

MAINE STATE LEGISLATURE

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LAWS
OF THE
STATE OF MAINE

AS PASSED BY THE

ONE HUNDRED AND EIGHTEENTH LEGISLATURE

SECOND REGULAR SESSION
January 7, 1998 to March 31, 1998

SECOND SPECIAL SESSION
April 1, 1998 to April 9, 1998

THE GENERAL EFFECTIVE DATE FOR
SECOND REGULAR SESSION
NON-EMERGENCY LAWS IS
JUNE 30, 1998

SECOND SPECIAL SESSION
NON-EMERGENCY LAWS IS
JULY 9, 1998

PUBLISHED BY THE REVISOR OF STATUTES
IN ACCORDANCE WITH MAINE REVISED STATUTES ANNOTATED,
TITLE 3, SECTION 163-A, SUBSECTION 4.

J.S. McCarthy Company
Augusta, Maine
1997

All Other 71,760
 Capital Expenditures 9,000

Allocates funds for one
 Division Director position, one
 Staff Attorney position, one
 Nurse V position and operating
 costs necessary to establish a
 Consumer Health Care
 Division, including the
 expenses of the Consumer
 Health Care Division Advisory
 Council.

**DEPARTMENT OF
 PROFESSIONAL AND
 FINANCIAL
 REGULATION
 TOTAL**

 \$273,040

Sec. 7. Allocation. The following funds are allocated from Other Special Revenue to carry out the purposes of this Act.

1998-99

LEGISLATURE

Study Commissions - Funding

All Other \$200
 Provides funds for the travel
 and other necessary expenses
 of the legislative members of
 the Consumer Health Care
 Division Advisory Council.

See title page for effective date.

CHAPTER 793

H.P. 1225 - L.D. 1737

**An Act to Provide for Confidentiality
 of Health Care Information**

**Be it enacted by the People of the State of
 Maine as follows:**

PART A

Sec. A-1. 22 MRSA §1711, as enacted by PL 1977, c. 122, is amended to read:

§1711. Patient access to hospital medical records

If a patient of an institution licensed as a hospital by the State, after discharge from such institution, makes written request for copies of ~~his or her~~ the patient's medical records, the copies ~~shall~~ must, if available, be made available to the patient within a reasonable time unless, in the opinion of the hospital, it would be detrimental to the health of the patient to obtain the records. If the hospital is of the opinion that release of the records to the patient would be detrimental to the health of the patient, the hospital shall advise the patient that copies of the records ~~shall~~ will be made available to the patient's authorized representative upon presentation of a proper authorization signed by the patient. The hospital may exclude from the copies of medical records released any information related to a clinical trial sponsored, authorized or regulated by the federal Food and Drug Administration.

If an authorized representative for a patient requests, in writing, that a hospital provide the authorized representative with a copy of the patient's medical records and presents a proper authorization from the patient for the release of the information, copies ~~shall~~ must be provided to the authorized representative within a reasonable time.

A written request or authorization for release of medical records under this section satisfies the requirements of section 1711-C, subsection 3.

A patient may submit to a hospital an addition to the patient's medical records, which must be retained with the medical record by the hospital. If the hospital adds to the medical record a statement in response to the submitted addition, the hospital shall provide a copy to the patient.

Reasonable costs incurred by the hospital in making and providing copies of medical records and additions to medical records, ~~shall~~ must be borne by the requesting person and the hospital may require payment prior to responding to the request.

Release of a patient's medical records to a person other than the patient is governed by section 1711-C.

Sec. A-2. 22 MRSA §1711-A, as amended by PL 1991, c. 142, §1, is further amended to read:

§1711-A. Fees charged for records

Whenever a health care practitioner defined in section 1711-B furnishes requested copies of a patient's ~~medical treatment~~ record or a medical report or an addition to a treatment record or medical report to the patient, the charge for the copies or the report may not exceed the reasonable costs incurred by the health care practitioner in making and providing the copies or the report.

