Wisconsin Legislative Council
AMENDMENT MEMO

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2023 Senate Bill 1027 | **Senate Amendments 1 and 2**

2023 Senate Bill 1027 generally does all of the following: (1) modifies certain aspects of current law allowing certain next of kin to consent to an incapacitated individual's admission from a hospital to certain facilities and to make decisions regarding, and authorize expenditures for, the health care of the incapacitated individual; (2) requires the Department of Health Services (DHS) to allocate nursing home beds and oversee an application process for those beds; and (3) requires DHS to award grants to partnership groups to be designated as participating sites for a complex patient pilot program.

In short, Senate Amendment 1 contains various changes to the aspects of the bill described above, and Senate Amendment 2 adds provisions modifying current laws regulating pharmacy benefit managers (PBMs). The remainder of this memo describes current law, when relevant, the bill, and each amendment, organized by topic.

AUTHORITY OF NEXT OF KIN REGARDING INCAPACITATED INDIVIDUALS

Current Law

State law, under s. 50.06, Stats., allows certain family members and next of kin, based on a hierarchical order of priority, to consent to an incapacitated[1] individual's admission to a nursing home or a community based residential facility (CBRF) directly from a hospital, if all of the following apply:

- The incapacitated individual does not have a valid power of attorney for health care.
- The incapacitated individual has not been adjudicated incompetent in this state.
- No person who is listed in the same order of priority, or higher priority, disagrees with the proposed admission.
- No person in any level of priority who resides with the incapacitated individual disagrees with the proposed admission, unless the person consenting also resides with, or is the spouse or domestic partner of, the incapacitated individual.
- The individual for whom admission is sought is not diagnosed as developmentally disabled or as having a mental illness at the time of the proposed admission.
- A petition for guardianship and a petition for a protective placement of the individual are filed prior to the proposed admission.
- The incapacitated individual does not verbally object to or otherwise actively protest the admission.[2]

Under current law, an individual who consents to an admission may, for the incapacitated individual, make health care decisions to the same extent as a guardian of the person and authorize expenditures

[1] Current law specifies the standard for "incapacitated" and the procedural requirements for that determination.

[2] Note that if such an objection or protest occurs, the individual may be admitted to the facility, but notice to and an investigation by a county department must be commenced using a procedure specified in current law.

related to health care to the same extent as a guardian of the estate, unless the incapacitated individual has an agent under a durable power of attorney who is authorized to make expenditures for health care. This authority is in effect until the earliest of the following occurs:

- Sixty days have passed since the incapacitated individual's admission to the facility, though if no guardian has been appointed, the authority may be extended for another 30 days to allow the facility to initiate discharge planning for the incapacitated individual.
- The incapacitated individual is discharged from the facility.
- A guardian has been appointed for the incapacitated individual.

Senate Bill 1027

Senate Bill 1027 creates the option for a "patient's representative"[3] to consent to an incapacitated individual's admission directly from a hospital to a nursing home or CBRF subject to the same requirements under current law, with the following exceptions: (1) a petition for guardianship or protective placement is not required to be filed for the patient's representative to consent to admission; and (2) the authority of a patient's representative to make health care decisions and authorize expenditures relating to health care does not end until a court appoints a guardian to make such decisions for the incapacitated individual.

In order for the bill's exceptions to apply, the patient's representative must do all of the following:

- Acknowledge, in writing, agreement to make health care decisions on the incapacitated individual's behalf and provide the acknowledgment to the discharging hospital and the accepting facility.
- Promptly notify all of the incapacitated individual's family members that can be readily contacted that the representative may make decisions or authorize expenditures as provided in the bill.
- Provide a written statement to the discharging hospital and the accepting facility stating: (1) to his or her best knowledge, a family member in a higher priority class does not exist, or no family member in a higher priority class is willing to make health care decisions on the incapacitated individual's behalf; (2) to his or her best knowledge, the incapacitated individual does not have a health care agent or guardian of the person; and (3) the family members who have received notice as provided under the bill.

The discharging hospital and accepting facility must include a copy of the written acknowledgement and written statement in the incapacitated individual's health care record. The bill requires the admitting facility to notify a representative of the Board on Aging and Long-Term Care of an admission under the bill's provisions no later than 72 hours after the admission. The bill also identifies certain obligations under federal law applicable to hospitals and nursing homes relating to patient's rights.

