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PREEMPTION ANALYSIS

-- Explanation of Form --

Statute/Regulation: Title of act, statute and/or rule
Citation

Agency: Responsible regulatory agency, if any

Summary: Short summary of act, statute and/or rule

Conclusion: Is the state provision preempted; if so, to what extent?

Covered

Entities Affected: Identifies whether the state provision applies to Health Plans, Health Care Providers and/or Health Care Clearinghouses.

Impact: Identifies whether the state law, HIPAA requirements, or both apply. HIPAA often has an impact on the implementation/operation of a statute even if the statute is not preempted. Sections impacted are identified in the text of the analysis; where the impact is significant, a reference is made here to highlight the need for further review of the text.

Summary of Pertinent Provisions:

This section summarizes those provisions of the state law that involve the disclosure or use of protected health information.

Does the state law apply to one or more covered entities?

This section identifies with more specificity the covered entities to which the state law applies.

Does the state law fall within a statutory carve-out category?

HIPAA identifies two “subject-area” categories of state law that are protected by statute and regulation from preemption. The statutory carve-out categories include:

- (1) Provisions of state law that provide for the “reporting of disease or injury, child abuse, birth or death or for the conduct of public health surveillance, investigation or intervention,” HIPAA § 160.203(c); and

(2) Provisions of state law that require “a health plan to report, or to provide access to, information for the purpose of management audits, financial audits, program monitoring and evaluation, or the licensure or certification of facilities or individuals,” HIPAA § 160.203(d).

If a provision of state law falls into one of these categories, it is “saved” from preemption and no further preemption analysis is required.

Does the state law fit the carve-out for authorization or prohibition of disclosure of a minor’s protected health information to a parent, guardian or person acting in loco parentis?

Regardless of the subject area of the state law, HIPAA § 160.202 provides that “nothing in this subchapter may be construed to preempt any State law to the extent that it authorizes or prohibits disclosure of protected health information about a minor to a parent, guardian, or person acting in loco parentis of such minor.” Thus, if a provision of state law authorizes or prohibits disclosure of protected health information about a minor to a parent, guardian or person acting in loco parentis, it is not preempted and no further preemption analysis of that provision is required.

Is the state law contrary to HIPAA because it is either impossible for the covered entity to comply with both the state and federal requirements, or the state law stands as an obstacle to the purposes of HIPAA?

HIPAA preempts a state law only if it is “contrary” to a HIPAA requirement. Under HIPAA § 160.202, a provision of state law is contrary to HIPAA only if “a covered entity would find it *impossible* to comply with both state and federal requirements,” or the provision stands as an obstacle to the accomplishment and execution of the full purpose and objectives of HIPAA. The term “contrary” is actually quite narrow. For instance, a state law is not “contrary” to HIPAA within the meaning of § 160.202 if that law declines to recognize one or more of the exceptions that HIPAA would allow under § 164.512; a Covered Entity can comply both with the state law and with HIPAA merely by refusing to disclose information under those HIPAA exceptions that the state law does not recognize. To the extent that HIPAA allows exceptions other than those specified in by the state, the state law would control. Similarly, if the state law authorizes, but does not require, a disclosure that HIPAA would not allow, a Covered Entity can comply both with the state law and with HIPAA simply by refusing to make that disclosure.

This section of the analysis explains why a pertinent provision of state law is or is not contrary to HIPAA. Because HIPAA can have a significant impact on the implementation or operation on a statute even if that statute is not preempted, this section also identifies the particular provisions of HIPAA that relate to the provision of state law under discussion.

Are the [contrary] state law requirements more stringent than those of HIPAA?

HIPAA § 160.203(b) protects from preemption a state law that relates to the privacy of health information and is more stringent than the HIPAA requirement. In the context of comparing a state law with HIPAA, the term “more stringent” is defined by HIPAA § 160.202 to mean,

(1) the state statute allows more access to individuals or less access to others (except to the Secretary of HHS); (2) the state statute provides more information to the individual regarding the use or disclosure of protected health information and the individual's rights and remedies; or (3) the state statute narrows the scope or duration of a consent, or increases the privacy protections afforded by, or reduces the coercive effect of circumstances surrounding the obtaining of, a required authorization.

