

# SOCIAL SERVICES BULLETIN

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## **CONFIDENTIALITY AND SOCIAL SERVICES (PART V): THE HIPAA PRIVACY RULE & COUNTY SOCIAL SERVICES DEPARTMENTS**

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On April 14, 2003, new federal regulations governing the privacy of individual health information took effect.<sup>1</sup> The new rule, adopted by the U.S. Department of Health and Human Services (DHHS) pursuant to the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA), governs the use and disclosure of individual health information by health care providers and health plans.

The HIPAA privacy rule will impact county departments of social services in two ways. First, the rule may have some (probably minimal) impact on the disclosure of individual health information by covered health care providers to county social services departments. Second, some county departments of social services may be subject to the rule's requirements governing the use and disclosure of individual health information.

This *Social Services Bulletin* summarizes the HIPAA privacy rule and discusses its potential impact on county social services departments and the programs they administer.<sup>2</sup>



## The HIPAA Privacy Rule

### Who Is Subject to the HIPAA Privacy Rule?

#### *Covered Entities*

The HIPAA privacy rule applies to most health care providers (including some state and local human services agencies that provide health care), health plans, and health care clearinghouses (referred to, collectively, as “covered entities”).<sup>3</sup>

**Health care clearinghouses.** A health care clearinghouse is an entity that processes health information from a nonstandard format into standard data elements or a standard transaction or vice versa.<sup>4</sup>

**Health plans.** A health plan is an individual or group plan that provides or pays the cost of medical care.<sup>5</sup>

Health plans that are subject to HIPAA include health insurance issuers, health maintenance organizations, the Medicare program, state Medicaid programs, state Child Health Insurance programs, issuers of Medicare supplemental policies, the Medicare + Choice program, the federal employees health benefits program, the Indian Health Service, the Civilian Health and Medical Program of the Uniformed Services, federal military and veterans health care programs, and other specified health plans.

Except as noted above, a government program is *not* subject to the HIPAA privacy rule as a covered health plan if (a) its principal activity is the direct provision of health care to persons or making grants to fund the direct provision of health care to persons, or (b) its principal purpose is other than providing or paying the cost of health care.

**Health care providers.** Most doctors, dentists, pharmacists, hospitals, nursing homes, adult care homes, health department clinics, mental health clinics, and other health care professionals are subject to the HIPAA privacy rule.

HIPAA’s definition of “health care provider” includes any person or entity who furnishes, bills, or is paid for health care in the normal course of business.<sup>6</sup> HIPAA’s definition of “health care” is also very broad, including any care, services, or supplies related to the health of an individual; preventive, diagnostic, therapeutic, rehabilitative, or palliative care, treatment, procedures, or services; counseling; assessment of an individual’s functional status or mental or physical condition; care, services, or procedures that affect the structure or function of the body; and the sale or dispensing of a drug, device, equipment, or other item in accordance with a prescription.<sup>7</sup>

A health care provider, however, is a covered entity subject to the HIPAA privacy rule only if it (or another

entity acting on its behalf) transmits health information electronically in connection with a health care claim or other health care transaction covered by HIPAA.<sup>8</sup> “Health information” includes information that is created or received by a health care provider that relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual, regardless of whether the information is “individually identifiable health information.”<sup>9</sup>

#### *Covered Health Care Components of Hybrid Entities*

A covered entity is a “hybrid entity” if (a) its business activities include both covered functions (functions that make it a health care clearinghouse, health plan, or health care provider) and non-covered functions (functions other than those that make it a health care clearinghouse, health plan, or health care provider) and (b) it designates itself as a hybrid entity and identifies its covered health care components pursuant to the HIPAA privacy rule.<sup>10</sup>

Any component of a hybrid entity that would be a covered entity if the component was a separate legal entity must be included within a covered health care component of the hybrid entity.<sup>11</sup> A covered health care component may include any other component to the extent that it performs covered functions or performs activities that would make it a business associate of a covered health care component if the components were separate legal entities.<sup>12</sup>

When a covered entity designates itself as a hybrid entity, the covered entity is responsible for adopting privacy policies and procedures required by the HIPAA privacy rule and for ensuring that its covered health care components comply with the requirements of the HIPAA privacy rule.<sup>13</sup>

A covered health care component of a hybrid entity may use or disclose protected health information created or received by or on behalf of the covered component only to the extent allowed by the HIPAA privacy rule and may not disclose protected health information to another component of the hybrid entity if the HIPAA privacy rule would prohibit the disclosure of the information if the components were separate legal entities.<sup>14</sup>

#### *Business Associates of Covered Entities*

The HIPAA privacy rule’s restrictions governing the use and disclosure of protected health information apply indirectly to the business associates of covered entities.

A “business associate” is a person or entity that (a) provides, other than as part of the workforce of a covered entity, legal, accounting, data aggregation, management, administrative, financial, or other specified services to or for the covered entity and the provision of these services involves the disclosure of individually identifiable health information to the person or entity by the covered entity or a business associate of the covered entity, or (b) performs, on behalf of the covered entity but not as part of the covered entity’s workforce, any function or activity regulated by the HIPAA privacy rule or any other function or activity (including claims processing, data processing, utilization review, quality assurance, billing, benefit management, and practice management) that involves the use or disclosure of individually identifiable health information.<sup>15</sup>

A covered entity generally may not disclose protected health information to a business associate or allow a business associate to create or receive protected health information on behalf of the covered entity unless it enters into a written contract or agreement restricting the business associate’s use or disclosure of protected health information.<sup>16</sup>

### **What Does the HIPAA Privacy Rule Require Covered Entities To Do?**

The HIPAA privacy rule prohibits a covered entity from using or disclosing protected health information except as required or allowed by the rule.<sup>17</sup> When use or disclosure of protected health information is allowed, the privacy rule generally requires a covered entity make reasonable efforts to limit the use or disclosure to the minimum necessary to accomplish the purpose of the use or disclosure.<sup>18</sup>

The HIPAA privacy rule also requires a covered entity to:

- develop and implement privacy policies and procedures governing the protection, use, and disclosure of protected health information;<sup>19</sup>
- train its workforce with respect to its privacy policies and procedures;<sup>20</sup>
- designate a privacy officer who is responsible for implementing the entity’s privacy policies and procedures;<sup>21</sup>
- provide a notice of privacy rights to individuals;<sup>22</sup>
- allow (with some exceptions) an individual to inspect and copy health information about himself or herself;<sup>23</sup>
- account to individuals, upon request, with respect to certain authorized disclosures of protected health information;<sup>24</sup>

- enter into agreements restricting the use and disclosure of protected health information disclosed to business associates of covered entities;<sup>25</sup> and
- comply with other requirements related to the protection, use, and disclosure of protected health information.

### **What Information Is Protected Under the HIPAA Privacy Rule?**

The HIPAA privacy rule governs the use and disclosure of protected health information by covered entities and their business associates.

Except as noted below, “protected health information” generally means individually identifiable health information regardless of whether the information is maintained or transmitted electronically or any other form or medium.<sup>26</sup> “Individually identifiable health information” is information (including demographic information collected from an individual), whether oral or recorded in any form or medium, that

- (a) is created or received by a health care provider, health plan, employer, or health care clearinghouse;
- (b) relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual; and
- (c) identifies the individual or might be used to identify the individual.<sup>27</sup>

Protected health information does not include individually identifiable health information contained in (a) education records subject to the federal Family Educational Rights and Privacy Act, (b) records of students who are 18 or older or records of students held by post-secondary educational institutions when the records are used exclusively for health care treatment and have not been disclosed to anyone other than a health care provider at the student’s request, or (c) employment records held by a covered entity in its role as an employer.<sup>28</sup>

### **When May Protected Health Information Be Used or Disclosed Under the HIPAA Privacy Rule?**

A covered entity may use or disclose protected health information only to the extent that use or disclosure of the information is required or permitted under the HIPAA privacy rule.<sup>29</sup>

“Use” of protected health information refers to the sharing, examination, utilization, application, or analysis of the information *within* a covered entity, a covered health care component of a hybrid entity, or a business associate that maintains the information.<sup>30</sup>

“Disclosing” protected health information means allowing any person or entity other than the covered entity to obtain access to the information or releasing, transferring, or divulging the information in any manner to any person or entity other than the covered entity, covered health care component, or business associate.<sup>31</sup> The release of protected health information by a covered health care component of a hybrid entity to a separate covered health care component of the hybrid entity or to any noncovered health care component of the hybrid entity constitutes a disclosure of protected health information and is unlawful unless permitted under the HIPAA privacy rule.

The HIPAA privacy rule applies with respect to the use or disclosure of *all* protected health information created or received by a covered entity, regardless of whether the information is oral, written, recorded, or maintained or transmitted in an electronic format.

