FAMILY TO FAMILY TEAM DECISION-MAKING

HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996 (HIPAA) AND THE TEAM DECISION - MAKING PROCESS

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INTRODUCTION

This document is designed to provide a basic background to begin to evaluate questions that arise for Family to Family sites regarding HIPAA, particularly in the context of the team decision-making process. It is not intended to provide legal advice regarding HIPAA compliance. Child welfare agencies, health providers and other health organizations should consult with an attorney to evaluate their specific situation and determine their specific obligations, if any, with respect to HIPAA.

WHAT IS HIPAA?

The Health Insurance Portability and Accountability Act of 1996[i] ("HIPAA") was enacted by Congress to improve portability and continuity of health insurance coverage; to combat waste, fraud, and abuse in health insurance and health care delivery; to promote the use of medical savings accounts; to improve access to coverage and long-term care services; and to simplify the administration of health insurance.[ii] HIPAA was not intended to regulate child welfare services. However, if child welfare services agencies function as health care providers or health insurers, as defined in the Act, they may be subject to HIPAA.

The Administrative Simplification provisions of HIPAA[iii] are potentially relevant to the delivery of child welfare services. The simplification provisions and regulations implementing HIPPA[iv] establish national data standards for electronic health care transactions as well as security and privacy standards for the protection of health information. These provisions are intended to make it easier for health plans, doctors, hospitals, and other health care providers to process claims and other transactions electronically while protecting the privacy of individual health information.

WHO MUST COMPLY WITH HIPAA's PRIVACY, SECURITY, AND DATA STANDARDS?

HIPAA requires health plans, health care clearinghouses, and those health care providers who conduct certain financial and administrative transactions electronically (such as eligibility, referral authorizations, and claims) to comply with the Administrative Simplification standards for privacy, security, and electronic health care transactions[v]("Covered Entities"). Other entities may voluntarily comply with the standards, but the law does not require them to do so.

"COVERED ENTITIES"

- ***Health Care Providers***: Any provider of medical, other health services, or supplies that transmits any health information in electronic form in connection with a transaction for which standard requirements have been adopted (e.g. any individual/organization that furnishes, bills, or is paid for health care).
- ***Health Plans***: Any individual or group plan that provides or pays the cost of health care.
- ***Health Care Clearinghouses***: Any public or private entity that transforms health care transactions from one format to another (e.g. a billing service that takes a paper claim from a provider and bills an insurer in an electronic format).

CAN A CHILD WELFARE AGENCY BE A COVERED ENTITY UNDER HIPAA?

YES. A Child Welfare Agency (CWA) may be a covered entity under HIPAA if the agency functions as health care provider, health plan, or health clearinghouse. A CWA commonly falls into one of these categories when: 1) the CWA is part of a larger human services agency that functions as a health plan or a health provider and does not declare itself as a ***"hybrid entity"*** under HIPAA; or 2) the CWA directly provides health care services such as ***targeted case management services*** that are billed to and paid for by Medicaid.

The HIPAA regulations permit an agency that performs both covered and non-covered functions to elect to be a "hybrid entity"[vi] by designating in writing its operations that perform covered functions as one or more "health care components".[vii] If the agency makes such a designation, only the health care components will be subject to the HIPAA standards regarding privacy, security, and data. If the agency fails to make the hybrid designation or designates itself as a single legal entity, the entire agency is deemed to be subject to the HIPAA standards.

OREGON DEPARTMENT OF HUMAN SERVICES
is a state-operated human services agency that directly provides an array of social services including health, mental health, child welfare, and adoption services. Oregon DHS has elected to designate itself as a single covered entity under HIPAA. It functions as a health plan (pays for health services through Medicaid and other state-funded programs) and as a health care provider (operates health and mental health treatment programs and facilities). The entire agency, including child welfare services and adoptions, is subject to HIPAA.

WASHINGTON COUNTY, MINNESOTA has declared the county as a hybrid entity under HIPAA. Services and functions in various county departments have been declared health care components. In the Social Services Division that provides child welfare services, only case management services have been designated as a health care component subject to HIPAA.

WHAT ARE THE HIPAA PRIVACY STANDARDS?

HIPAA's privacy standards, also known as the Privacy Rule, were established by regulations[viii] issued by the federal Department of Health & Human Services. The rule establishes safeguards and restrictions regarding the use and release of individually identifiable health information, gives patients the right to access their medical records and be given an accounting of disclosures, requires that patients

be notified about their privacy rights and how their information can be used, restricts most disclosure of health information to the minimum needed for the intended purpose, and establishes safeguards and restrictions regarding disclosure of records for certain public responsibilities, such as public health, research, and law enforcement. Improper uses or disclosures under the rule are subject to criminal and civil sanctions.