Is an exception warranted?

HIPAA § 164.203(a) authorizes the Secretary of HHS to except a state statute from preemption under specific circumstances detailed in that section. The request must be made by the chief elected official of the state or his or her designee. HIPAA § 160.204(a).

Comments:

This section is provided for any comments that might be useful or noteworthy.

PREEMPTION ANALYSIS

Statute/Regulation:	Abuse and Neglect Act NMSA §§ 32A-4-1 to -33(1993)
Agency:	Children, Youth and Families
Summary:	Requires reporting of suspected child abuse or neglect; establishes procedures for addressing a child's needs when there is a suspicion or finding of abuse or neglect.
Conclusion:	Not preempted.
Covered Entities Affected:	All
Impact:	State law applies.

Summary of Pertinent Provisions:

Section 32A-4-3 – Duty to report child abuse and child neglect; responsibility to investigate child abuse or neglect; penalty:

Subsection (A): Imposes a duty to report on any person who has a reasonable suspicion that a child is an abused or neglected child. The report is made to (1) a local law enforcement agency; (2) the department (CYFD) office in the county where the child resides; or (3) tribal law enforcement or social services agencies.

Subsection (C): Requires the recipient of the report to take immediate steps to ensure prompt investigation of the report and to protect the health or welfare of the child.

Subsection (E): Gives a law enforcement agency and the department access to any of the records pertaining to a child abuse or neglect case maintained by certain persons “enumerated in Subsection (A),” which include a physician, a resident or intern, registered nurse, visiting nurse or social worker (except as otherwise provided in the Act),

Section 32A-4-5 – Admissibility of report in evidence; immunity of reporting person; investigation of report:

Subsection (C): Any person who has a duty to report must permit a member of a law enforcement agency or the department to interview the child without the permission of the child's parent, guardian or custodian.

Section 32A-4-33 – Confidentiality; records; penalty:

Subsection (A): Protects as confidential all records in the possession of a court or the department as a result of an abuse or neglect investigation or proceeding.

Subsection (B)(12): Provides that records referenced in (A) are open to inspection only by specific persons or categories of persons, including “health care or mental health professionals involved in the evaluation or treatment of the child.”

Subsection (C): Allows a parent, guardian or legal custodian whose child has been the subject of an investigation where no petition has been filed “the right to inspect any medical report, psychological evaluation, law enforcement reports or other investigative or diagnostic evaluation; provided that any identifying information related to the reporting party or any other party providing information shall be deleted. The parent, guardian or legal custodian shall also have the right to the results of the investigation and the right to petition the court for full access to all department records and information except those records and information the department finds would be likely to endanger the life or safety of any person providing information to the department.”

Does the state law apply to one or more Covered Entities?

Yes. The reporting obligation extends to all persons, including all Covered Entities. In addition, all Covered Entities are subject to the disclosure requirements of § 32A-4-3(E) to the extent they have any information to which the disclosure requirement applies.

Does the state law fall within a statutory carve-out category?

Yes, in part. Subsections 32A-4-3(A) and (E) fall within the carve-out category for reporting child abuse.

Section 32A-4-3(A): Reporting obligation. This provision is clearly saved from preemption under HIPAA § 160.203(c), which incorporates the HIPAA statutory protection for state laws that provide for the reporting of child abuse.

Section 32A-4-3(E): This section authorizes law enforcement or the department to access files of persons “enumerated” in subsection (A). Although subsection (A), the reporting obligation, applies to all persons, that subsection specifically lists certain categories of persons likely to be in a position to notice signs of abuse or neglect. These include physicians, residents or interns, teachers, judges presiding in any proceeding, school officials or social workers “acting in an official capacity.” Although subsection (E) does not specifically address reporting, *per se*, its intent appears to be to authorize access to records maintained by those reporters most likely to maintain actual records or files of an “official” or recording nature that pertain to the matter. The disclosure authorized by subsection (E) therefore should be viewed as an integral part of the required

reporting, justifying its protection from preemption under the carve-out for statutes that provide for the reporting of child abuse.