Sec. A-3. 22 MRSA §1711-B, sub-§1, ¶¶A and B, as enacted by PL 1991, c. 142, §2, are amended to read:

A. "Health care practitioner" has the same meaning as in ~~Title 24, section 2502~~ 1711-C, subsection 1, paragraph F. "Health care practitioner" also includes ~~"licensed clinical social workers" as defined in Title 32, chapter 83 and "marriage and family therapists" and "professional counselors" as defined in Title 32, chapter 119.~~

B. "Treatment records" means all records relating to a patient's diagnosis ~~and~~, treatment ~~and~~ care, including x rays, performed by a health care practitioner.

Sec. A-4. 22 MRSA §1711-B, sub-§2, as enacted by PL 1991, c. 142, §2, is amended to read:

2. Access. ~~Upon written consent of the person to whom copies of records must be released pursuant to this section authorization executed in accordance with section 1711-C, subsection 3, a health care practitioner shall release copies of all treatment records of a patient or a narrative containing all relevant information in the treatment records to the patient. The health care practitioner may exclude from the copies of treatment records released any personal notes that are not directly related to the patient's past or future treatment and any information related to a clinical trial sponsored, authorized or regulated by the federal Food and Drug Administration. The copies or narrative must be released to the designated person within a reasonable time.~~

If the practitioner believes that release of the records ~~to the patient~~ is detrimental to the health of the patient, the practitioner shall advise the patient that copies of the treatment records or a narrative containing all relevant information in the treatment records will be made available to the patient's authorized representative upon presentation of a written authorization signed by the patient. The copies or narrative must be released to the authorized representative within a reasonable time.

Except as provided in subsection 3, release of a patient's treatment records to a person other than the patient is governed by section 1711-C.

Sec. A-5. 22 MRSA §1711-B, sub-§3, ¶¶B and C, as enacted by PL 1991, c. 142, §2, are amended to read:

B. The parent, guardian ad litem or legal guardian of the person who is the subject of the record if the person is a minor, or the legal guardian if the person who is the subject of the record is mentally incompetent; ~~or~~

C. The designee of a durable ~~medical~~ health care power of attorney, ~~if the person who is the subject of the record is incompetent and executed such an instrument. executed by the person who is the subject of the record, at such time as the power of attorney is in effect; or~~

Sec. A-6. 22 MRSA §1711-B, sub-§3, ¶D is enacted to read:

D. The agent, guardian or surrogate pursuant to the Uniform Health-care Decisions Act.

Sec. A-7. 22 MRSA §1711-B, sub-§3-A is enacted to read:

3-A. Additions to treatment records. A patient may submit to a health care practitioner an addition to the patient's treatment records, which must be retained with the treatment record by the health care practitioner. If the health care practitioner adds to the treatment record a statement in response to the submitted addition, the health care practitioner shall provide a copy to the patient.

Sec. A-8. 22 MRSA §1711-C is enacted to read:

§1711-C. Confidentiality of health care information

1. Definitions. As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. "Authorized representative of an individual" or "authorized representative" means an individual's legal guardian; agent pursuant to Title 18-A, section 5-802; attorney-in-fact pursuant to Title 18-A, section 5-506; or other authorized representative or, after death, that person's personal representative. For a minor who has not consented to health care treatment in accordance with the provisions of state law, "authorized representative" means the minor's parent, legal guardian or guardian ad litem.

B. "Disclosure" means the release, transfer or provision of access to health care information in any manner.

C. "Health care" means preventative, diagnostic, therapeutic, rehabilitative, maintenance or palliative care, services, procedures or counseling, including appropriate assistance with disease or symptom management and maintenance, that affects an individual's physical, mental or behavioral condition, including individual cells or their components or genetic information, or the structure or function of the human body or any part of the human body. Health care includes prescrib-

ing, dispensing or furnishing to an individual drugs, biologicals, medical devices or health care equipment and supplies; providing hospice services to an individual; and the banking of blood, sperm, organs or any other tissue.

D. "Health care facility" or "facility" means a facility, institution or entity licensed pursuant to this Title that offers health care to persons in this State, including a home health care provider, hospice program and a pharmacy licensed pursuant to Title 32. For the purposes of this section, "health care facility" does not include a state mental health institute, the Elizabeth Levinson Center, the Aroostook Residential Center or Freeport Towne Square.