The HIPAA privacy rule allows a covered entity to use or disclose protected health information:

- pursuant to the written authorization of the individual to whom the information pertains or written authorization of the individual’s personal representative;<sup>32</sup>
- when use or disclosure of the information is required by federal or state law;<sup>33</sup>
- to report suspected child abuse or neglect to a government agency that is authorized to receive reports of suspected child abuse or neglect;<sup>34</sup>
- to report suspected abuse, neglect, or domestic violence (other than child abuse or neglect) to a government agency that is authorized to receive these reports;<sup>35</sup>
- to a health oversight agency for legally authorized audit, investigation, inspection, licensure, or oversight activities;<sup>36</sup>
- in response to a court order;<sup>37</sup>
- in a legal proceeding in response to a subpoena, discovery request, or legal process (other than a court order);<sup>38</sup>
- to prevent or mitigate a serious and imminent threat to the health or safety of a person or the public;<sup>39</sup>
- upon request of a law enforcement officer under specified circumstances;<sup>40</sup>
- to a public health authority for specified public health activities;<sup>41</sup>
- for its own “treatment” activities;<sup>42</sup>

- to another health care provider for the other provider’s treatment activities;<sup>43</sup>
- for its own “payment” activities;<sup>44</sup>
- to another health care provider for the other provider’s payment activities;<sup>45</sup>
- for its own “health care operations;”<sup>46</sup>
- in other specified circumstances expressly permitted under the rule.<sup>47</sup>

The HIPAA privacy rule does *not* govern the use or disclosure of health information that is created or received by a person, state or local government agency, or other entity that is *not*

- a covered entity,
- part of a covered entity that has not designated itself as a hybrid entity,
- a covered health care component of a hybrid entity, or
- a business associate of a covered entity.<sup>48</sup>

### What Is the Relationship Between the HIPAA Privacy Rule and State Law?

The HIPAA privacy rule does not preempt state laws that *require* the disclosure of protected health information.<sup>49</sup> Thus, if the HIPAA privacy rule *permits* a covered entity to disclose protected health information and state law *requires* the covered entity to disclose the information, the covered entity *must* disclose the information to the extent required by state law.

The HIPAA privacy rule does not preempt a state law regarding the privacy of individually identifiable health information if the state law is “more stringent than” the requirements of the HIPAA privacy rule.<sup>50</sup> Thus, if the HIPAA privacy rule *permits* a covered entity to disclose protected health information but state law *restricts* or *prohibits* disclosure of the information, the covered entity may *not* disclose the information in violation of state law even though the HIPAA privacy rule would permit disclosure.

The HIPAA privacy rule does not preempt state laws that provide for the reporting of child abuse, births and deaths, or disease or injury or for the conduct of public health surveillance, investigation, or intervention.<sup>51</sup>

Except as noted above, the HIPAA privacy rule preempts state laws to the extent that they are “contrary to” the requirements contained in the new privacy rule.<sup>52</sup> Thus, if the HIPAA privacy rule *restricts* or *prohibits* disclosure of protected health information and state law *authorizes* but does not require disclosure of the information, a covered entity may *not* disclose the information in violation of the HIPAA privacy rule.

### **How Will the HIPAA Privacy Rule Be Enforced?**

The HIPAA privacy rule will be enforced by the U.S. DHHS Office of Civil Rights and the U.S. Department of Justice. HIPAA authorizes criminal penalties (a fine of \$50,000 to \$250,000 and imprisonment for one to ten years) for willful violation of the privacy rule, as well as civil monetary penalties of \$100 for each violation (up to \$25,000 per year).<sup>53</sup>

### **How Will the HIPAA Privacy Rule Affect the Ability of DSS to Obtain Protected Health Information?**

Because the HIPAA privacy rule allows health care providers to disclose protected health information to county social services departments in a wide variety of situations, the rule should not significantly affect the ability of county social services departments to obtain the health information they need in order to properly administer public assistance and social services programs. The following sections discuss some of the common situations in which the HIPAA privacy rule allows disclosure of protected health information to county social services departments.

### **Does HIPAA Prevent Covered Health Care Providers from Reporting Suspected Child Abuse or Neglect to the County DSS?**

No. The HIPAA privacy rule does not prevent covered health care providers from disclosing protected health information for the purpose of reporting suspected child abuse or neglect to the county department of social services.

First, the HIPAA privacy rule does not preempt any provision of state law that provides for the reporting of child abuse.<sup>54</sup>

Second, the HIPAA privacy rule expressly allows a covered entity to disclose protected health information, without the authorization of the individual who is the subject of the information, to a government authority that is authorized by law to receive reports of suspected child abuse or neglect.<sup>55</sup> State law authorizes the county social services director and his or her staff to receive and investigate reports of suspected child abuse and neglect.<sup>56</sup> The HIPAA privacy rule therefore allows a covered health care provider to disclose protected health information to the county social services

department for the purpose of reporting suspected child abuse or neglect.

Third, the HIPAA privacy rule allows a covered entity to disclose protected health information, without the authorization of the individual who is the subject of the information, to the extent that disclosure of the information is required by law.<sup>57</sup> Because state law *requires* any person or institution, including health care providers, to report suspected child abuse, neglect, or dependency to the county social services department,<sup>58</sup> the HIPAA privacy rule allows a covered health care provider to disclose protected health information to the county social services department to the extent necessary to comply with state law.<sup>59</sup>

A covered health care provider that discloses protected health information to the county social services department in connection with reporting suspected child abuse or neglect, however, must account for the disclosure if requested by the individual who is the subject of the information or the individual's personal representative.<sup>60</sup>

### **Does HIPAA Allow Covered Health Care Providers to Disclose Protected Health Information When the DSS Is Investigating Reported Child Abuse or Neglect?**

Yes. As noted above, the HIPAA privacy rule allows a covered entity to disclose protected health information, without the authorization of the individual who is the subject of the information, to the extent that disclosure of the information is required by law.<sup>61</sup>

State law generally *requires* individuals and public and private agencies (including health care providers and facilities) to provide any information and records (including confidential information and records) that may be relevant to the county social services director's investigation of reported child abuse, neglect, or dependency or the county social services department's provision of protective services to abused, neglected, or dependent children when requested by the county social services director or the director's staff.<sup>62</sup> The HIPAA privacy rule therefore allows a covered health care provider to disclose protected health information to the county social services department to the extent necessary to comply with this state law.<sup>63</sup>

Again, however, a covered health care provider must, if requested by the individual or the individual's personal representative, account for its disclosure of protected health information to the social services department.<sup>64</sup>

### **Does HIPAA Allow Covered Health Care Providers to Disclose Protected Health Information About Foster Children to the County DSS?**

Yes. Several provisions of the HIPAA privacy rule may allow covered health care providers to disclose protected health information about foster children to the county department of social services in specific circumstances.

First, when an abused, neglected, or dependent child has been placed by the juvenile court in the custody of the county social services department and the department has placed the child in foster care, the county social services director, as the child's legal custodian, may have the right, under the HIPAA privacy rule and state law, to inspect and obtain a copy of the child's health information.

Under the HIPAA privacy rule, an individual generally has the right to inspect and copy his or her protected health information that a covered entity maintains in a "designated record set."<sup>65</sup> When the individual to whom protected health information pertains is an unemancipated minor child, the child's right to obtain his or her health information from a covered health care provider generally may be exercised by the child's personal representative.<sup>66</sup>

The HIPAA privacy rule defines "personal representative" as a person who has the authority to make decisions related to the health care of an individual.<sup>67</sup> When applicable law gives a parent or guardian of an unemancipated minor child (or person acting in loco parentis for an unemancipated child) authority to make decisions regarding the child's health care, a covered entity generally must treat the parent, guardian, or person acting in loco parentis as the child's personal representative.<sup>68</sup>

When an abused, neglected, or dependent juvenile is placed by the juvenile court in the custody of the department of social services, the county social services director, unless otherwise ordered by the court, may consent to routine or emergency medical or surgical care or treatment that the child needs.<sup>69</sup> To the extent that the county social services director has the legal authority to make decisions regarding the health care of abused, neglected, and dependent children that have been placed by the juvenile court in the social services department's custody, the HIPAA privacy rule allows covered health care providers to disclose protected health information about these children to the social services director, as the personal representative of these foster children.