The bill creates a judicial remedy under which any interested party may petition the court to review whether the patient's representative is acting in accordance with the known wishes or in the best interest of the incapacitated individual, and is exercising the degree of care, diligence, and good faith when acting on behalf of the incapacitated individual that an ordinarily prudent person exercises in his or her own affairs. The bill authorizes a court to issue orders that the court determines necessary to protect the incapacitated individual, including a non-exhaustive list of potential remedies.

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[3] The bill defines "patient's representative" to mean the individual who may consent to an admission using the same hierarchical order of priority among family members and next of kin that exists under current law.

Senate Amendment 1

Senate Amendment 1 modifies the bill's provisions regarding next of kin decision-making authority, as follows:

- Creates a sunset provision specifying that, after three years from the bill's effective date, a patient's representative may not consent to a facility admission in the manner created by the bill.
- Specifies that a patient's representative's authority under the bill ends not only if the court appoints a guardian, as provided under the bill, but also if either of the following occur: the incapacitated individual is discharged to a setting that is not a nursing home or CBRF; or a health care power of attorney that was not identified when the patient's representative was established is identified.
- Clarifies that the patient's representative's authority to make health care decisions includes the decision to enroll the incapacitated individual in the Medical Assistance program.
- Expands the conditions that must be met in order for a patient's representative to consent to an incapacitated individual's facility admission under the bill's provisions to include the following requirements:
    - The incapacitated individual must be admitted directly from a hospital inpatient unit.
    - The patient's representative must acknowledge, in writing, agreement to not only make health care decisions, as required under the bill, but also that the patient's representative does not have an activated power of attorney for health care, has not been adjudicated incompetent, agrees to authorize expenditures related to the incapacitated individual's health care, agrees to exercise the degree of care, diligence, and good faith that an ordinary prudent person exercise in his or her own affairs, and understands the role and responsibilities as the patient's representative.
- Requires that the patient's representative's notice to family members, as required under the bill, be in writing and also be provided to the incapacitated individual.
- Clarifies the ability to request a reevaluation of the determination that an individual is incapacitated if admitted to a nursing home or CBRF under the bill's provisions, and that the authority of a patient's representative ends if the individual is determined to no longer be incapacitated.
- Immunizes a health care facility, health care provider, and patient's representative from being charged with a crime, held civilly liable, or, as applicable, found guilty of unprofessional conduct for certain actions, as specified in the amendment, relating to the authority created in the bill, with exceptions, which are similar to certain immunity provisions under current law that exist in the context of a power of attorney for health care.
- Requires the Board on Aging and Long-Term Care to, by April 1, 2025 and annually thereafter, report to the Joint Committee on Finance (JCF) on the number of patients admitted into a facility with the consent of a patient's representative as provided under the bill.

NURSING HOME BED ALLOCATION

Senate Bill 1027

The bill requires DHS to allocate 250 nursing home beds beginning on July 1, 2024, using an application process specified in the bill. Specifically, DHS must request applications for the allocated beds that include a plan for the applicant to satisfy all of the following criteria within 18 months of DHS approval: (1) become licensed for the nursing home beds requested in the application; (2) become a certified provider under the Medical Assistance program; and (3) hire sufficient health care personnel and expend sufficient resources to provide 24-hour nursing services.

Under the bill, no application may be for more than 50 beds and, as a condition of being awarded the allocated beds, an applicant must agree to prioritize admissions of patients with complex needs and conditions, as well as patients who have been unable to find appropriate placement at another facility.

The bill specifies certain information that bed awardees must provide to DHS biennially or upon request, and further requires DHS to report biennially to the Legislature beginning no later than September 1, 2025, on the performance of the program, including the total number of patients served, the complex conditions addressed, the number of patients served and the number of patient days for each complex condition, and any cost savings associated with the program.