Section 32A-4-5(C): This subsection involves the disclosure of the child's location, which could be considered protected health information. See, e.g., HIPAA § 160.510 (In connection with the publication of a facility directory, a Covered Entity is required to give an individual the opportunity to agree or object to the disclosure of the individual's location in the facility.). Like § 32A-4-3(E), section 32A-4-5(C) is addressed to the reporter; disclosure of the child's whereabouts can reasonably be considered an integral part of the report and therefore is protected from preemption under HIPAA § 160.203(c).

Does the state law fit the carve-out for authorization or prohibition of disclosure of a minor's protected health information to a parent, guardian or person acting in loco parentis?

Yes, in part. Although it is unclear whether subsection (C) of § 32A-4-33 affects only records maintained by the department, as do subsections (A) and (B) of this section, or also affects records maintained by a Covered Entity, subsection (C) falls within the carve-out for authorization of disclosure of a minor's protected health information to a parent or guardian. Section 32A-4-33 is therefore saved from preemption under HIPAA § 160.202.

Is the state law contrary to HIPAA because it is either impossible for the Covered Entity to comply with both the state and federal requirements, or the state law stands as an obstacle to the purposes of HIPAA?

No. Subsections (A) and (B) of § 32A-4-33 address the confidentiality of and access to records maintained by the department, not a Covered Entity. Paragraph (12) of § 32A-4-33(B) authorizes a treating health care professional to access these records. This is not contrary to HIPAA, although the health care professional requires consent from the individual to use the records for treatment purposes.

Are the [contrary] state law requirements more stringent than those of HIPAA?

N/A

Is an exception warranted?

N/A

Comments:

Section 32A-44-33(C) authorizes withholding from the parents or guardian information relating to the identity of the person reporting the suspected abuse or neglect. Similarly, HIPAA § 164.524(a)(2)(v), authorizes a Covered Entity to redact from information released to an individual (or his personal representative, such as the parent or guardian of a minor) information obtained from

someone other than a health care provider under a promise of confidentiality, when the access requested would be reasonably likely to reveal the source of the information.

PREEMPTION ANALYSIS

Statute/Regulation: Adoption Act
NMSA §§ 32A-5-1 to -45 (1993)

Agency: Children, Youth and Families

Summary: This Act governs adoption proceedings and regulates access to records maintained in connection with such proceedings.

Conclusion: The provisions of the Act that relate to the confidentiality of and access to records address records that are maintained by a court, an agency or by the Department. They are not records of a Covered Entity. The Act does require counseling and the filing of a counseling narrative, which may involve treatment by a Covered Entity.

Covered Entities Affected: Health Care Providers, but only to the extent a Covered Entity provides the counseling required under the Act.

Impact: None

Summary of Pertinent Provisions:

Sections 32A-5-8 and 32A-5-40 impose confidentiality and access requirements on records maintained by the Department and by courts involved in adoption proceedings, and by any person involved in making full disclosure in connection with an adoption proceedings, i.e., an investigator, an agency, the Department or a petitioner, see NMSA § 32A-5-3(F). Section 32A-5-22 also requires certain persons to undergo counseling prior to an adoption.

Does the state law apply to one or more covered entities?

The Act has limited application to Health Care Providers.

Does the state law fall within a statutory carve-out category?

No.

Does the state law fit the carve-out for authorization or prohibition of disclosure of a minor's protected health information to a parent, guardian or person acting in loco parentis?

No.

Is the state law contrary to HIPAA because it is either impossible for the covered entity to comply with both the state and federal requirements, or the state law stands as an obstacle to the purposes of HIPAA?

No. The counseling required by the Act is undertaken with consent, which must comply with HIPAA requirements if provided by a Covered Entity. The filing with the court of the counseling narrative is required by law and can be made by a Covered Entity without consent, authorization or the opportunity to agree or object pursuant to HIPAA § 164.512(a)(1) (required by law).

Are the [contrary] state law requirements more stringent than those of HIPAA?

N/A

Is an exception warranted?