Second, state law requires health care providers (and others) to provide information (including

information that might otherwise be confidential) to the county social services department when the information is relevant to the department's provision of protective services to an abused, neglected, or dependent child.<sup>70</sup> Because state law *requires* the disclosure of information, the HIPAA privacy rule allows a covered health care provider to disclose protected health information about an abused, neglected, or dependent child (or about another individual) to the county social services department when it is relevant to the department's provision of protective services to an abused, neglected, or dependent child.<sup>71</sup>

Third, state law and rules require certain agencies (including local health departments and mental health agencies) to disclose, upon request by the county social services department, information about abused, neglected, or dependent children who are subject to the juvenile court's jurisdiction.<sup>72</sup> Again, because the HIPAA privacy rule allows a covered health care provider to disclose protected health information to the extent that disclosure is required by law, a covered health care provider may disclose protected health information about an abused, neglected, or dependent juvenile to the county social services department to the extent the provider is required to do so under this state law.<sup>73</sup>

### **Does HIPAA Allow Covered Health Care Providers to Disclose Protected Health Information About Abused or Neglected Adults to the County DSS?**

The HIPAA privacy rule allows a covered health care provider to disclose protected health information to a government agency that is authorized by law to receive reports of abuse, neglect, or domestic violence if the provider reasonably believes that the individual to whom the information pertains is a victim of abuse, neglect, or domestic violence (other than child abuse or neglect) and state law requires the disclosure of information in connection with the abuse, neglect, or domestic violence.<sup>74</sup>

State law *requires* any person (including a health care provider) who reasonably believes that a disabled adult is in need of protective services due to abuse, neglect, or financial exploitation to report the suspected abuse or neglect to the county social services director.<sup>75</sup> The HIPAA privacy rule therefore allows a covered health care provider to disclose protected health information to the county social services department to the extent necessary to comply with this state law.

The HIPAA privacy rule also allows the disclosure of protected health information to a county social services

department under the state's adult protective services law if a covered entity reasonably believes that an individual is the victim of abuse or neglect and (1) the individual agrees to disclosure of the information, or (2) disclosure is expressly authorized by statute or regulation, and (a) the covered entity, in the exercise of professional judgment, reasonably believes that disclosure is necessary to prevent serious harm to the individual, or (b) the individual is unable, due to incapacity, to agree to disclosure, failure to disclose the information would materially and adversely affect an immediate enforcement activity, and the social services director does not intend to use the information against the individual.<sup>76</sup>

When a covered entity discloses protected health information to the county social services department under either of the two exceptions discussed above, the covered entity must promptly notify the individual that it has made, or will make, the disclosure *unless*

- the covered entity, in the exercise of professional judgment, believes that informing the individual would place the individual at risk of serious harm, or
- notice would be given to the individual's personal representative and the covered entity reasonably believes that the personal representative is responsible for the abuse, neglect, or other injury and believes, in the exercise of professional judgment, that notifying the personal representative would not be in the individual's best interest.<sup>77</sup>

Finally, state law gives the county social services director the authority to review and copy any records related to the care and treatment of a disabled adult that are maintained by an individual, facility (including hospitals, nursing homes, adult care homes, and other health care facilities), or agency acting as the disabled adult's caretaker when necessary for a complete evaluation of a report under the adult protective services law.<sup>78</sup> Because state law *requires* these facilities to provide information regarding a disabled adult's care and treatment to the county DSS in connection with its evaluation of an adult protective services report, the HIPAA privacy rule allows them to disclose protected health information to the extent necessary to comply with this state law.<sup>79</sup>

### **Does HIPAA Prevent DSS from Obtaining Protected Health Information About Residents in Adult Care Homes?**

Even though many, if not most, adult care homes may be subject to the HIPAA privacy rule, there are several circumstances in which HIPAA does not prevent the

county department of social services from examining or obtaining protected health information about residents of adult care homes.

First, state law requires county social services departments to assist the state Department of Health and Human Services (DHHS) in monitoring the compliance of adult care homes with state licensing requirements.<sup>80</sup> State law also authorizes the disclosure of otherwise confidential records and information concerning the admission, discharge, medication, care, medical condition, or history of current or former adult care home residents to DHHS and county DSS staff in the course of licensure and monitoring inspections unless a resident objects in writing to the disclosure of his or her medical information.<sup>81</sup>

When the county social services department is engaged in legally-mandated activities related to licensure compliance inspections of adult care homes it is acting as a "health oversight agency" carrying out health oversight activities within the definitions contained in the HIPAA privacy rule.<sup>82</sup> The HIPAA privacy rule, therefore, allows covered entities to disclose protected health information to the county social services department in connection with its inspection of adult care homes.<sup>83</sup>

Second, state law requires the county social services department to monitor the implementation of the state's bill of rights for adult care home residents and to investigate complaints and grievances alleging violations of the adult care home residents' bill of rights.<sup>84</sup> State law also provides that the county social services department may inspect residents' records maintained at an adult care home when necessary to investigate alleged violations of the residents' legal rights.<sup>85</sup> Again, the HIPAA privacy rule allows disclosure of protected health information to the county DSS to the extent that disclosure is necessary in order for DSS to discharge its responsibility as a health oversight agency in connection with the investigation of complaints under the adult care home residents' bill of rights.<sup>86</sup>

Third, when the county social services department receives a report regarding the suspected abuse or neglect of a disabled adult who lives in an adult care home, the HIPAA privacy rule allows a covered health care facility or provider to disclose protected health information regarding a resident to the extent necessary to comply with the requirements of the state's adult protective services law (discussed in the preceding section).

Fourth, many residents of adult care homes receive public assistance under the State-County Special Assistance and Medicaid programs. County social services departments are responsible for determining and redetermining the eligibility of adult

care home residents for assistance under the State-County Special Assistance program, for determining eligibility for Medicaid, and for certifying a resident's need for enhanced personal care services under the Medicaid program. The HIPAA privacy rule allows an adult care home to disclose protected health information about an adult care home resident to the county social services department without the resident's permission to the extent that disclosure is necessary

- (a) for appropriate oversight of the Special Assistance or Medicaid programs by the county social services department,<sup>87</sup>
- (b) in order to obtain payment for the resident's care through the Special Assistance or Medicaid programs,<sup>88</sup> or
- (c) to provide, coordinate, or manage the health care and related services for a resident by the adult care home or the county social services department.<sup>89</sup>

### **Does HIPAA Allow the Disclosure of Protected Health Information to DSS to Determine Eligibility for and Administer Medicaid and Public Benefit Programs?**

County departments of social services administer a number of state public assistance programs, including Medicaid, Health Choice (the state health insurance program for uninsured children), State-County Special Assistance (for disabled adult care home residents), Work First (temporary assistance for needy families), Food Stamps, and Energy Assistance.<sup>90</sup> Under the rules governing these programs, a county social services department may need to obtain information about an individual's health status in order to determine whether he or she is eligible to receive public assistance.<sup>91</sup>

If the county department of social services needs health information in order to determine an individual's eligibility for public benefits, it may obtain the information from a covered health care provider with the written authorization of the individual or the individual's personal representative.<sup>92</sup> The HIPAA privacy rule also may allow a covered health care provider to disclose individual health information (other than psychotherapy notes) to the county social services department without the individual's written authorization when disclosure is necessary for the department's administration and oversight of a government benefits program for which health information is relevant to beneficiary eligibility.<sup>93</sup>

### **Does HIPAA Allow Covered Health Care Providers to Disclose Information to DSS Pursuant to a Subpoena or Court Order?**

Yes. Subject to certain requirements and restrictions, the HIPAA privacy rule permits a covered health care provider (or covered health plan) to disclose protected health information about an individual to the county social services department, without the consent of the individual or the individual's personal representative, in response to a subpoena, discovery request, legal process, or order in connection with an administrative or judicial proceeding.

If, in the course of any administrative or judicial proceeding, a court or administrative tribunal orders a covered health care provider to disclose information, the HIPAA privacy rule allows the provider to disclose protected health information (other than psychotherapy notes) to the extent expressly required by the order.<sup>94</sup>

If a health care provider receives a subpoena, discovery request, or other legal process (other than an order by a court or administrative tribunal) in connection with an administrative or judicial proceeding, the HIPAA privacy rule allows the provider to disclose the minimum amount of protected health information (other than psychotherapy notes) necessary to comply with the subpoena, discovery request, or process *if* the individual or agency seeking the information provides satisfactory assurance that it

- (a) has made reasonable efforts to notify the individual to whom the information pertains that the information is being sought, or
- (b) has made reasonable efforts to obtain a qualified protective order with respect to the information.<sup>95</sup>

### **Does the HIPAA Privacy Rule Allow the Disclosure of Information to DSS in Connection with the Provision of and Payment for Health Care?**

The HIPAA privacy rule allows a covered entity to disclose protected health information in connection with its own treatment activities or in connection with the treatment activities of a health care provider (regardless of whether the other health care provider is subject to HIPAA).<sup>96</sup> The rule defines "treatment" as the provision, coordination, or management of health care *and related services* by one or more health care providers, including the coordination or management of health care by a health care provider with a third party.<sup>97</sup>

Although county social services departments generally do not consider themselves to be health care



providers, at least some of their programs, services, and activities may constitute the provision, coordination, or management of health care within the HIPAA privacy rule's definition of "treatment." For example, social workers often provide case management services (including the coordination and management of health care) for children and adults who are deemed "at risk" or receive home and community-based care under Medicaid's community alternatives program (CAP). And county social services departments may provide other types of assistance and services that are *related* to the treatment of an individual by public and private health care providers (including county health departments, hospitals, doctors, and nursing homes).