E. "Health care information" means information that directly identifies the individual and that relates to an individual's physical, mental or behavioral condition, personal or family medical history or medical treatment or the health care provided to that individual. "Health care information" does not include information that protects the anonymity of the individual by means of encryption or encoding of individual identifiers or information pertaining to or derived from federally sponsored, authorized or regulated research governed by 21 Code of Federal Regulations, Parts 50 and 56 and 45 Code of Federal Regulations, Part 46, to the extent that such information is used in a manner that protects the identification of individuals. The Board of Directors of the Maine Health Data Organization shall adopt rules to define health care information that directly identifies an individual. Rules adopted pursuant to this paragraph are major substantive rules as defined in Title 5, chapter 375, subchapter II-A.

F. "Health care practitioner" means a person licensed by this State to provide or otherwise lawfully provide health care or a partnership or corporation made up of those persons or an officer, employee, agent or contractor of that person acting in the course and scope of employment, agency or contract related to or supportive of the provision of health care to an individual.

G. "Individual" means a natural person who is the subject of the health care information under consideration and, in the context of disclosure of health care information, includes the individual's authorized representative.

H. "Third party" or "3rd party" means a person other than the individual to whom the health care information relates.

2. Confidentiality of health information; disclosure. An individual's health care information is

confidential and may not be disclosed by the health care practitioner or facility except as provided in subsection 3, 6 or 11. Nothing in this section prohibits a health care practitioner or health care facility from adhering to applicable ethical or professional standards provided that these standards do not decrease the protection of confidentiality granted by this section. Health care information disclosed pursuant to subsection 3, 6 or 11 retains its confidential nature after such disclosure and may be subsequently disclosed only if the written authorization to disclose allows future disclosures or if the disclosure is made pursuant to a separate written authorization to disclose or under circumstances stated in subsection 6 or 11.

3. Written authorization to disclose. A health care practitioner or facility may disclose health care information pursuant to a written authorization signed by an individual for the specific purpose stated in the authorization. An authorization to disclose health care information must be retained with the individual's health care information. An authorization to disclose is valid if it is in writing, whether as an original, facsimile or electronic form. An authorization to disclose must contain the following elements:

A. The name and signature of the individual and the date of signature. If the authorization is in electronic form, a unique identifier of the individual and the date the individual authenticated the electronic authorization must be stated in place of the individual's signature and date of signature;

B. The types of persons authorized to disclose health care information and the nature of the health care information to be disclosed;

C. The identity or description of the 3rd party to whom the information is to be disclosed;

D. The specific purpose or purposes of the disclosure and whether any subsequent disclosures may be made pursuant to the same authorization. An authorization to disclose health care information related to substance abuse treatment or care subject to the requirements of 42 United States Code, Section 290ee-3 (Supplement 1997) is governed by the provisions of that law;

E. The duration of the authorization;

F. A statement that the individual may refuse authorization to disclose all or some health care information but that refusal may result in improper diagnosis or treatment, denial of coverage or a claim for health benefits or other insurance or other adverse consequences;

G. A statement that the authorization may be revoked at any time by the individual by execut-

ing a written revocation, subject to the right of any person who acted in reliance on the authorization prior to receiving notice of revocation, instructions on how to revoke an authorization and a statement that revocation may be the basis for denial of health benefits or other insurance coverage or benefits; and

H. A statement that the individual is entitled to a copy of the authorization form.

4. Duration of written authorization to disclose. A written authorization to disclose may not extend longer than 30 months, except that the duration of an authorization for the purposes of insurance coverage under Title 24, 24-A or 39-A is governed by the provisions of Title 24, 24-A or 39-A, respectively.

5. Revocation of authorization to disclose. An individual may revoke a written authorization to disclose at any time, subject to the rights of any person who acted in reliance on the authorization prior to receiving notice of revocation. A revocation of authorization must be in writing and must be signed and dated by the individual. If the revocation is in electronic form, a unique identifier of the individual and the date the individual authenticated the electronic authorization must be stated in place of the individual's signature and date of signature. A revocation of authorization must be retained with the individual's authorization and health care information.