N/A

Comments:

N/A

PREEMPTION ANALYSIS

Statute/Regulation:	Adult Protective Services Act: Provisions other than Reporting Provisions NMSA §§ 27-7-14 to –31 (1990)
Agency:	Children, Youth and Family Department
Summary:	Authorizes the reporting and investigation of allegations of exploitation, abuse or neglect of adults and the provision of protective services, including healthcare services.
Conclusion:	Not preempted, except to the extent that § 27-7-29 would prohibit the disclosure of protected health information by a Covered Entity to the Secretary of HHS pursuant to § 164.502(a)(2)(ii)
Covered Entities Affected:	All
Impact:	State law and HIPAA requirements apply; HIPAA modifies some of the disclosure provisions of the state statute.

Summary of Pertinent Provisions:

The Adult Protective Services Act establishes a system of protective services designed to meet the needs of adults who are unable to manage their own affairs or protect themselves from exploitation, abuse or neglect. Provisions pertinent to a HIPAA preemption analysis include:

Section 27-7-19: Investigations.

Subsection (A): The Department is obligated to investigate reports of suspected abuse, neglect or exploitation of adults; in determining the need for protective services, the Department must visit the person and gather information from others having knowledge.

Subsection (D): This subsection provides that “Except when prohibited by law, the Department shall have access” to information and records (including medical and psychological records) necessary to pursue investigations:

- (1) with written consent, if person has ability to give written consent;
- (2) with oral consent in the presence of a third party if the person is unable to consent in writing;
- (3) with the permission of a guardian or conservator authorized to give consent; provided that the Department does not need to obtain such permission if the Department or

facility is unaware of the personal representative or if the personal representative cannot be reached within five working days; or

(4) on court order if the person is unable to express consent, the personal representative refuses to give consent, or the person is deceased.

Subsection (F): This subsection provides that the Department “shall have” immediate access to the subject adult; if access is refused, the Department may obtain a court order if it can show that a care provider or third party interfered with the Department’s attempts to access the individual.

Subsection (G): Interfering with an investigation is a misdemeanor.

Section 27-7-20: Protective services. Subsection (B) provides that a protective services agency (which is any organization so designated by the Department) has the authority to furnish protective services to an adult with his consent or, in the case of an emergency, without his consent; to petition the court to appoint a guardian or conservator; or to serve as a guardian or conservator. The agency is obligated to make such reports as the Department or a court may require.

Section 27-7-21: Nature of protective services. Subsection (B) specifies that health care is included within the meaning of the term “protective services.”

Section 27-7-22: Evaluations. This section mandates that the Department establish a mental and physical evaluation process for adults for whom a petition for protective placement has been filed; the evaluation is to include a summary description of care, treatment and services being provided to the adult, and, where necessary, a medical, psychological, psychiatric or social evaluation and review.

Section 27-7-23: Voluntary protective services. Protective services are to be provided on the request of an adult in need of services.

Section 27-7-24: Involuntary protective services. If an adult is unable to give his consent, the Department may provide services on court order or through the appointment of a guardian. Subsection (D) provides that “no person shall interfere” with the provision of these services.

Sections 27-7-25 to 28: These sections set forth procedures for emergency and non-emergency placement for protective services.

Section 27-7-29: Confidentiality of records.

Subsection (A): Mandates confidentiality for records of the Department, courts, state and local agencies and protective services agencies that are created or maintained pursuant to investigations under Act.

Subsection (B): Records described in (A) are open to inspection by

(1) the subject adult, except as to the identity of the referral source and second source information such as medical psychological evaluations;

(7) health care or mental health professionals involved in the evaluation, treatment, residential care or protection of the adult;

(8) parties and their counsel in legal proceedings under the Act or the Probate Code;

(9) persons who have been or in the immediate future will be providing care or services (except the alleged abuser);

(10) persons appointed by a court to be an adult's personal representative or qualified healthcare professional.;

(12) any other person or entity, by order of the court, having a legitimate interest in the case or the work of the court;

(13) Protection and Advocacy representatives.