To the extent that a covered health care provider needs to disclose protected health information about an individual to the county social services department to facilitate the individual's treatment (as defined by the rule) by the provider or by the county social services department in its role as a health care provider, the rule allows the provider to disclose the information either with or without the individual's written authorization.

The HIPAA privacy rule also allows a covered health care provider to disclose protected health information about an individual in order to obtain reimbursement for providing health care to the individual.<sup>98</sup> Although county social services departments generally are not involved in processing or paying health care claims under the state's Medicaid program, the HIPAA privacy rule allows a covered health care provider to disclose protected health information to the county social services department in order to obtain approval for payment for enhanced personal care services for adult care home residents or home and community-based services when the department administers the Medicaid community alternatives program.

### **When May a Covered Health Care Provider Disclose Information to DSS With an Individual's Consent?**

The HIPAA privacy rule allows (but does not require) a covered health care provider to disclose protected health information about an individual to another individual, provider, or agency pursuant to the written authorization of the individual or the individual's personal representative.<sup>99</sup>

Under the HIPAA privacy rule, an individual's authorization for the disclosure of protected health information must

- be written in plain language;
- be executed voluntarily;

- describe the information to be disclosed in a specific and meaningful fashion;
- identify the individuals, providers, agencies, or other entities to whom the information may be disclosed;
- indicate the date on which the authorization will expire;
- recognize the individual's right to revoke the authorization; and
- be signed by the individual or the individual's personal representative.

When an authorization to disclose protected health information is executed by an individual's personal representative, the authorization must indicate the basis of the representative's authority. As discussed above, a person who has authority to make medical decisions on behalf of an individual (for example, the parent of a minor child or the guardian of an incompetent adult) generally has the authority to consent to the disclosure of protected health information concerning the individual.<sup>100</sup>

Special rules, however, apply when state law (for example, G.S. 90-21.5(a)) allows a health care provider to treat a minor child based on the child's consent.<sup>101</sup> In addition, a provider may refuse to disclose protected health information pursuant to a personal representative's authorization if the provider

- (a) reasonably believes that treating the person as the individual's personal representative would endanger the individual or that the personal representative has abused or neglected, or might abuse or neglect, the individual, and
- (b) decides, exercising professional judgment, that it is not in the individual's best interest to treat the person as the individual's personal representative.<sup>102</sup>

County departments of social services that seek the release of protected health information from covered health care providers or health plans pursuant to an individual's written authorization should ensure that the authorization forms they use are consistent with the HIPAA privacy rule's requirements.

### **Are County Social Services Departments Required to Comply with the HIPAA Privacy Rule?**

The short answer is "it depends." Although there may be some situations in which some components, programs, or employees of a county social services department may be subject to the HIPAA privacy rule as a covered health care component of a hybrid entity or a business associate of a covered entity, the HIPAA privacy rule should rarely, if ever, apply to all (or even most) of the health information that is

created or received by a county social services department. The following sections discuss some of the factors that determine whether, and to what extent, a county social services department must comply with the HIPAA privacy rule's requirements regarding individual health information it creates or receives.

### **Are County Social Services Departments Subject to HIPAA Because They Create or Maintain Individual Health Information?**

No. A county social services department is *not* subject to the HIPAA privacy rule simply because it creates or maintains health information about individuals.

Although the individual health information maintained by county social services departments often will be similar, or even identical, to the individual health information that is protected under the HIPAA privacy rule, the rule's requirements with respect to protected health information apply only to the extent that this information is created, received, or maintained by a health plan, health care provider, or health care clearinghouse that is subject to the HIPAA privacy rule. The privacy of individual health information under HIPAA depends not only on the characteristics of the information but also on the characteristics of the entity that creates, receives, or maintains the information.

### **Are County Social Services Departments Subject to HIPAA Because They Receive Health Information That Is Protected Under the HIPAA Privacy Rule?**

No. A county social services department is *not* subject to the HIPAA privacy rule simply because it receives protected health information from a covered health plan or health care provider.<sup>103</sup>

Although the HIPAA privacy rule governs the disclosure of protected health information by a covered health plan or health care provider *to* a county social services department, it does not govern the use, protection, or redisclosure of that information *by* the county social services department *unless* the department (or a component of the department) is

- (a) a covered entity that is subject to the HIPAA privacy rule,
- (b) a covered component of a covered entity, or
- (c) a business associate of a covered entity.

### **Is the County Social Services Department a Separate Legal Entity or a Component of the County for Purposes of Determining the HIPAA Privacy Rule's Applicability?**

The HIPAA privacy rule applies to a county department of social services if the department is (a) a covered entity (an entity that is a health plan, health clearinghouse, or health care provider that is covered by the rule), or (b) a component or constituent part of a county that is a covered entity that has not designated itself as a hybrid entity and excluded all or part of the social services department as a noncovered component.<sup>104</sup>

Although the HIPAA privacy rule defines each of the three types of covered entities (covered health plans, health care clearinghouses, and health care providers) that must comply with its requirements and restrictions, it does not define the term "entity." In defining the term "hybrid entity," however, the rule appears to suggest that the term "entity" means a "single legal entity."

Is a county social services department a single (separate or discreet) legal entity for purposes of determining the HIPAA privacy rule's applicability to the department? Or is it a component or constituent part of the county? And more importantly, what difference does this make?

One might argue that the county social services department is a single, separate, and discreet legal entity because state law authorizes or requires the creation of county social services departments, specifies the legal responsibilities of the county social services department, and contains a number of references to county social services departments.<sup>105</sup>

In response, however, it might be argued that, under state law, a county department of social services is merely a department or agency of county government—not an independent municipal corporation, unit of local government, or political subdivision of the state.<sup>106</sup>

In most counties, the department of social services has been considered a component or constituent part of the county for purposes of the HIPAA privacy rule, but the county has designated itself as a hybrid entity and excluded the county social services department (other than those components of the department that are health care providers and would be subject to the rule if they were separate legal entities) from the HIPAA privacy rule's application.

In counties that consider the county as a single legal entity and the social services department as merely a component or constituent part of the county, the HIPAA privacy rule's applicability to the department will depend on a number of factors:

- whether the county or any component agency of the county is engaged in covered functions (even if the social services department does not engage in covered functions)
- whether the county has designated itself as a hybrid entity
- if the county has designated itself as a hybrid entity, whether all or part of the social services department has been designated as a noncovered component.

In these counties, the *county* will be responsible for ensuring the county's compliance with the HIPAA privacy rule (including compliance by the social services department and other component agencies of the county), for adopting privacy policies and procedures for the county and its constituent agencies (including the social services department), for appointing a privacy officer, for determining whether it will designate itself as a hybrid entity, and for determining whether all or part of the county social services department can and will be designated as a noncovered component.

In other counties, the social services department has been considered a separate legal entity for purposes of the HIPAA privacy rule.<sup>107</sup> In these counties, the HIPAA privacy rule's applicability to the department depends primarily on whether the department (or some component of the department)—not some other department or agency of the county—is engaged in covered functions as a health plan, health care clearinghouse, or health care provider. And if the social services department is determined to be a covered entity, the *department* is responsible for complying with the HIPAA privacy rule, for adopting privacy policies and procedures, for appointing a privacy officer for the department, and for determining whether it will designate itself as a hybrid entity.

### Are County Social Services Departments Health Care Providers?

As noted above, the HIPAA privacy rule applies to most "health care providers."

Before the HIPAA privacy rule was adopted, the functions, activities, services, and programs performed or administered by county social services departments—determining eligibility for public assistance programs, providing subsidies for child day care, investigating suspected abuse and neglect of children and disabled adults, and providing social work services to individuals and families—were not generally thought of as involving the provision of

health care to individuals, at least in the sense that nursing homes, health department clinics, hospitals, doctors, and pharmacies provide health care.<sup>108</sup>

The HIPAA privacy rule's definitions of "health care" and "health care provider," however, are so broad that county social services may be considered to be health care providers under the HIPAA privacy rule.