6. Disclosure without written authorization to disclose. A health care practitioner or facility may disclose, or when required by law must disclose, health care information without written authorization to disclose under the circumstances stated in this subsection or as provided in subsection 11. The circumstances in which disclosure may be made without written authorization to disclose include the following:

A. To another health care practitioner or facility for diagnosis, treatment or care of the individual as follows:

(1) In emergency circumstances; or

(2) In nonemergency circumstances:

(a) For a disclosure within the office, practice or organization of the health care practitioner or facility, when the disclosure is made for a purpose related to the provision of health care to the individual; or

(b) For a disclosure outside of the office, practice or organization of the health care practitioner or facility, when authorization is given orally by

the individual or may be inferred from the individual's conduct. Health care information related to an HIV test, HIV infection or HIV infection status, as defined in Title 5, section 19201, subsections 3, 4-A and 5, may not be disclosed in reliance on an authorization inferred from an individual's conduct. Health care information derived from mental health services provided by any of the following individuals may not be disclosed by any such individual in reliance on an authorization implied from an individual's conduct:

(i) A clinical nurse specialist licensed under the provisions of Title 32, chapter 31;

(ii) A psychologist licensed under the provisions of Title 32, chapter 56;

(iii) A social worker licensed under the provisions of Title 32, chapter 83;

(iv) A counseling professional licensed under the provisions of Title 32, chapter 119; and

(v) A physician specializing in psychiatry licensed under the provisions of Title 32, chapter 36 or 48.

A physician specializing in psychiatry may disclose any such information to a licensed pharmacist but solely for purposes related to prescribing, dispensing or furnishing medication to a patient;

B. To an agent, employee, independent contractor or a successor in interest of the health care practitioner or facility or to a member of a quality assurance, utilization review or peer review team to the extent necessary to carry out the practitioner's or facility's lawful purposes in diagnosing, treating or caring for the individual, including billing and collection, risk management, quality assurance, utilization review and peer review. Disclosure for a purpose listed in this paragraph is not a disclosure for the purpose of marketing or sales;

C. To a family or household member when an individual is receiving diagnosis, treatment or care in an emergency care facility or health care facility. A disclosure made pursuant to this paragraph may include only the presence and general health condition of the individual;

D. When a health care practitioner or facility that is providing or has provided diagnosis, treatment or care to the individual has determined, based on reasonable professional judgment, that the individual poses a direct threat of imminent harm to the health or safety of any individual. A disclosure pursuant to this paragraph must protect the confidentiality of the health care information consistent with sound professional judgment;

E. To federal, state or local governmental entities in order to protect the public health and welfare when reporting is required or authorized by law;

F. To federal, state or local governmental entities pursuant to statute, subpoena or court order for use in an investigation relating to the individual; a health care practitioner or facility; a health, life, disability insurance or health care benefits entity required to be licensed pursuant to Title 24 or 24-A; a 3rd party; or pursuant to a subpoena or court order in a civil proceeding filed in a court. The requesting governmental entity must specify the nature and type of health care information to be disclosed. For the purposes of this section, "governmental entity" includes a licensing board for a health care practitioner;

G. When necessary to conduct scientific research approved by an institutional review board or by the board of a nonprofit health research organization or when necessary for a clinical trial sponsored, authorized or regulated by the federal Food and Drug Administration. A person conducting research or a clinical trial may not identify any individual patient in any report arising from the research or clinical trial. For the purposes of this paragraph, "institutional review board" means any board, committee or other group formally designated by a health care facility and authorized under federal law to review, approve or conduct periodic review of research programs. Health care information disclosed pursuant to this paragraph that identifies an individual must be returned to the health care practitioner or facility from which it was obtained or must be destroyed when it is no longer required for the research or clinical trial. Disclosure for a purpose listed in this paragraph is not a disclosure for the purpose of marketing or sales;

H. To a person engaged in the assessment, evaluation or investigation of the provision of or payment for health care or the practices of a health care practitioner or facility or to an agent, employee or contractor of such a person, pursuant to statutory or professional standards or

requirements. Disclosure for a purpose listed in this paragraph is not a disclosure for the purpose of marketing or sales;

I. To a person engaged in the regulation, accreditation, licensure or certification of a health care practitioner or facility or to an agent, employee or contractor of such a person, pursuant to standards or requirements for regulation, accreditation, licensure or certification;

J. To a person engaged in the review of the provision of health care by a health care practitioner or facility or payment for such health care under Title 24, 24-A or 39-A or under a public program for the payment of health care or professional liability insurance for a health care practitioner or facility or to an agent, employee or contractor of such a person; or

K. To attorneys for a health care practitioner or facility as determined by the practitioner or facility to be required for adequate legal representation.