WHAT INFORMATION IS PROTECTED?

All individually identifiable information held or disclosed by a covered entity in any form that relates to past, present or future health conditions of an individual or to the provision of, or payment for, health care to the individual is protected.

WHEN DO AGENCIES HAVE TO BE IN COMPLIANCE WITH HIPAA?

HIPAA compliance has been phased in over several years. The deadline for compliance with the privacy standards was April 14, 2003, for all covered entities except small health plans. The electronic transaction data standards compliance deadline was October 16, 2003, for those entities that requested a compliance extension. The security standards will go into effect in 2005.

HIPAA AND TEAM DECISION – MAKING (TDM) – FREQUENTLY ASKED QUESTIONS

1. Does HIPAA prohibit the sharing of health information in a TDM meeting?

NO. HIPAA does not provide absolute prohibitions on disclosure of health information. HIPAA only applies to the sharing of health information by an individual or entity covered by HIPAA. HIPAA does not prohibit redisclosure of health information by TDM meeting participants who are not covered entities.

If the CWA or any other participant in a TDM meeting is a covered entity under HIPAA, the privacy standards permit disclosure of health information with a patient's written authorization[ix] and under certain circumstances, permit disclosure without a patient's written authorization.

The privacy standards permit disclosures of health information without the patient's written consent under circumstances that clearly give the patient the opportunity to agree, acquiesce, or object to the disclosure. This provision would apply, for example, if a health care provider (or other HIPAA covered entity) disclosed health information about a parent at a TDM meeting, with or without the parent in attendance, if the parent has agreed to participate in the TDM process, has been informed that the health information will be disclosed, and has been given the opportunity to object to or restrict the disclosure.

2. Does HIPAA prohibit the CWA from sharing specific information about reasons for removal that include protected health information (e.g. parent's substance abuse and/or mental illness) with resource caregivers?

NO. If the CWA is a covered entity, the privacy standards permit disclosure of health information with a written patient authorization and even without written authorization under certain circumstances. In addition to the circumstances described above in question 1, disclosure of the reasons for removal when they include protected health information may be authorized without written consent by the privacy standards: 1) to carry out treatment[x], 2) when required by law [xi], or 3) for safety reasons to prevent or lessen a serious and imminent threat to the safety of a person[xii]. For example, a CWA may disclose to the caregiver that the child was removed for reasons related to the parent's mental illness if a state statute, regulation or a court order requires caregivers to be provided with the reasons for removal or if the parent's mental illness poses an imminent and serious threat to the caregiver or the child.

3. Does HIPAA require consent/permission from parents--separate from a Court order--to validate participation in therapy, parenting classes, etc…?

NO. If the health care provider is an entity covered by HIPAA, the provider may disclose participation information pursuant to a court order. HIPAA permits the disclosure of protected health information without the authorization of the individual in the course of any judicial or administrative proceeding in response to a court or administrative order. [xiii]

4. Does HIPAA prohibit a child welfare agency from providing health information to researchers?

NO. Even when the child welfare agency is a covered entity, HIPAA does not prohibit disclosure of aggregate data or health information with names and other personal identifiers removed. HIPAA also permits disclosure of personally identifiable health information for research purposes provided that certain strict protocols and conditions are met.[xiv]

ENDNOTES

[i] P.L. 140-191

[ii] From a consumer perspective, HIPAA is a wide-ranging health reform act that provides rights and protections for employees and other participants and beneficiaries in group health plans. HIPAA includes protections for coverage that limit exclusions for preexisting conditions, prohibit discrimination against employees and dependents based on their health status, and allows the opportunity to enroll in a new plan to individuals in certain circumstances. HIPAA also provides

patients with certain rights and protections regarding access to, as well as use and disclosure of, health information.

[iii] 42 U.S.C. §1320d *et seq*.

[iv] 45 C.F.R. §§160 & 164

[v] 42 U.S.C. §1320d – 1, 45 C.F.R. §164.501

[vi] 45 C.F.R. §§164.103, 164.105

[vii] 45 C.F.R. §§164.103, 164.105

[viii] 45 C.F.R. §§ 160 & 164 HHS Office of Civil Rights has authored a brief that summarizes the HIPAA Privacy Rule, available at: http://www.hhs.gov/ocr/privacysummary.pdf.

[ix] 45 C.F.R.§ 164.502(a)(1)(iv)

[x] 45 C.F.R. §164.502, § 164.506(a)(2)

[xi] 45 C.F.R.§ 164.512(a)(1) An example would be a state statute, regulation, or court order that **requires** the reasons for removal be disclosed to the caregiver.

[xii] 45 C.F.R.§ 164.512(j)

[xiii] 45 C.F.R. §164.512(a) & (e)

[xiv] 45 C.F.R. §164.512(g) & (i)