As discussed above, the term "health care provider" means any person or entity that, in the normal course of business, furnishes, bills, or is paid for care, services, or supplies related to the health of an individual, including, but not limited to, preventive, diagnostic, or *therapeutic* care, *counseling*, *assessment of physical or mental condition or functional status*, or procedures or services that affect the structure or function of the body.<sup>109</sup>

At least some of the "traditional" social work services provided by social workers and other social services employees almost certainly fall within the rule's broad definitions of "health care" and "health care provider." For example, social workers employed by county social services departments may provide individual and family counseling to agency clients. Similarly, social workers who investigate suspected abuse or neglect of children and disabled adults or who provide social services to children, families, and the elderly often assess the physical or mental condition or functional status of their clients. And if social workers or other employees of the department provide or furnish services that may constitute health care, other units or components of the department, such as the business office, may be involved in billing or receiving payment for these health care services.

If *none* of the functions, activities, programs, or services of a county social services department involve furnishing, billing, or receiving payment for health care (as defined by the HIPAA privacy rule), the department is *not* a covered health care provider and will not be subject to the HIPAA privacy rule (unless it is a business associate of a covered entity, a component of a covered entity, or a covered component of a hybrid entity).

It is likely, however, that at least *some* function, activity, program, or service performed or provided by the county social services department *may* constitute the provision of health care, and to the extent that the county social services department (or some component of the department) is a health care provider, the department (or one or more components of the department) *may* be subject to the HIPAA privacy rule.

## Is a County Social Services Department That Provides Health Care Subject to the HIPAA Privacy Rule?

If a county social services department furnishes, bills, or is paid for health care, it will be a covered health care provider and subject to the HIPAA privacy rule *if* it (or another person, agency, or entity acting on its behalf)

1. *transmits in electronic form*
2. *any health information*
3. in connection with a *transaction* involving particular financial or administrative activities related to health care.

If a health care provider engages in even a single electronic transmission of health information in connection with a covered transaction, *all* of the protected health information it creates or receives—regardless of the form or format of the information and regardless of whether the information has been or may be transmitted electronically in connection with a covered transaction—is subject to the HIPAA privacy rule

To determine whether a health care provider is subject to the HIPAA privacy rule, one must focus on each of the three factors listed above individually and together.

With respect to the first factor, a health care provider that transmits health information in connection with a covered transaction (such as a claim for payment submitted to a health plan) is *not* subject to the HIPAA privacy rule unless the provider (or someone acting on the provider's behalf) transmits this information *electronically*. A health care provider that transmits health information to a health plan in connection with a health insurance claim is subject to the HIPAA privacy rule if the information is transmitted digitally via a computer floppy disk, tape, or CD or through a computer network or the internet using the transaction code sets required by the HIPAA regulations. A health care provider that *always* transmits health information related to health insurance claims and other transactions *using paper forms only* is not subject to the HIPAA privacy rule because he or she never transmits health information *electronically* in connection with these transactions.

With respect to the second factor, the privacy rule defines "health information" as any information that is created or received by a health care provider and relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past,

present, or future payment for the provision of health care to an individual.<sup>110</sup> It should be noted that the rule's definition of "health information" is different from and broader than its definitions of "individually identifiable health information" and "protected health information."

With respect to the third factor, the privacy rule refers to ten specific types of financial or administrative transactions involving the transmission of information related to health care.<sup>111</sup> Most of these transactions are governed by, and defined in, another HIPAA regulation (the transactions and code sets rule).<sup>112</sup> Of the eight transactions defined in that regulation, at least four apply with respect to the transmission of health information by health care providers to other health care providers or health plans.

1. A "health care claim" transaction involves a request by a health care provider to a health plan to obtain payment for the provision of health care.<sup>113</sup>
2. A "health care claim status" transaction includes an inquiry by a health care provider to a health plan to determine the status of a health care claim.
3. A transaction related to "eligibility for a health plan" includes an inquiry by a health care provider to a health plan to determine whether an individual is eligible to receive health care under the plan, coverage of health care under the plan, or benefits associated with the plan.
4. A "referral certification and authorization" transaction involves a request by a health care provider for review of health care to obtain an authorization for the care, a request to obtain authorization for referring an individual to another provider, or a response to either of these requests.

A county social services department that (1) furnishes, bills, or receives payment for health care *and* (2) electronically transmits health information in connection with one or more of the covered transactions described above is subject to the HIPAA privacy rule.

Conversely, a county social services department that furnishes, bills, or receives payment for health care is not subject to the HIPAA privacy rule if (a) it does not directly or indirectly transmit health information in connection with health care claims or other covered transactions, or (b) it transmits health information in connection with health care claims or other covered transactions but does not do so electronically.

### **Should a Social Services Department That Is a Covered Health Care Provider Be Designated as a Hybrid Entity?**

In almost every instance, the activities that might make a county social services department a covered health care provider will constitute only a tiny fraction of department's activities. In most cases, entire programs, services, or components of a county social services department do not engage in any activities that would make that the employees involved with that program, service, or component covered health care providers.

Nonetheless, if a county social services department, or any component of the social services department, is a covered health care provider (even if its activities related to the provision of health care are minimal compared with its other functions or it only infrequently engages in the electronic transmission of health information in connection with health care claims or other covered transaction), the department is subject to the HIPAA privacy rule and *all* protected health information created or received by the department—regardless of the form or format of the information, regardless of whether the information was created or received in connection with the provision of “health care,” and regardless of whether the information has been or may be transmitted electronically in connection with a covered transaction—may be used or disclosed only as allowed under the HIPAA privacy rule.

The HIPAA privacy rule, however, was written, for the most part, with “traditional” health care providers—not social services agencies—in mind and its provisions allowing use or disclosure of protected health information focus primarily on uses or disclosures related to the provision of health care (for example, treatment, payment, health care operations, public health, health care oversight), not uses or disclosures related to the administration of public assistance or social services. Social services agencies that are subject to the HIPAA privacy rule therefore may find it somewhat awkward, challenging, or difficult to make the rule's provisions “fit” their use or disclosure of protected health information in a social services, rather than health care, context.

The solution is for a county social services department that is a covered health care provider to limit HIPAA's application to the agency by designating itself as a “hybrid entity.”<sup>114</sup>

As discussed above, a covered entity may designate itself as a hybrid entity if its activities include both covered functions (functions that make it

a health care provider) and noncovered functions (functions other than those that make it a health care provider). Although some of the activities and functions of a county social services department may involve the provision of health care, many (if not most) of the department's functions and activities related to the administration of public assistance and social services programs do not involve the provision of health care.

A county social services department that wishes to designate itself as a hybrid entity must designate which components of the department will be included within one or more covered health care components and which will not.<sup>115</sup> In doing so, the department must include within a covered health care component any component of the department that would be a covered health care provider or health plan if the component was a separate legal entity.<sup>116</sup> The department also may include in a covered health care component any component of the department that performs (a) any covered function (i.e., functions that would make the component a health care provider or health plan), or (b) activities that would make the component a business associate of a component that performs covered functions if the two components were separate legal entities.<sup>117</sup>

Designating the county social services department as a hybrid entity limits the HIPAA privacy rule's application to health information created or received by the department. Although the department, because it remains a covered entity, retains certain responsibilities with respect to implementation of and compliance with the HIPAA privacy rule (for example, adopting privacy policies and procedures), the rule's requirements and restrictions with respect to the use and disclosure of protected health information apply only with respect to health information created or received by the department's covered health care components and do not apply to the use or disclosure of health information by noncovered components within the department.

### **Are County Social Services Departments Subject to HIPAA As Business Associates of Covered Health Care Providers?**

Although, theoretically, a county social services department may be subject to the HIPAA privacy rule as the business associate of a covered entity, there are probably very few instances in which a county social services department is, in fact, the business associate of a covered entity.

A county social services department is a business associate of a covered entity if the department

- performs, *on behalf of the covered entity*, any function or activity regulated by the HIPAA regulations or any function (such as billing, claims processing, quality assurance, utilization review, etc.) involving the use or disclosure of individually identifiable health information; *or*
- provides legal, accounting, financial, administrative, management, accreditation, or other specified services *to or for a covered entity* and the provision of these services requires the disclosure of individually identifiable health information by the covered entity to the department.<sup>118</sup>

In most instances, the functions and activities performed by a county social services department are performed on behalf of the county social services department itself as an integral part of its responsibility to administer public assistance and social services programs. But there may be some instances in which a county social services department provides accounting, financial, claims processing, or billing services to, for, or *on behalf of* a covered health care provider and receives, uses, or discloses individually identifiable health information in connection with these functions, activities, or services. For example, some county social services departments have indicated that they process Medicaid or health insurance claims for certain types of health care providers who serve social services clients.

