposes of health care operations.

Breaking down the new law...

New Wisconsin obligation on ch. 51 “treatment facilities” to comply with the HIPAA notice of privacy practices.

(3) A covered entity that is a treatment facility shall comply with the notice of privacy practices obligations under 45 CFR 164.520, including the obligation to include in plain language in the notice of privacy practices a statement of the individual’s rights with respect to protected health information and a brief description of how the individual may exercise those rights including the right to request restrictions on uses and disclosures of protected health information about the individual to carry out treatment, payment, or health care operations as provided in 45 CFR 164.522.

- It was important to consumer advocates that HIPAA’s “right to request a restriction” provision be specifically referenced in WI’s HIPAA Harmonization statute.
Breaking down the new law…

**Requirement on DHS to develop a plain language summary of health information privacy rights.**

(4) The department shall make a comprehensive and accessible document written in commonly understood language that explains health information privacy rights available to all applicable health care facilities in the state and on the department’s Internet site.

- Intended to be modeled on documents for consumers available on HHS’s website: [http://www.hhs.gov/ocr/privacy/hipaa/understanding/consumers/index.html](http://www.hhs.gov/ocr/privacy/hipaa/understanding/consumers/index.html).

Revisiting HIPAA’s Treatment of Mental Health

- HIPAA does not treat mental health information differently, except for “psychotherapy notes.”
- **45 CFR 164.501**
  - *Psychotherapy notes means notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual’s medical record.*
  - *Psychotherapy notes excludes medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: Diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date.*
**Revisiting HIPAA’s Treatment of Mental Health**

- HIPAA does not treat mental health information differently, except for “psychotherapy notes.”
- 45 CFR 164.508(a)(2)
  
  (2) Authorization required: Psychotherapy notes. Notwithstanding any provision of this subpart, other than the transition provisions in § 164.532, a covered entity must obtain an authorization for any use or disclosure of psychotherapy notes, except: (i) To carry out the following treatment, payment, or health care operations: (A) Use by the originator of the psychotherapy notes for treatment; (B) Use or disclosure by the covered entity for its own training programs in which students, trainees, or practitioners in mental health learn under supervision to practice or improve their skills in group, joint, family, or individual counseling; or (C) Use or disclosure by the covered entity to defend itself in a legal action or other proceeding brought by the individual; (ii) A use or disclosure that is required by § 164.502(a)(2)(ii) or permitted by § 164.512(a); § 164.512(d) with respect to the oversight of the originator of the psychotherapy notes; § 164.512(g)(1); or §164.512(j)(1)(i).

**Revisiting HIPAA’s Right to Request Provisions**

- Pursuant to 45 CFR 164.522, a patient has a right to request that their health information not be shared with other treating providers. Further, HIPAA provides that if a patient and his/her health care provider agree to not share mental health or other health information with other treating providers, the health care provider must abide by such an agreement. HIPAA does not require a provider to agree to do what the patient asks, particularly if it could affect the patient’s care.
Revisiting HIPAA’s Right to Request Provisions
http://www.hhs.gov/ocr/privacy/hipaa/understanding/consumers/consumer_rights.pdf

“Let your providers or health insurance companies know if there is information you do not want to share. You can ask that your health information not be shared with certain people, groups, or companies. If you go to a clinic, for example, you can ask the doctor not to share your medical records with other doctors or nurses at the clinic. You can ask for other kinds of restrictions, but they do not always have to agree to do what you ask, particularly if it could affect your care.”

Panel discussion:
What are the practical implications for health care providers as they implement the new law?