



Broadcast MSG0795

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To: Executive Directors, Local Mental Health Authorities
Executive Directors, Local Behavioral Health Authorities

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Subject: Exchanging Information on Special Needs Offenders

Overview

The purpose of this letter is to require individuals and entities regulated by or under contract with The Health and Human Services Commission (HHSC) for the provision of mental health services to exchange information on special needs offenders in accordance with the provisions of Health & Safety Code (HSC) §614.017. Some providers of mental health services have been reticent to exchange information on special needs offenders as required by §614.017 due to misinterpretation of the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

To summarize, HHSC requires mental health providers regulated by or under contract with HHSC to exchange information in accordance with the provisions of HSC §614.017. Psychotherapy notes, however, cannot be exchanged without an individual's authorization. The exchange of information also cannot include individual's information that would identify the individual as having received or applied for treatment for alcohol or substance use without the individual's consent.

Discussion

HIPAA is a federal law which generally preempts state laws that allow disclosure when HIPAA prohibits it; however, HIPAA permits protected health information to be disclosed if the disclosure is required by law. HHSC's Office of General Counsel

has confirmed that HIPAA permits the disclosure of protected health information related to mental health treatment in accordance with the provisions of HSC §614.017.

In addition to summarizing the HIPAA "required by law" exemption and how it relates to the required disclosures specified in HSC §614.017, this broadcast message will briefly review the more restrictive federal requirements in 42 Code of Federal Regulations (CFR) pt. 2 on the disclosure of information that would identify an individual as having received or applied for treatment for alcohol or substance use.

The federal HIPAA Security and Privacy Rules in the CFR at 45 CFR pt. 164. Sec. 164.512(a) permits a covered entity to "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." The title of §614.512, "Uses and disclosures for which an authorization or opportunity to agree or object is not required," clearly shows that a covered entity does not need to obtain an individual's authorization for a disclosure that is required by and in compliance with another law. Sec. 164.103 defines "required by law" to mean "a mandate contained in law that compels an entity to make a use or disclosure of protected health information and that is enforceable in a court of law." The definition includes, as an example, "statutes or regulations that require the production of information."

HSC §614.017 is a state law that requires disclosure of information that may be protected health information under HIPAA. HSC §614.017(c)(1) defines "agency" and lists 20 entities and individuals included in that definition. Please note that an agency also includes "a person with an agency relationship with" one of the entities and "a person who contracts with one or more" of them. HHSC encourages providers to carefully review §614.017 so providers will be able to determine whether providers can honor a request from one of the listed entities or individuals, or their agents or contractors, for disclosure of information. According to HSC §614.017, an agency "shall" accept and disclose "information relating to a special needs offender," including "information about the offender's identity, needs, treatment, social, criminal, and vocational history, supervision status and compliance with conditions of supervision, and medical and mental health history." By using the word "shall" in this law, the legislature clearly mandates and requires the acceptance and disclosure of this information. Thus, §164.512(a) of the HIPAA rules applies, and covered entities can disclose protected health information in accordance with this state law.

Information exchanged between the listed agencies under §614.017 must serve "the purposes of continuity of care and services" of a special needs offender. HSC §614.001(3-a) broadly defines "continuity of care and services." Sec. 614.017(c)(2) states that a special needs offender "includes an individual for whom criminal

charges are pending or who after conviction or adjudication is in custody or under any form of criminal justice supervision.” While there are generally no restrictions on the type of mental health information that can be exchanged under HSC §614.017, HIPAA specifically requires an individual’s authorization before psychotherapy notes can be disclosed, even if another law requires disclosure. “Psychotherapy notes” is a defined term in the HIPAA rules in §164.501, and the restrictions on disclosure are in §164.508(a)(2). Sec. 164.508(b) has standards for authorizations that cover psychotherapy notes. HHSC encourages providers to become familiar with the HIPAA provisions related to the use and disclosure of psychotherapy notes.

Please also note that §§164.512(e), (f), and (k) of the HIPAA rules allow an individual’s protected health information to be disclosed for judicial and administrative proceedings and certain law enforcement purposes. Disclosures in accordance with those regulations are allowed without the need for another statute which requires the disclosures. The Office for Civil Rights of the U.S. Department of Health & Human Services, the office that enforces and provides guidance on the HIPAA rules, has a series of Frequently Asked Questions (FAQs) available on its website, including one which summarizes disclosures related to law enforcement purposes. That FAQ can be accessed at the following website:
<https://www.hhs.gov/hipaa/for-professionals/faq>.

Finally, the federal regulations in 42 CFR pt. 2 which apply to alcohol and substance use treatment programs that receive “federal assistance,” is a term explained in §2.12(b). These regulations place restrictions beyond those in HIPAA on the use and disclosure of information that would identify an individual as having received or applied for treatment for alcohol or substance use. These regulations do not have the broad exemption found in HIPAA for disclosures required by other laws, so they preempt other laws that allow disclosures when the 42 CFR pt. 2 regulations prohibit the disclosures. Thus, these regulations prohibit the exchange of information under HSC §614.017 if that information would identify an individual as having received or applied for treatment for alcohol or substance use. The entities and individuals listed in HSC §614.017 as agencies, and their agents and contractors, should not accept or disclose such information without an individual’s consent.

Note, however, that Subparts D and E of the 42 CFR pt. 2 regulations cover specific situations where an individual’s consent is not required before disclosing an individual’s protected information related to alcohol or drug use treatment. Addressing those specific situations is beyond the scope of this broadcast message, but providers are encouraged to review the applicable regulations. Subpart D, titled “Disclosures Without Patient Consent,” permits disclosures without an individual’s consent for medical emergencies, research activities, and audit and evaluation activities, so long as the disclosures are in accordance with the Subpart D requirements. Subpart E of the regulations, titled “Court Orders Authorizing

Disclosure and Use," covers other situations where a court is involved in the request to disclose information otherwise protected under the 42 CFR pt. 2 regulations.

As stated above, HHSC requires mental health providers regulated by or under contract with HHSC to exchange information in accordance with the provisions of HSC §614.017. Psychotherapy notes, however, cannot be exchanged without an individual's authorization. The exchange of information also cannot include an individual's information that would identify the individual as having received or applied for treatment for alcohol or substance use without the individual's consent.

Provider's cooperation in ensuring that disclosures of information for the purposes of continuity of care for special needs offenders are made expeditiously and in compliance with applicable laws is appreciated. If providers have questions or concerns regarding this broadcast message, please seek assistance from your attorney.