*If* a county social services department is a business associate of a covered entity, the covered entity may not disclose protected health information to the department or allow the department to create, receive, or use protected health information on behalf of the covered entity unless it receives “satisfactory assurance” that the department will appropriately safeguard that information.<sup>119</sup>

In most circumstances, this means that a covered entity must enter into a written, legally-binding contractual agreement with each business associate.<sup>120</sup> Among other things, a business associate agreement must

- prohibit the business associate from using or disclosing protected health information created for or received from the covered entity except as permitted or required by the agreement or as required by law;<sup>121</sup>
- require the business associate to use appropriate safeguards to prevent uses or disclosures of protected health information that are not permitted by the agreement.

If a county social services department is a business associate of a covered entity and uses or discloses protected health information in violation of a business

associate agreement, the department will not be subject to civil or criminal penalties under the HIPAA privacy rule unless it is also a covered entity subject to the rule.<sup>122</sup> The covered entity, however, may be able (and if able, required) to terminate the agreement based on the business associate’s violation.

It is important to note, though, that the mere fact that a county social services department has some sort of relationship with a covered entity or that the social services department receives protected health information from a covered entity does not, in and of itself, make the social services department a business associate of the covered entity. And, as discussed in the next section, county social services departments are not considered business associates of the state’s Medicaid and Health Choice programs despite their performing eligibility determination and other functions on behalf of those covered health plans.

### **Are County Social Services Departments Subject to the HIPAA Privacy Rule Because They Determine Eligibility for Medicaid and Health Choice?**

Both Medicaid (a federal-state health insurance program for the poor) and Health Choice (the state’s health insurance program for uninsured children) fall within HIPAA’s definition of “health plan” and are subject to the HIPAA privacy rule.<sup>123</sup>

County social services departments are responsible, along with the state Division of Medical Assistance and other state agencies and contractors, for administering the state’s Medicaid and Health Choice programs. In this role, county social services departments may create and receive health information about the individuals who apply for or receive assistance under these programs.

Because Medicaid and Health Choice are health plans that are subject to the HIPAA privacy rule and county social services departments are involved in administering these health plans, it would seem to follow that social services departments (or at least their Medicaid and Health Choice eligibility units) would be subject to the HIPAA privacy rule as part of a covered health plan (Medicaid and Health Choice) or as the business associate of a covered health plan (because they create or receive individual health information to determine eligibility on behalf of Medicaid and Health Choice).

This, however, is not the case. The preamble to the HIPAA privacy rule states that a local welfare agency (such as a county social services department) is *not* a covered entity subject to the HIPAA privacy rule due to

its collection, use, or transmission of individual health information in connection with determining the eligibility of individuals for or enrolling individuals in a health plan that is a government benefits program (such as Medicaid and Health Choice) that is administered by another public agency.<sup>124</sup> And the HIPAA privacy rule itself provides that the restrictions on the use and disclosure of protected health information by business associates of state Medicaid programs and other covered health plans that are government benefit programs do *not* apply with respect to an agency (such as a county social services department) that is legally authorized to receive or use individual health information in connection with determining the eligibility of individuals for or enrolling individuals in these health plans.<sup>125</sup>

County social services departments therefore are *not* subject to the HIPAA privacy rule by virtue of their activities related to eligibility determination and enrollment in the state's Medicaid and Health Choice programs even though the Medicaid and Health Choice programs are health plans that are subject to the HIPAA privacy rule.

### **If a Social Services Department Is a Covered Health Care Provider, When Can It Use and Disclose Protected Health Information?**

The short answer is that, assuming that a county social services department has been designated as a hybrid entity, the covered health care components of the department may use and disclose protected health information only to the extent allowed under the HIPAA privacy rule (for example, with the written authorization of the individual to whom the information pertains, to the extent required by law, for purposes related to treatment or payment, to business associates pursuant to a written agreement that safeguards privacy, etc.).<sup>126</sup>

Covered health care components of a county social services department may *not* disclose protected health information to noncovered components of the department unless the HIPAA privacy rule expressly authorizes the particular use or disclosure.

As noted above, noncovered components of the department will not be subject to the privacy rule's requirements and restrictions regarding use or disclosure of protected health information. Confidentiality rules other than the HIPAA privacy rule, however, may also apply to the use or disclosure of health information by covered or noncovered components of the social services department.

## **Conclusion**

The HIPAA privacy rule will almost certainly have a significant impact on public health agencies, mental health facilities, public and private health plans, hospitals, doctors, nursing homes, pharmacists, and other health care providers as they attempt to comply with the rule's new requirements and restrictions regarding the use, protection, and disclosure of individual health information.

The new rule also has affected, and will continue to affect, county social services departments in North Carolina. Employees of county social services departments have invested thousands of hours over the past year determining whether and to what extent their agencies will have to comply with the new rule, adopting and implementing policies and procedures required under the new rule, and worrying whether the rule will affect their ability to obtain health information about the individuals and families they serve.

It appears, however, that only a few programs or components of some county social services departments will have to comply with the requirements of the HIPAA privacy rule and that the new rule should not significantly affect the ability of county social services departments to obtain, use, and disclose individual health information in connection with their administration of public assistance and social services programs.<sup>127</sup>

## **Notes**

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1. 45 C.F.R. Parts 160 and 164.

2. This is the fifth in a series of *Social Services Bulletins* addressing issues involving confidentiality and social services. *Social Services Bulletin No. 30* (February, 2001) discussed the general meaning, purposes, nature, scope, and limits of confidentiality. *Social Services Bulletin No. 31* (May, 2001) examined the legal sources of rules governing the acquisition, use, and disclosure of confidential information. *Social Services Bulletin No. 35* (April, 2002) outlined a process that social services agencies can use to analyze issues, solve problems, and answer questions involving the acquisition, use, and disclosure of confidential information. *Social Services Bulletin No. 37* (October, 2002) identified and briefly summarized many of the federal and state statutes and

regulations that govern the acquisition, use, and disclosure of information by county social services departments. To order copies of any of these *Social Services Bulletins*, please contact the Institute's publications office at 919-966-4119, [sales@iogmail.iog.unc.edu](mailto:sales@iogmail.iog.unc.edu), or <https://iogpubs.iog.unc.edu/>.

3. The application and requirements of the HIPAA privacy rule are discussed in more detail in Aimee N. Wall, *Health Privacy: The New Federal Framework*, *Popular Government* 67(3):44–52 (Institute of Government, UNC-Chapel Hill, Spring, 2002), and in materials included on the Institute of Government's HIPAA web site: <http://www.medicalprivacy.unc.edu>.

4. 45 C.F.R. 160.103.

5. 45 C.F.R. 160.103.

6. 45 C.F.R. 160.103.

7. 45 C.F.R. 160.103.

8. 45 C.F.R. 160.103. Transactions subject to HIPAA are defined in more detail in 45 C.F.R. Part 162.

9. 45 C.F.R. 160.103.

10. 45 C.F.R. 164.504(a); 45 C.F.R. 164.501.

11. 45 C.F.R. 164.504(c)(3).

12. 45 C.F.R. 164.504(c)(3).

13. 45 C.F.R. 164.504(c)(3); 45 C.F.R. 164.504(c)(2).

14. 45 C.F.R. 164.504(c)(1); 45 C.F.R. 164.504(c)(2). If a person performs duties for a covered health care component and works in the same capacity for another component of the hybrid entity, the person may not use or disclose protected health information created or received incident to the person's work for the covered health care component in a way prohibited by the HIPAA privacy rule. 45 C.F.R. 164.504(c)(2)(iii).

15. 45 C.F.R. 160.103. A covered entity may be the business associate of another covered entity.

16. 45 C.F.R. 164.502(e); 45 C.F.R. 164.504(e).

17. A covered entity may not use or disclose protected health information unless use or disclosure is required or permitted under the HIPAA privacy rule *and* is consistent with the entity's notice of individual privacy rights. 45 C.F.R. 164.502(i).

18. 45 C.F.R. 164.502(b). There are several exceptions to the "minimum necessary" requirement. For example, a covered entity is not required to limit the amount of information it discloses to health care providers for treatment purposes.

19. 45 C.F.R. 164.530(i); 45 C.F.R. 164.530(c).

20. 45 C.F.R. 164.530(b).

21. 45 C.F.R. 164.530(a).

22. 45 C.F.R. 164.520; 45 C.F.R. 164.522.

23. 45 C.F.R. 164.524. The rule also allows individuals to seek correction or amendment of their health information if it is inaccurate or incomplete. 45 C.F.R. 164.526.

