

New York State Office of Mental Health HIPAA Preemption Analysis

| NYS Statute | HIPAA Regulation (45 CFR Parts 160, 164) | Preemption Analysis |
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| MHL Section 29.29 Incident Reporting Procedures | | |
| <p>MHL §29.29 The commissioners of OMH and OPWDD shall establish policies and uniform procedures for their offices for the compilation and analysis of incident reports.</p> <p>OMH Official Policy Directive QA-510 (note: under revision as of 9.23.13)</p> <p>D)4)c)iii) <i>External Reporting:</i></p> <p>(1) The Executive Director or the administrator on duty is responsible for the timely notification of appropriate persons or organizations of certain incidents in accordance with the provisions of this Policy Directive.</p> <p>(2) Each facility shall have procedures to assure that appropriate notifications occur. Such procedures must generally identify who, within the facility, bears responsibility for making each type of required notification. Copies of all external reports must be concurrently sent to the Bureau of Quality Management in Central Office. The following notifications are required:</p> | <p>§164.501: Health oversight agency means an agency or authority of the United States, a State, a territory, a political subdivision of a State or territory...or a person or entity operating under a grant of authority from or contract with such public agency....that is authorized by law to oversee the health care system (whether public or private) or government programs in which health information is necessary to determine eligibility or compliance, or to enforce civil rights laws for which health information is relevant.</p> <p>§164.506(c):(1) A covered entity may use/disclose PHI for its own treatment, payment, or health care operations. (2) A covered entity may disclose PHI for treatment activities of a health care provider. (3) A covered entity may disclose PHI to another covered entity or health care provider for the payment activities of the entity that receives the information....</p> <p>§164.512(a)</p> | <p>No preemption: OMH Policy QA-510 and 14 NYCRR Part 524 are consistent with HIPAA, due in part to the adoption of proposed amendments to HIPAA:</p> <ol style="list-style-type: none"> 1. The Facility and Central Office are divisions within the same covered entity as a matter of law. HIPAA permits the use of PHI by a covered entity without patient consent for health care operations purposes (e.g., quality assurance activities). As OMH Policy QA-510 and 14 NYCRR Part 524 permit use of PHI for incident management purposes w/out patient consent; and HIPAA does not requires such consent, there is no preemption: State policy/ regulations and HIPAA are consistent. 2. Disclosures by OMH to the Justice Center are permitted under the health oversight agency and required by law exceptions. 3. Disclosures by OMH to the FDA are permitted under the required by law exception to HIPAA and the disclosures for public health activities exception. 4. Disclosures by OMH to medical |

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| <p>(A) Justice Center for the Protection of People with Special Needs (JC), <i>(formerly Commission on Quality of Care for the Mentally Disabled (CQC))</i>.</p> <p>1.The JC and its Mental Hygiene Medical Review Board must be notified of all patient deaths within 3 working days..</p> <p>B) Food and Drug Administration (FDA).</p> <p>1. An Adverse Drug Reaction should be reported to the Food and Drug Administration (FDA), following FDA specifications and in accordance with FDA requirements, when the patient outcome is death, life-threatening; hospitalization;disability; congenital anomaly;required intervention to prevent permanent impairment; or reaction. related to to the use of a newly marketed drug as part of post-marketing surveillance. 2. Incidents resulting in serious injury or death through the use of medical devices shall be reported to the FDA in accordance with the Safe Medical Devices Act.</p> <p>C)Persons Who May Be Endangered. Any person or persons who are known to be potentially endangered by a patient placed on missing patient-escape status must be notified immediately.</p> <p>(D) Local Law Enforcement Authorities</p> <p>1. Local law enforcement</p> | <p>(a) Standard: Uses and disclosures required by law.</p> <p>(1) A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.</p> <p>(2) A covered entity must meet the requirements described in paragraph(c) (Disclosures about victims of abuse, neglect or domestic violence); (e) (Disclosures for judicial or administrative proceedings); or (f) (Disclosures for law enforcement purposes) of Section 164.512 for uses or disclosures required by law</p> <p>§164.512(d) A covered entity may disclose PHI to a health oversight agency for oversight activities authorized by law.</p> <p>§164.512(g) PHI about decedents can be released to a coroner or medical examiner for the purpose of identifying a deceased person, determining a cause of death, or other duties as authorized by law. PHI may also be released to funeral directors to carry out their duties with respect to a decedent.</p> <p>§164.512(b): A covered entity may disclose PHI for the public health activities and purposes described in this paragraph to: (ii)</p> | <p>examiners/coroners, provided they are disclosures necessary for such entities to perform their statutory duties, are consistent with HIPAA and are permitted.</p> <p>5.Disclosures by OMH to law enforcement authorities and endangered persons in the case of patients placed on missing/escape status are permitted under the express exception to HIPAA to lessen a serious and imminent threat to the health and safety of a person.</p> <p>6 . The provisions of OMH policy requiring the reporting of crimes on program premises is consistent with the exception to use/disclosures under HIPAA for reporting same.</p> <p>8. Disclosures to the NYS Central Register of Child Abuse are permitted under the HIPAA exception permitting such reports for public health purposes and as authorized by law.</p> <p>9. Disclosures to next of kin are authorized, provided the patient has previously been given the opportunity to agree or object to such notifications; OMH policy is generally consistent with this requirement.</p> <p>10. Disclosures to qualified persons under Jonathan’s Law are permitted under the required by law exception to HIPAA. Notably, MHL Section 33.23 specifically provides in cases where federal regulations are more stringent, those federal</p> |
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| <p>authorities must be notified in a timely manner of any incident when it appears that a crime may have occurred.</p> <p>2. Local law enforcement authorities shall also be notified as soon as possible when a patient has been placed on missing patient-escape status.</p> <p>(E) Medical Examiner/Coroner. When a patient dies while an inpatient of a State-operated facility, the County Medical Examiner or Coroner must be notified immediately in accordance with applicable OMH Policy.</p> <p>(H) New York Statewide Central Register of Child Abuse and treatment (SCR). Suspected abuse or neglect of persons under age 18 by a parent, guardian, or caretaker in a foster family boarding home, must be reported to the Statewide Central Register of Child Abuse and Maltreatment in accordance with the provisions of Section 413 of the Social Services Law</p> <p>(I) Next of Kin. Unless the patient involved in an incident is an adult who objects to such notification, the patient's next of kin or guardians shall be notified immediately of allegations of abuse or neglect, incidents involving missing patients or incidents involving patient death or injury. In such cases, next of kin or guardians shall also be notified of the outcomes of the investigation and review process</p> | <p>a public health authority or other appropriate government authority authorized by law to receive reports of child abuse or neglect.,,(iii) a person subject to the jurisdiction of the FDA (A) to report adverse events....</p> <p>§164.512(j):A covered entity may use/disclose PHI (consistent with law & professional conduct) if it believes in good faith that the disclosure is necessary to prevent or lessen a serious & imminent threat to the health or safety of a person (per preamble, consistent with Tarasoff) or the public and is being made to a person or persons reasonably able to prevent or lessen the threat or is necessary for law enforcement authorities to identify/apprehend an individual. If disclosure is to be made to one other than the target, the information cannot have been obtained in the course of treatment to affect the propensity to commit the criminal conduct or through a request by the person to initiate or be referred to treatment.</p> <p>§164.512(f)(5): Crime on program premises. A covered entity may disclose to a law enforcement official PHI that the covered entity believes in good faith constitutes evidence of criminal conduct that occurred on the premises of the covered entity.</p> <p>§164.510(b)(1): A covered entity may disclose to a family member, other relative, close personal friend of the individual or any other person identified by the individual, the PHI directly</p> | <p>regulations shall apply.</p> <p>11. Disclosures to contact persons are permitted if authorized by the patient.</p> <p>12. Disclosures to other treatment providers, with a direct treatment relationship with the patient, are permitted without patient consent as a result of the adoption of the 8/02 amendments to HIPAA allowing use/disclosure of PHI for treatment purposes without patient consent.</p> <p>13. Disclosures to the Department of Labor, Department of Education, Department of Health, and National Practitioner Data Bank are probably permitted under the required by law and/or health oversight agency exceptions to HIPAA; Counsel's Office will need to advise in individual circumstances. Also note that in some cases, it might be possible to utilize de-identified information to some extent.</p> |
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for the most serious incidents.