Senate Amendment 1

Senate Amendment 1 deletes the bill's provisions regarding the nursing home bed allocation. Instead, the amendment requires DHS, no later than January 1, 2025, to submit a plan to JCF to make a maximum of 250 licensed nursing home beds available to ensure an adequate number of beds are available to serve patients with complex needs and conditions statewide, including patients with mental health and behavior needs, serious wound care needs, bariatrics, substance use disorder, nonambulatory disability, intravenous therapy needs, or dialysis needs. The amendment further requires DHS to consult with hospitals and nursing homes to assess demand for such beds.

COMPLEX PATIENT PILOT PROGRAM

Senate Bill 1027

The bill requires DHS to use a competitive grant selection process to award grants to partnership groups to be designated as participating sites for a complex patient pilot program. The bill defines "partnership group" as one or more hospitals in partnership with one or more post-acute facilities.

Under the bill, DHS must solicit feedback regarding the complex patient pilot program from representatives of various stakeholder organizations. In addition, DHS must require an applicant seeking site designation under the pilot program to address various issues in its application, such as the number of complex patient care beds, goals and outcomes of the pilot program, an operating budget, and the group's expertise to successfully implement the proposal, which may include a discussion of several issues specified in the bill.

When implementing the grant for the pilot program, the bill requires DHS to do all of the following:

- Reserve 10 percent of the funding appropriated for the pilot program for reconciliation to help address unanticipated costs.
- Develop a methodology to evaluate the pilot program and contract with an independent organization to complete the evaluation, the fee for which may be paid from the pilot program's appropriation.
- Give additional weight to partnership groups that would ensure geographic diversity.

Senate Amendment 1

Senate Amendment 1 modifies the bill's provisions regarding the complex patient pilot program, as follows:

- Deletes the requirement that DHS reserve 10 percent of the funding for reconciliation to help address unanticipated costs.

- Requires that the independent organization provide its evaluation of the complex patient pilot program to DHS upon completion, and that DHS promptly further submit the evaluation to JCF.
- Requires DHS, by April 1, 2025, to report to the Legislature on the performance of the complex patient pilot program, including the total number of patients served, the complex conditions addressed, the number of patients served and the number of patient days for each complex condition, and any cost savings associated with the program.

PHARMACY BENEFIT MANAGERS

Current Law

As affected by 2021 Wisconsin Act 9, state law requires a PBM to be licensed by the Office of the Commissioner of Insurance (OCI). Among the regulations, as relevant to Senate Amendment 2, current law requires a PBM to have a process for a pharmacy to appeal a dispute regarding the maximum allowable cost list pricing, commonly referred to as a "MAC list." A PBM must provide a 21-day limit on the right to appeal, and a 21-day limit to investigate and resolve the appeal.

In addition to requiring an appeals process, current law specifies certain parameters when a PBM audits a pharmacy or pharmacist, requires advance written notice of a formulary change, with some exceptions, requires updates on the MAC list, places certain limits on retroactive claim reductions and recoupments, and requires a PBM to submit an annual report to OCI with certain specified information.

Senate Amendment 2

Senate Amendment 2 adds provisions to the bill that modify the current PBM regulations, as follows:

- Reduces the current 21-day limits to a seven-business-day limit to appeal and to a seven-business-day limit to investigate and resolve a dispute regarding the MAC list pricing.
- Specifies that a pharmacy or pharmacist may ask OCI to review any allegations that a PBM has violated any provision of the PBM regulations, and requires OCI to initiate an investigation within 14 days after receiving a request to determine if probable cause exists to take action against a PBM.
- Delays for six months the effective date of the above two provisions.
- Adds four positions, funded with program revenue, to OCI's division that is responsible for market regulation and enforcement, and specifies that the positions are to help the division fulfill its responsibilities in new areas of regulation, including enforcement of the PBM regulations enacted in 2021 Wisconsin Act 9.

BILL HISTORY

On February 26, 2024, Senator Cabral-Guevara offered Senate Amendment 1 and Senate Amendment 2. On March 5, 2024, the Senate Committee on Health recommended adoption of Senate Amendment 1 on a vote of Ayes, 6; Noes, 0, Senate Amendment 2 on a vote of Ayes, 5; Noes, 1, and passage of the bill, as amended, on a vote of Ayes, 5; Noes, 1.

For a full history of the bill, visit the Legislature's bill history page.

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