The Network for Public Health Law

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MISSOURI PUBLIC HEALTH AUTHORITY

Legal Technical Assistance

Privacy Protections in Federal and State Law for Health Data Obtained from the Provision of Free Healthcare Services

Question Presented:

What are the privacy protections in state and federal law for health care data when the data is obtained from the provision of free healthcare services and there are no electronic transactions, such as billing, that would trigger HIPAA?

Discussion:

The legal information provided in this document does not constitute legal advice or legal representation. For legal advice, readers should consult a lawyer in their jurisdiction.

Some local public health agencies (LPHAs) provide free clinical services, in which no health care payor, either government or private, is billed for the healthcare services. These free services may be funded by federal, state, and/or local funds through various programs. The most well-known health privacy law is the Health Insurance Portability and Accountability Act (HIPAA). As the law relates to health care providers, HIPAA only applies when a health care provider conducts certain electronic transactions such as billing. An LPHA should first evaluate whether HIPAA applies to the entire department (such as when the LPHA is a covered entity) or a particular program (which may be the case if the department is a HIPAA hybrid, when only certain components of the department are covered by HIPAA). The provision of free clinical services does not always mean HIPAA is not applicable, if for example, an LPHA that is a HIPAA covered entity provides a mix of free and reimbursed clinical services.

If the LPHA determines that HIPAA does not apply to the department or program though, the health information associated with the provision of the free services may still be subject to certain confidentiality protections. An exhaustive overview of every federal and state-specific provision that may apply to the provision of free healthcare services in Missouri is beyond the scope of this technical assistance memorandum (TA). Instead, this TA is intended to provide a framework for public health practitioners to use when evaluating which privacy

provisions may apply to health information obtained from the provision of free clinical services when the LPHA has determined that HIPAA does not apply. Specifically, public health officials and practitioners should approach the inquiry as follows:

1) Identify the type of free services (e.g., immunizations, family planning) the LPHA is providing.
2) Determine how the free services are funded (e.g., federal, state, philanthropic) and whether the type of funding triggers any applicable statutory or regulatory confidentiality provisions.
3) Identify any state-specific provisions of law that may affect the type of data being collected.
4) Evaluate whether there are contractual obligations (such as a grant agreement), local ordinances, or LPHA policies and procedures that impact confidentiality of health data.

This TA will walk through this framework in more detail, using sexually transmitted infection (STI) testing and treatment as a case study. It will also briefly explain some of the confidentiality provisions that apply to specific federal funding streams for free healthcare services. Please be aware that this TA is not intended as legal advice. For legal advice, please consult with your attorney.

To determine which, if any, confidentiality provisions may apply to the services, a public health practitioner should first ascertain what type of services the LPHA is providing. Examples may include family planning services, immunizations, primary care services for the uninsured, or sexually transmitted infection (STI) testing and treatment. Different services may trigger different confidentiality provisions under state and federal law. For purposes of this example, the public health practitioner determines that the LPHA is providing STI testing and treatment.

The public health official will next need to evaluate how the services are funded. Are the services funded through a federal grant, state general funds or a specific state program, local funds, philanthropic dollars, another funding stream, or some mix of braided funds? Once the public health official determines how the services are funded, the official will then want to determine whether there are any statutory or regulatory confidentiality provisions specific to that funding stream. Continuing with the STI testing and treatment example, the official determines these services are funded through a mix of federal funds from the Sexually Transmitted Diseases Prevention and Control Grants from the CDC and HHS, state general funds the LPHA receives from the state legislature, and a grant from a local community foundation that focuses on healthcare.

Turning first to the federal funds, the official consults with legal counsel and determines that the regulations on the STI Prevention Grants are codified at 42 CFR § 51b.401. The regulations have a specific provision that addresses the confidentiality requirements for programs that receive funding under this grant. Specifically, 42 CFR § 51b.404 states the following: "*All information obtained by program personnel in connection with the examination, care, and treatment of an individual in this program shall be held confidential. It shall not be disclosed without the individual's consent except as may be required by the law of a State or political subdivision of a State or as may be necessary to provide services to the individual. Information may be disclosed in summary, statistical, or other form, or for clinical or research purposes, but only if the disclosure does not identify particular individuals.*" The public health official and legal counsel determine that there are no state statutes or regulations impacting this particular state funding. The grant from the community foundation will be addressed later in the analysis.

Next, the official needs to consider whether there are any state specific provisions that apply either because of how the program is funded or to the type of health information being collected. The official will want to consider

Missouri specific provisions on confidentiality for STI testing or medical records. For example, Missouri has a law requiring that records related to HIV status and testing remain confidential and only be disclosed under certain circumstances. There could also be additional laws or regulations that apply to other types of STIs or that require the medical records maintained by health care providers remain confidential. It is fairly common to find state laws that impose heightened confidentiality provisions on mental health records, substance use disorder records, communicable and genetic diseases, and STI testing and treatment, among others.

The next area the public health official will want to evaluate is whether there are any local ordinances, contractual obligations, or LPHA policies and procedures that impose confidentiality requirements on the data. As noted above, in this example, the STI testing and treatment services are partially funded by a grant from a community foundation. Did the LPHA sign a grant agreement that had any requirements around patient confidentiality? Furthermore, LPHAs may have policies and procedures that detail how patient information must be protected. These may be applicable to all clinical services a LPHA provides, not specific to only free services. The public health official will want to ensure that they have reviewed and that the LPHA is adhering to existing policies and procedures.

While there are many laws that can trigger confidentiality provisions on health information, three of the more common federal funding streams besides the STI Prevention and Control Grants that are accompanied by specific confidentiality provisions that grantees must comply with are:

- Community health center program funded under § 330 of the Public Health Service Act;[42] this program funds Federally Qualified Health Centers (FQHCs)
- Family planning services funded under the Public Health Service Act (Title X)
- Maternal and child health projects funded under the Social Security Act (Title V)

Again, this is not an exhaustive list but rather a summary of some of the more common funding streams with specific confidentiality provisions. The confidentiality sections for these programs are similar although not identical. All make information concerning individuals they serve confidential, and prohibit disclosure, absent consent, unless an exception applies. Exceptions for all programs include disclosures required by law and as necessary for treatment purposes. All programs are also permitted to disclose information in summary, statistical, or other form which does not identify particular individuals.

It is important for public health officials to be aware that even in instances where HIPAA is not applicable, there may be other federal or state laws and regulations, contractual obligations, and policies and procedures that delineate how health care data obtained from free services must remain confidential. Once the public health official has evaluated which laws, regulations, policies and procedures, and contractual obligations may apply to the data obtained from free services, the public health official should analyze how the LPHA is currently using and disclosing the data. The public health official should ensure data is being used and disclosed in accordance with existing obligations. If it is not, the public health official will need to work with staff to revise the LPHA's policies and procedures to come into compliance.

This document was developed by Meghan Mead, JD, Acting Deputy Director, Network for Public Health Law – Mid-States Region. The Network for Public Health Law provides information and technical assistance on issues related to public health. The legal information and assistance provided in this document does not constitute legal advice or legal representation. For legal advice, please consult specific legal counsel.

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