7. Confidentiality policies. A health care practitioner or facility shall develop and implement policies, standards and procedures to protect the confidentiality, security and integrity of health care information to ensure that information is not negligently, inappropriately or unlawfully disclosed. The policies, standards and procedures must state that information disclosed remains confidential and that the person to whom the information is disclosed must protect the confidentiality of the information.

8. Prohibited disclosure. A health care practitioner or facility may not disclose health care information for the purpose of marketing or sales without written or oral authorization for the disclosure.

9. Disclosures of additions to health care information. A health care practitioner or facility shall provide to a 3rd party a copy of an addition submitted by an individual to the individual's health care information if:

A. The health care practitioner or facility provided a copy of the original health care record to the 3rd party on or after January 1, 1999;

B. The addition was submitted by the individual pursuant to section 1711 or 1711-B and relates to diagnosis, treatment or care;

C. The individual requests that a copy be sent to the 3rd party and provides an authorization that meets the requirements of subsection 3; and

D. If requested by the health care practitioner or facility, the individual pays to the health care

practitioner or facility all reasonable costs requested by that practitioner or facility.

10. Requirements for disclosures. Except as otherwise provided by law, disclosures of health care information pursuant to this section are subject to the following requirements.

A. A health care practitioner or facility that discloses health care information pursuant to subsection 3 may not disclose information in excess of the information requested in the authorization.

B. A health care practitioner or facility that discloses health care information pursuant to subsections 3 and 6 may not disclose information in excess of the information reasonably required for the purpose for which it is disclosed.

C. If a health care practitioner or facility believes that release of health care information to the individual would be detrimental to the health of the individual, the health care practitioner or facility shall advise the individual and make copies of the records available to the individual's authorized representative upon receipt of a written authorization.

D. If a health care practitioner or facility discloses partial or incomplete health care information, as compared to the request or directive to disclose under subsection 3 or 6, the disclosure must expressly indicate that the information disclosed is partial or incomplete.

11. Health care information subject to other laws, rules and regulations. An authorization to disclose or a disclosure of health care information that is subject to the provisions of 42 United States Code, Section 290ee-3 (Supplement 1997); chapters 710 and 711; Title 5, section 200-E; Title 24 or 24-A; Title 34-B, section 1207; Title 39-A; or other provisions of state or federal law, rule or regulation is governed by those provisions.

12. Minors. If a minor has consented to health care in accordance with the laws of this State, authorization to disclose health care information pursuant to this section must be given by the minor unless otherwise provided by law.

13. Enforcement. This section may be enforced within 2 years of the date a disclosure in violation of this section was or should reasonably have been discovered.

A. When the Attorney General has reason to believe that a person has intentionally violated a provision of this section, the Attorney General may bring an action to enjoin unlawful disclosure of health care information.

B. An individual who is aggrieved by conduct in violation of this section may bring a civil action against a person who has unlawfully disclosed health care information in the Superior Court in the county in which the individual resides or the disclosure occurred. The action may seek to enjoin unlawful disclosure and may seek costs and a forfeiture or penalty under paragraph C. An applicant for injunctive relief under this paragraph may not be required to give security as a condition of the issuance of the injunction.

C. A person who violates this section commits a civil violation for which a forfeiture not to exceed \$1,000, payable to the State, may be adjudged for a negligent violation, plus costs. A person who violates this section is subject to a civil penalty not to exceed \$5,000, payable to the State, for an intentional violation, plus costs. If a court finds that intentional violations of this section have occurred after due notice of the violating conduct with sufficient frequency to constitute a general business practice, the person is subject to a civil penalty not to exceed \$10,000 for health care practitioners and \$50,000 for health care facilities, payable to the State. A civil penalty under this subsection is recoverable in a civil action.

14. Waiver prohibited. Any agreement to waive the provisions of this section is against public policy and void.

15. Immunity. A cause of action in the nature of defamation, invasion of privacy or negligence does not arise against any person for disclosing health care information in accordance with this section. This section provides no immunity for disclosing false information with malice or willful intent to injure any person.

16. Application. This section applies to all requests and directives to disclose health care information issued or received on or after January 1, 1999 and to all authorizations to disclose health care information executed on or after January 1, 1999.

