



**Testimony for the Senate Finance Committee  
March 10, 2011**

**SB 723 –Medical Records – Health Information Exchanges**

**SUPPORT WITH AMENDMENTS**

The ACLU of Maryland supports SB 723 provided that the bill is amended in certain particulars. In 2009, the Maryland General Assembly enacted SB 723, initiating the process of establishing a Health Information Exchange in the State of Maryland. (Hereafter, HIE). *See* §19-143 of the Health - General Article. Since then, there has been a great deal of progress toward implementing a system to allow medical records to be transmitted electronically among medical providers, patients, and other entities involved in health care and public health. Many issues are involved in this undertaking, and SB 723 addresses several of these.

The ACLU of Maryland is a member of the Policy Board appointed by the Maryland Health Care Commission (hereafter, MHCC) to recommend policy and procedures for the Statewide HIE. The Policy Board's mandate is to implement a system for exchanging information that incorporates effective rules and procedures relating to privacy and security of protected health information (hereafter, PHI). The goals underlying the HIE have been summarized as follows:

The statewide HIE is designed to deliver essential patient information to authorized providers at the time and place of care; to help assure appropriate, safe, and cost-effective care; store and transmit sensitive health information privately and securely; provide patient access to important elements of an individual's clinical record to help engage patients in their own care; provide a means for the patient to exercise appropriate control over the flow of private health information, both as a matter of right and as a means of assuring trust; provide a secure method of transmitting administrative health care transactions; and gather information from the health care system to research efficiency and cost-effectiveness of care, to measure quality and outcomes of care, and to conduct biosurveillance and post-marketing surveillance of drugs and devices.

State Information Technology State Plan, FY 2010-FY 2013, p. 2. The privacy rules provided by state and federal law do not provide the detail needed in an electronic networked environment. Policies are needed, for example, regarding authorization, authentication, audit, how to opt out, accountability, patient access and control, requests for correction, sensitive information, notification of breach, and secondary uses of information, and the policy decisions required are complex and novel.

SB 723 clarifies certain issues regarding the HIE, and ACLU of Maryland supports this effort. However, the bill would be much more effective with the following changes.

Section 4-302.2 relates to adoption of regulations, and their scope. ACLU of Maryland strongly supports the adoption of regulations as set forth in the bill, however, several parties were omitted and should be added to Section A. First, business associates have been made subject to the privacy provisions of HIPAA by the ARRA-HiTech act and should be subject to any regulations regarding exchange of protected health information. See, 42 USC 17931. Second, the health care consumer or any person authorized to act on their behalf will be subject to certain procedures to allow for access to their own records, notification of breach, and correction of errors, for example, and should be added to the parties subject to the regulations.

Section 4-302.2 (B) provides for a wholesale exemption from the regulations adopted under 4-302.2(A) for exchange of PHI in a hospital setting among the hospital and credentialed staff. We do not agree with this provision. We believe that anyone gaining access to the HIE must be expected to comply at all times with such policies as those governing authorization, authentication, and audit. There may be certain policies or procedures which are unnecessary in the hospital environment, if this is so, the best way to sort these out would be to give the process a chance to work by bringing the concerns to the attention of the Policy Board, which is actively engaged in the process of working out the details for all of the stakeholders and participants in the HIE. The Policy Board should include a determination regarding any special exceptions for hospitals in its deliberations. Among other factors, the Board will need to weigh the occurrence of breaches of protected health information that have been reported in hospital settings and whether the privacy and security concerns are substantially different from other health-care providers.

Section 4-302-3 applies to health insurers that own or operate a health information exchange, and requires that electronic exchanges of PHI, other than with the originator of the information, must utilize the State-designated HIE. We agree that this is good policy, and recommend that the section be amended so that it applies not only to “payors,” but also to any entity that is acting as, operating or owns a health information exchange. This amendment will ensure that the rules and regulations adopted by the MHCC will govern all electronic transmissions of protected health information once it leaves the office where it originated.

Section 4-302.4 deals with several issues of potential liability. It appears that the primary intent is to address the potential effect of the HIE on the standard of care for medical

malpractice liability. We are concerned that there will be unintended consequences resulting from this section, and offer the following suggestions: Section (B) (1) as written could result in unintentionally abolishing legal responsibility under contract, statute, and state and federal law. We suggest that section (B)(1) be amended by adding “or contractual obligation, state or federal law or regulation”. We suggest that section (B)(2) be amended by adding “or contractual obligation or regulation”. These changes will harmonize the law with the statutory scheme set out in ARRA-Hi-Tech, and Maryland law, which provide for penalties for certain violations. In addition, there is a master data-use agreement under development, which will be executed by participating providers, setting forth contractual terms, obligations and consequences for breach. The current draft of SB 723 appears to have the unintended effect of negating both the penalty provisions of the statutes and any future contractual agreements of the participants in the HIE.

In conclusion, the ACLU of Maryland encourages the committee to report out favorably a bill that addresses issues requiring clarification so the HIE can continue to move ahead, including the amendments to the proposed bill, as outlined above.