

SB 1328 Would Align Several Texas Laws with the HIPAA Privacy Rule

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On March 10, 2005, Senator Jane Nelson introduced Senate Bill 1328 (SB 1328),¹ which would amend several provisions within Texas' Family Code, Government Code, Health and Safety Code, Insurance Code, Labor Code, and Occupations Code to align them with the requirements set forth in the federal privacy rule ("Privacy Rule")² that implements the Administrative Simplification provisions of the Health Insurance Portability and Accountability Act of 1996.³ If passed, SB 1328 would simplify the compliance efforts of Texas hospitals, physicians, and other individuals and organizations that constitute covered entities under the Privacy Rule.

The Privacy Rule generally preempts contrary state laws.⁴ However, a state law will survive preemption if, among other things, the state law relates to the privacy of individually identifiable health information and is more stringent than the Privacy Rule.⁵ Because the Texas Legislature had enacted dozens of provisions relating to the privacy of individually identifiable health information before the Privacy Rule was adopted, many Texas hospitals, physicians, and other individuals and organizations became concerned about how they should determine whether a particular Texas law is more or less stringent than a provision in the Privacy Rule.

¹ S.B. 1328, 79th Leg., R.S. (Tx. 2005) [hereinafter, SB 1328], available at <http://www.capitol.state.tx.us/cgi-bin/tlo/textframe.cmd?LEG=79&SESS=R&CHAMBER=S&BILLTYPE=B&BILLSUFFIX=01328&VERSION=1&TYPE=B>.

² 45 C.F.R. Parts 160 and 164.

³ Pub. L. No. 104-191, § 264 (Aug. 21, 1996).

⁴ 45 C.F.R. § 160.203(a).

⁵ *Id.* § 160.203(b).

During its 78th Regular Session, the Texas Legislature passed Senate Bill 1136,⁶ which directed the Texas Attorney General (AG) to file a report with the presiding officer of each house of the Texas Legislature no later than November 1, 2004, identifying the Texas laws that are preempted by the Privacy Rule as well as the AG's recommendations for legislation to make such laws consistent with the Privacy Rule. The AG timely responded on November 1, 2004, by issuing a 465-page report.⁷

In its report, the AG found that the majority of the Texas laws reviewed were not preempted by the Privacy Rule. However, the AG did identify a few preempted provisions. For example, the current Texas Hospital Licensing Law generally permits a hospital to charge a reasonable fee for providing a patient with access to (including an examination or copy of) his or her hospital medical record. The Texas Hospital Licensing Law also permits a hospital to withhold such access until the patient pays the fee.⁸ The Privacy Rule, on the other hand, allows hospitals to charge reasonable cost-based fees for *copying* a medical record but not for allowing a patient to *look* at his or her medical record. In its report, the AG compared these provisions and concluded that the Texas Hospital Licensing Law provision is contrary to the Privacy Rule prohibition against charging for medical record examination. Accordingly, the AG recommended that the Texas Legislature amend the Texas Hospital Licensing Law to prohibit hospitals from charging fees not associated with copying.⁹ Other provisions the AG recommended

⁶ S.B. 1136, 78th Leg., R.S. (Tx. 2003), available at <http://www.capitol.state.tx.us/cgi-bin/tlo/textframe.cmd?LEG=78&SESS=R&CHAMBER=S&BILLTYPE=B&BILLSUFFIX=01136&VERSION=5&TYPE=B>.

⁷ OFFICE OF THE ATTORNEY GENERAL, PREEMPTION ANALYSIS OF TEXAS LAWS RELATING TO THE PRIVACY OF HEALTH INFORMATION & THE HEALTH INSURANCE PORTABILITY & ACCOUNTABILITY ACT & PRIVACY RULES (HIPAA), November 1, 2004 [hereinafter, AG REPORT], available at <http://www.law.uh.edu/healthlawperspectives/TxAGPreemptionAnalysis.pdf>.

⁸ TEX. HEALTH & SAFETY CODE § 241.154(a) and (b).

⁹ AG REPORT, *supra* note 7, at 227.

that the Texas Legislature amend or consider amending included, but were not limited to, Tex. Family Code § 264.408,¹⁰ Tex. Health & Safety Code § 262.030,¹¹ and Tex. Health & Safety Code § 595.004.¹²

In introducing SB 1328 this session, Senator Nelson appears to have taken the AG's recommendations to heart by proposing amendments to numerous provisions within Texas' Family Code, Government Code, Health and Safety Code, Insurance Code, Labor Code, and Occupations Code. Many of the revisions contained in SB 1328 simply clarify that if the individual or organization regulated under the Texas provision also is a covered entity for purposes of the Privacy Rule, then the covered entity must comply with the use, disclosure, and other requirements set forth in the Privacy Rule. However, SB 1328 also adds language specifically aligning several Texas provisions with the Privacy Rule. For example, SB 1328 adds new language to the Texas Hospital Licensing Law clarifying that Texas hospitals may not: (1) charge patients a fee for retrieving their medical records; or (2) withhold copies of their records for nonpayment of permitted fees, such as copying and postage fees.¹³

SB 1328 should simplify Texas health care providers' and other covered entities' efforts to comply with both Texas and federal law relating to the confidentiality of individually identifiable health information. If passed, the act would take effect September 1, 2005.¹⁴

¹⁰ *Id.* at 113.

¹¹ *Id.* at 274.

¹² *Id.* at 301.

¹³ SB 1328, *supra* note 1, § 18.

¹⁴ *Id.* at § 40.