24. 45 C.F.R. 164.528. A covered health care provider is not required to account for disclosures for treatment, payment, or health care operations, disclosures made pursuant to individual authorization, and other specified disclosures. When the HIPAA privacy rule requires a covered entity to account for the disclosure of protected health information, the accounting must include, for each disclosure, the date on which the disclosure was made, the name and address of the entity to whom the information was disclosed, a brief description of the information disclosed, and a brief statement of the purpose of the disclosure. 45 C.F.R. 164.528(b)(2).

25. 45 C.F.R. 164.502(e); 45 C.F.R. 164.504(e).

26. 45 C.F.R. 164.501.

27. 45 C.F.R. 160.103.

28. 45 C.F.R. 164.501.

29. 45 C.F.R. 164.502(a).

30. 45 C.F.R. 164.501. A covered entity must make reasonable efforts to limit the access of workforce members to the minimum amount of protected health information that is necessary to carry out their duties. 45 C.F.R. 164.514(d)(2).

31. 45 C.F.R. 164.501.

32. 45 C.F.R. 164.508. An authorization for the release of protected health information must be voluntary, informed, and comply with the standards established under 45 C.F.R. 164.508(c). In the case of an adult, a personal representative is a person who has the legal authority to make medical decisions on behalf of the individual. 45 C.F.R. 164.502(g). Special rules apply with respect to authorizations for the release of health information concerning unemancipated minors. 45 C.F.R. 164.502(g)(3).

33. 45 C.F.R. 164.512(a).

34. 45 C.F.R. 164.512(b).

35. 45 C.F.R. 164.512(c). Disclosure is permitted if (1) reporting abuse, neglect, or domestic violence is required by law, (2) the individual consents, or (3) reporting is expressly authorized by law and (a) is necessary to prevent serious harm to the individual or (b) the individual is unable to consent due to incapacity and disclosure is sought by a law enforcement or public official under specified circumstances.

36. 45 C.F.R. 164.512(d).

37. 45 C.F.R. 164.512(e).

38. 45 C.F.R. 164.512(e).

39. 45 C.F.R. 164.512(j).

40. 45 C.F.R. 164.512(f).

41. 45 C.F.R. 164.512(b).

42. 45 C.F.R. 164.506(c). "Treatment" is defined as the provision, coordination, or management of health care and related services by one or more health care providers. 45 C.F.R. 164.501.

43. 45 C.F.R. 164.506(c).



44. 45 C.F.R. 164.506(c). "Payment" activities include actions undertaken by a health care provider to obtain reimbursement for the provision of health care. 45 C.F.R. 164.501.

45. 45 C.F.R. 164.506(c).

46. 45 C.F.R. 164.506(c). "Health care operations" include quality assessment and improvement activities, evaluating provider performance, providing training, business management and general administrative functions, and other specified activities related to the provision of health care. 45 C.F.R. 164.501. A covered entity may disclose protected health information to another health care provider for the other provider's health care operations under limited circumstances. 45 C.F.R. 164.506(c).

47. The rule *requires* a covered entity to disclose protected health information to the U.S. Department of Health and Human Services in connection with its investigation or audit of the entity's compliance with the HIPAA privacy rule. 45 C.F.R. 160.310. The rule generally *requires* a covered entity to disclose protected health information to the individual who is the subject of the information upon request of the individual or the individual's personal representative. 45 C.F.R. 164.524.

48. Use and disclosure of health information by the county social services department may be restricted or prohibited by other federal and state confidentiality rules. *See* John L. Saxon, Confidentiality and Social Services (Part IV): An Annotated Index of Federal and State Confidentiality Laws, *Social Services Bulletin No. 37* (October, 2002).

49. 45 C.F.R. 164.512(a). A disclosure is required by state law if it is mandated by a state statute, administrative regulation, court order, warrant, summons, subpoena, or similar legal authority that is enforceable in a court of law. 45 C.F.R. 164.501.

50. 45 C.F.R. 160.203(b). In general, a state law is more stringent than the HIPAA privacy rule if it provides greater privacy protection to the individual who is the subject of individually identifiable health information. 45 C.F.R. 160.202.

51. 45 C.F.R. 160.203(c).

52. 45 C.F.R. 160.203. A state law is contrary to the HIPAA privacy rule if a covered entity would find it impossible to comply with both the state and federal requirements or the state law would interfere with the purposes and objectives of the federal rule. 45 C.F.R. 160.202.

53. 42 U.S.C. 1320d-6; 42 U.S.C. 1320d-5(a)(1); 45 C.F.R. 160.500 et seq. The DHHS Office of Civil Rights is responsible for auditing and enforcing the HIPAA privacy rule. 45 C.F.R. 160.300 et seq. It is unclear whether individuals will be able to enforce their privacy rights through a private cause of action under HIPAA or, in the

case of covered entities acting under color of state law, through a civil rights action under 42 U.S.C. 1983.

54. 45 C.F.R. 160.203(c).

55. 45 C.F.R. 164.512(b).

56. G.S. 7B-300, 7B-301, 7B-302.

57. 45 C.F.R. 164.512(a).

58. G.S. 7B-301.

59. A report under G.S. 7B-301 must include, to the extent known by the person making the report, the child's name and address, the name and address of the child's parent, guardian, or caretaker, the child's age, the names and ages of other children in the home, the present whereabouts of the child if not in the home, the nature and extent of any injury or condition resulting from abuse, neglect, or dependency, and any other information that might be helpful in determining the need for protective services or court intervention.

60. 45 C.F.R. 164.528; 45 C.F.R. 164.512(k)(5); 45 C.F.R. 164.502(g)(5). When the HIPAA privacy rule requires a covered entity to account for the disclosure of protected health information, the accounting must include, for each disclosure, the date on which the disclosure was made, the name and address of the entity to whom the information was disclosed, a brief description of the information disclosed, and a brief statement of the purpose of the disclosure. 45 C.F.R. 164.528(b)(2). A covered health care provider may refuse a request for an accounting of disclosures made by an individual's personal representative if the provider reasonably believes that the personal representative has abused or neglected the individual, reasonably believes that treating a person as the individual's personal representative could endanger the individual, or exercising professional judgment decides that treating a person as the individual's personal representative is not in the individual's best interest. 45 C.F.R. 164.524(a)(3)(iii).

61. 45 C.F.R. 164.512(a).

62. G.S. 7B-302(e). In most instances, the health information requested by the county social services department will relate to the health or medical care of the child who is alleged to be abused, neglected, or dependent. In some instances, however, health information about a child's parent, caretaker, or sibling or another individual may be relevant in connection with the department's investigation of reported abuse or neglect of a child.

63. The provider should require a social services employee to verify his or her identity and authority to seek disclosure of protected health information. 45 C.F.R. 164.514(h).

64. *See* note 60 and accompanying text.

65. 45 C.F.R. 164.524(a). The term "designated record set" includes the medical and billings records about individuals maintained by a health care provider, claims,

payment, and other records maintained by a health plan, and other records that include protected health information and are used by a covered entity to make decisions about individuals. 45 C.F.R. 164.501.

66. 45 C.F.R. 164.502(g)(1). A covered entity may deny a request for access to an individual's protected health information if the request is made by the individual's personal representative and a licensed health care professional determines, in the exercise of professional judgment, that disclosing the information to the individual's personal representative is reasonably likely to result in substantial harm to the individual or another person. 45 C.F.R. 164.524(a)(3)(iii). A covered entity also may refuse to treat a person or agency as an individual's personal representative if it decides, in the exercise of professional judgment, that refusing to recognize the person or agency as the individual's personal representative is in the individual's best interest. 45 C.F.R. 164.502(g)(5).

67. 45 C.F.R. 164.501.

68. 45 C.F.R. 164.502(g)(3). Special rules regarding disclosure of protected health information regarding a minor child to the child's parent or other personal representative may apply when a state law (for example, G.S. 90-21.5(a)) allows a health care provider to treat a minor child based on the child's consent.

69. G.S. 7B-903(a)(2)c. The director does not have the authority to consent to psychiatric or psychological treatment for a child placed in the department's custody unless the child's parent is unknown, unavailable, or unable to act on behalf of the child.

70. G.S. 7B-302(e).

71. 45 C.F.R. 164.512(a).

72. G.S. 7B-3100; 28 N.C. Admin. Code 01A.0301 and 01A.0302.

73. 45 C.F.R. 164.512(a).

74. 45 C.F.R. 164.512(c)(1)(i).

75. G.S. 108A-102(a). The report must include the disabled adult's name and address, the name and address of the disabled adult's caretaker, the disabled adult's age, the nature and extent of the disabled adult's injury or condition resulting from abuse or neglect, and other pertinent information. G.S. 108A-102(b).

76. 45 C.F.R. 164.512(c)(1)(ii) and (iii).