(J) Qualified Persons: In accordance with the procedures identified in Mental Hygiene Law Section 33.23, providers of mental health services subject to this Part must provide telephone notice to a qualified person of a patient of a Reportable Incident involving such patient and identified as injury, death, medication error, missing person, or allegation of abuse or neglect within 24 hours of the initial report of the incident.

(K) Contact Persons and Other Mental Health Programs. When an inpatient of a State-operated psychiatric facility is considered missing, any contact person identified in the missing person's case record ... shall be notified. In addition, any mental health program, including a case management program, which recently provided services to the person or is likely to encounter the missing person, shall be notified.

(L) New York State Education Department, New York State Health Department, and National Practitioner Data Bank. In cases where possible misconduct of licensed practitioners or physicians is related to an incident, Counsel's Office must be contacted for advice regarding notification of the NYS Education Department, NYS Department of Health, and the National Practitioner Data

relevant to such persons involvement with the individual's care or payment related to the individual's care, if the individual is given the opportunity to agree, prohibit, or restrict the disclosure.

§164.501 Treatment means 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, consultation between health care providers relating to a patient, or the referral of a patient for health care from one health care provider to another.

§164.506(c):(1) A covered entity may use/disclose PHI for its own treatment, payment, or health care operations. (2) A covered entity may disclose PHI for treatment activities of a health care provider. (3) A covered entity may disclose PHI to another covered entity or health care provider for the payment activities of the entity that receives the information

.... **§164.512(f)(2):** ...A covered entity may disclose PHI in response to a law enforcement official's request for such information for the purpose of identifying or locating a suspect, fugitive, material witness, or missing person, provided that: (i) the covered entity may disclose only the following information: (A) Name/address; (B) Date/place of birth; (C) SS#; (D) ABO blood

Bank, as applicable.

(M) New York State Department of Labor. In cases where an incident results in the fatality or inpatient hospitalization of an employee of OMH, Counsel's Office and the Bureau of Human Resources must be contacted for advice regarding notification of the New York State Department of Labor, Division of Safety and Health.

Note: These requirements are also included in 14 NYCRR Section 524.7, and are referenced, as applicable, in OMH Official Policy Manual ## QA-515, QA-520, QA-530, and PC-450.

type and rh factor; (E) type of injury; (F) date/time of treatment; (G) date/time of death, if applicable; and (H) description of distinguishing physical characteristics...

§164.512(f)(3): ...a covered entity may disclose PHI in response to a law enforcement official's request for such information about an individual who is or is suspected to be a victim of a crime, ...if (i) the individual agrees to the disclosure, or (ii) the covered entity is unable to obtain the individual's agreement because of incapacity or other emergency, provided that (A) the law enforcement official represents that such information is needed to determine whether a violation of law by a person other than the victim has occurred, and such information is not intended to be used against the individual; (B) the law enforcement official represents that immediate law enforcement activity that depends upon the disclosure would be materially and adversely affected by waiting until the individual is able to agree to the disclosure; and (C) the disclosure is in the best interests of the individual as determined by the covered entity, in the exercise of its professional judgment.