Sec. A-9. Report. The Superintendent of Insurance shall report to the joint standing committee of the Legislature having jurisdiction over banking and insurance matters and the joint standing committee of the Legislature having jurisdiction over health and human services matters by January 1, 2000 on complaints against insurers, health maintenance organizations and managed care entities related to their requirements for collecting health care information from or about individuals. The report must contain any recommendations of the Superintendent for legislative or administrative action.

Sec. A-10. Effective date. This Part takes effect January 1, 1999 with the exception of section 9 of this Part which takes effect August 1, 1998.

PART B

Sec. B-1. 5 MRSA §19203, sub-§2, as amended by PL 1995, c. 404, §4, is further amended to read:

2. Designated health care provider. To a health care provider designated by the subject of the test in writing pursuant to Title 22, section 1711-C. ~~When a patient has authorized disclosure of HIV test results to a person or organization providing health care, the patient's health care provider may make these results available only to other health care providers working directly with the patient, and only for the purpose of providing direct medical or dental patient care.~~ Any health care provider who discloses HIV test results in good faith pursuant to this subsection is immune from any criminal or civil liability for the act of disclosing HIV test results to other health care providers;

Sec. B-2. 5 MRSA §19203, sub-§9, as repealed and replaced by PL 1987, c. 811, §3, is amended to read:

9. Medical records. As part of a medical record when release or disclosure of that record is authorized pursuant to ~~section 19203-D~~ Title 22, section 1711, 1711-B, subsection 1 or section 1711-C, subsection 3, 6 or 11; or

Sec. B-3. 5 MRSA §19203, last ¶, as repealed and replaced by PL 1987, c. 811, §3, is amended to read:

Nothing in this section may be construed as prohibiting the entry of an HIV test result on the patient's medical record ~~in accordance with this chapter.~~

Sec. B-4. 5 MRSA §19203-D, as amended by PL 1995, c. 404, §14, is repealed.

Sec. B-5. 22 MRSA §1711-B, sub-§5, as enacted by PL 1991, c. 142, §2, is amended to read:

5. HIV test. Release of information regarding the HIV infection status of a patient is governed by ~~Title 5, section 49203-D~~ 1711-C.

Sec. B-6. Effective date. This Part takes effect January 1, 1999.

Effective January 1, 1999, unless otherwise indicated.

CHAPTER 794

H.P. 1291 - L.D. 1836

An Act to Facilitate Delegation of the Federal Waste Discharge Permitting Program

Be it enacted by the People of the State of Maine as follows:

PART A

Sec. A-1. 30-A MRSA §4452, sub-§3, ¶G, as amended by PL 1991, c. 732, §3, is further amended to read:

G. The penalties for violations of ~~waste discharge licenses issued by the municipality pursuant to Title 38, section 413, subsection 8, or violations of a septage land disposal or storage site permit issued by the Department of Environmental Protection under Title 38, chapter 13, subchapter 1, are as prescribed in Title 38, section 349.~~

Sec. A-2. 38 MRSA §341-A, sub-§3, ¶B, as enacted by PL 1989, c. 890, Pt. A, §13 and affected by §40, is amended to read:

B. When the State receives authority to issue permits under the Federal Water Pollution Control Act, 33 United States Code 1982, Section 1251 et seq., as amended, a person may not serve as commissioner who receives, or during the 2 years prior to appointment has received, a significant portion of income directly or indirectly from license or permit holders or applicants for a license or permit under the Federal Water Pollution Control Act. For the purposes of this section, "a significant portion of income" means 10% or more of gross personal income for a calendar year, except that it means 50% or more if the recipient is over 60 years of age and is receiving that portion under retirement, pension or similar arrangement.

Sec. A-3. 38 MRSA §341-C, sub-§8, as enacted by PL 1989, c. 890, Pt. A, §13 and affected by §40, is amended to read:

8. Federal Water Pollution Control Act requirements. When the State receives authority to grant permits under the Federal Water Pollution Control Act, 33 United States Code 1982, Section 1251 et seq., as amended, a person may not serve as a board member who receives, or during the 2 years prior to appointment has received, a significant portion of income directly or indirectly from license or permit holders or applicants for a license or permit under the Federal Water Pollution Control Act. For