77. 45 C.F.R. 164.512(c)(2). When disclosing protected health information under 45 C.F.R. 164.512(c), a provider may disclose only the minimum amount of protected health information required to report suspected abuse or neglect. 45 C.F.R. 164.502(b). The authorization to disclose protected health information under 45 C.F.R. 164.512(c) does not extend to the disclosure of psychotherapy notes. 45 C.F.R. 164.508(a)(2)(ii).

78. G.S. 108A-103(a).

79. The provider should require a social services employee to verify his or her identity and authority to seek disclosure of protected health information. 45 C.F.R. 164.514(h). Upon request, the health care provider generally must account to the individual or the individual's personal representative with respect to the discussion. *See* note 60 and accompanying text.

80. G.S. 131D-2(b)(1a); G.S. 108A-14(8).

81. G.S. 131D-2(b)(4).

82. 45 C.F.R. 164.512(d)(1)(iii).

83. A covered entity may disclose only the minimum amount of protected health information necessary for the social services department to carry out its health care oversight responsibilities and may not disclose psychotherapy notes to the department. 45 C.F.R. 164.502(b) and 164.508(a)(2)(ii).

84. G.S. 131D-26.

85. G.S. 131D-37.

86. 45 C.F.R. 164.512(d)(1)(iii), (iv). If the disclosure of information is authorized under 45 C.F.R. 164.512 but is not required under state law, the provider may disclose only the minimum amount of protected health information necessary for the social services department to carry out its health care oversight responsibilities and may not disclose psychotherapy notes to the department. 45 C.F.R. 164.502(b) and 164.508(a)(2)(ii).

87. 45 C.F.R. 164.501; 45 C.F.R. 164.512(d)(1)(ii).

88. 45 C.F.R. 164.506; 45 C.F.R. 164.501.

89. 45 C.F.R. 164.506; 45 C.F.R. 164.501.

90. The administrative responsibilities of county social services departments with respect to these public benefit programs generally include determining whether an individual or family is eligible for assistance, determining the amount of assistance the beneficiary is entitled to receive, and investigating suspected fraud by beneficiaries.

91. An individual's eligibility for Medicaid or State-County Special Assistance may depend on whether the individual is disabled. An individual's disability also may affect an individual's participation in the Work First, Food Stamp, or Energy Assistance programs.

92. 45 C.F.R. 164.508. *See also* notes 99 through 102 and accompanying text.

93. 45 C.F.R. 164.501; 45 C.F.R. 164.512(d)(1)(ii). The HIPAA privacy rule's definition of "health oversight agency" includes a public agency (like the county social services department) that is authorized by law to oversee government programs in which health information is necessary to determine eligibility. The rule also allows the disclosure of protected health information to health oversight agencies for activities that are necessary for the appropriate oversight of government benefit programs (like Medicaid) for which health information is relevant to beneficiary

eligibility. Although health oversight activities generally include audits and civil, criminal, or administrative investigations, protected health information may not be disclosed in connection with an investigation of the individual to whom the information pertains *unless* the investigation is directly related to the receipt of health care, a claim for public benefits related to health, or qualification for or receipt of public benefits or services when a patient's health is integral to the claim for public benefits or services. 45 C.F.R. 164.512(d)(2). *See also* 45 C.F.R. 164.512(k)(6) (authorizing government agencies that provide public benefits and are covered by HIPAA to share protected health information).

94. 45 C.F.R. 164.512(e)(i). Even though the HIPAA privacy rule authorizes the disclosure of protected health information in response to a valid court order, a provider may refuse to disclose information in response to a court order if court-ordered disclosure is prohibited under other state or federal laws.

95. 45 C.F.R. 164.512(e)(ii) through 164.512(e)(v). In some instances, disclosure of protected health information in response to a subpoena or discovery request may be authorized by the HIPAA privacy rule but prohibited under other state or federal laws. G.S. 8-53 (recognizing a physician-patient privilege), for example, may prohibit a medical doctor from disclosing protected health information in response to a subpoena or discovery request unless (a) the physician-patient privilege has been waived or is inapplicable, (b) the patient has authorized the disclosure of the information, (c) a court order expressly requires disclosure of the information, or (d) another federal or state law expressly requires disclosure of the information.

96. 45 C.F.R. 164.506(c).

97. 45 C.F.R. 164.501.

98. 45 C.F.R. 164.506(c).

99. 45 C.F.R. 164.502(a)(1)(iv); 45 C.F.R. 164.508.

100. 45 C.F.R. 164.502(g).

101. 45 C.F.R. 164.502(g)(3).

102. 45 C.F.R. 164.502(g)(5).

103. The answer to this question would be different if a county social services department is a "business associate" of a covered entity and receives protected health information from the covered entity. *See* text accompanying notes 118 through 122.

104. The rule applies indirectly to a county social services department if the department is a business associate of a covered entity.

105. *See* G.S. 108A-14(a)(2) and (b); G.S. 108A-12. North Carolina's General Statutes contain approximately 100 references to county departments of social services (as opposed to references to the county social services director or board).

106. *See* *Malloy v. Durham County Department of Social Services*, 58 N.C. App. 61, 293 S.E.2d 285 (1982) (holding that the county department of social services was not an independent legal entity that had standing to bring a civil action for reimbursement of Medicaid expenditures in its own name rather than in the name of the county of which it was a part. *See also* G.S. Ch. 159 (county department of social services is not a unit of local government or public authority under the state's Local Government Budget and Fiscal Control Act).

107. The analysis in the following sections assumes that the social services department is a separate legal entity and that the HIPAA privacy rule's applicability to the social services department depends on whether the department is a covered health plan or health care provider, not whether the department is a component of a county that is a covered health plan or health care provider.

108. As a general rule, the employees of county social services departments who provide social work and services to individuals and families are not required to be licensed or certified as health care providers under state law.

109. 45 C.F.R. 160.103. *See also* text accompanying notes 6 and 7.

110. 45 C.F.R. 160.103.

111. 45 C.F.R. 160.103.

112. 45 C.F.R. Part 162.

113. It is important to note that health care claim transactions include only requests for payment from a "health plan." If a county social services department electronically transmits health information to request payment for health care from a government program that is *not* a health plan (for example, from the Older Americans Act, Temporary Assistance for Needy Families, or Social Services Block Grant programs), its doing so will not, standing alone, make it subject to the HIPAA privacy rule.

114. 45 C.F.R. 164.504(a). If the county social services department is considered to be a component of the county rather than a separate legal entity and the county has determined that it is a covered entity, the county may designate itself as a hybrid entity and designate some or all of the county social services department (depending on whether and to what extent the department or any of its components would be a covered health care provider, a health care provider, or a business associate of a health care provider if the department or component was a separate legal entity) as a noncovered component that is not subject to the HIPAA privacy rule.

115. The rule does not define the term "component." "Component" might mean an organizational unit of the social services department, a particular program or service provided by the department, a designated group of positions or employees whose functions involve furnishing, billing, or

receiving payment for health care, or only those functions of particular positions or employees that involve furnishing, billing, or receiving payment for health care.

116. 45 C.F.R. 164.504(e)(3)(iii).

117. 45 C.F.R. 164.504(e)(3)(iii).

118. 45 C.F.R. 164.501.

119. 45 C.F.R. 164.502(e); 45 C.F.R. 164.504(e).

120. 45 C.F.R. 164.504(e). If the covered entity and business associate are both government entities, they may enter into a memorandum of understanding rather than a legally binding contractual agreement and are not required to enter into a business associate agreement if applicable law imposes privacy requirements on the business associate that accomplish the same objectives as a business associate agreement.

121. As a general rule, a business associate agreement may not permit the business associate to use or disclose protected health information in any manner that would violate the HIPAA privacy rule if done by the covered entity.

122. 45 C.F.R. 164.502(e). A covered entity, however, may be subject to penalties based on the business associate's

violations if it knows of a pattern of activity or practice by the business associate that constitutes a material breach or violation of the business associate agreement and fails to take reasonable steps to remedy the violation or to terminate the agreement.

123. 45 C.F.R. 160.103. *See also* text accompanying note 5.

124. 65 Fed.Reg. 82470 (Dec. 28, 2000).

125. 45 C.F.R. 164.502(e)(1)(ii)(C).

126. *See* notes 29 through 47 and accompanying text.

127. Although the HIPAA privacy rule may not significantly affect the use, protection, and disclosure of health information by county social services departments, county social services departments and their employees will have to continue to comply with other federal and state rules that restrict the use and disclosure of information about individuals who apply for or receive assistance and services from state and local social services programs. *See* John L. Saxon, "Confidentiality and Social Services (Part IV): An Annotated Index of Federal and State Confidentiality Rules," *Social Services Bulletin No. 37* (October, 2002).

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