Subsection (C): Records of substantiated abuse, neglect or exploitation shall be provided, as appropriate, to the Department of Health, the DA's office, the medicaid fraud control unit and the office of long-term care ombudsman.

Subsection (D): Unlawful release or use of records is a misdemeanor.

Section 27-7-20: Mandatory reporting. This section requires that any person having reasonable cause to believe that an incapacitated adult is being abused, neglected or exploited immediately report that information to the Department. The report is to include the nature and extent of the adult's condition and other relevant information. Any person failing or refusing to report, or obstructing or impeding any investigation is guilty of a misdemeanor.

Section 27-7-31. Immunity. Any person making a report, testifying, participating in an evaluation or providing information is not subject to civil or criminal liability therefor unless the person acted in bad faith or with a malicious purpose.

Does the state law apply to one or more Covered Entities?

Yes. The Act includes provisions that apply to all Covered Entities who have information relevant to the subject individual and to Health Care Providers who perform evaluations or provide services under the Act.

Does the state law fall within a statutory carve-out category?

No.

Does the state law fit the carve-out for authorization or prohibition of disclosure of a minor's protected health information to a parent, guardian or person acting in loco parentis?

No.

Is the state law contrary to HIPAA because it is either impossible for the Covered Entity to comply with both the state and federal requirements, or the state law stands as an obstacle to the purposes of HIPAA?

Section 27-7-19(A): Investigations. N/A. Subsection (A) simply instructs the Department to conduct an investigation by visiting the individual and gathering relevant information. The disclosure of information by Covered Entities to the Department or its investigators is governed by subsections (D) and (F) of this section.

Section 27-7-19(D): Access by the Department to information and records. Note that this subsection specifies that access is not authorized where it would otherwise be prohibited by law. Therefore, where HIPAA prohibits or conditions access, the statute honors that restriction notwithstanding that the statute would otherwise allow it. The analysis of the individual provisions follows.

Subsections 27-7-19(D)(1) and (2) authorize a Covered Entity to disclose the records of an individual who has the ability to consent only with that individual's written or oral consent. HIPAA § 164.512(c)(1)(ii) authorizes disclosure about a person the Covered Entity reasonably believes to be a victim of abuse or neglect if the individual agrees to such disclosure. Where agreement of an individual is required under HIPAA § 164.512, the agreement may be oral and need not be formalized either by a HIPAA-defined consent or by an authorization. Obtaining the individual's agreement meets the requirement of HIPAA § 164.512(c)(2) that the Covered Entity inform the individual that it has or will be disclosing the information. Note, however, that HIPAA requires a Covered Entity to obtain an authorization (or be subject to court order) before disclosure can be made under the following circumstances that fall within the scope of this statute:

(a) To the extent an investigation involves allegations of exploitation, and not abuse or neglect, the disclosure of records is authorized under HIPAA § 164.512, only with an authorization or court order. (It is not clear whether "exploitation" comes within the meaning of "abuse" or "neglect" as used in the regulations. See 65 FR at 82527. This analysis takes the position that it does not.)

(b) Disclosure under HIPAA § 164.512(c) is limited to situations where the Covered Entity reasonably believes that the individual is a victim of abuse or neglect. If the Department is conducting an investigation and requests the information, but the Covered Entity does NOT reasonably believe that the individual is a victim of abuse or neglect, the disclosure is not authorized under § 164.512, and a HIPAA authorization or court order is required.

Subsection 27-7-19(D)(3) authorizes disclosure of records to the Department with the permission of a guardian or conservator authorized to give consent. HIPAA §

164.502(g) allows for disclosure under these circumstances to the same extent disclosure is authorized with the consent of the individual, as discussed under (D)(1) and (2), above.

Subsection 27-7-19(D)(4) provides that if the individual cannot consent to the disclosure because of incapacity, or if the personal representative refuses permission or cannot be found, the Department must obtain a court order for disclosure of the information. This is consistent with HIPAA § 164.512(e)(1)(i), which allows for disclosure pursuant to court order, although the disclosure is limited to that expressly authorized by the order. Under these circumstances, the Covered Entity is not obligated to notify the individual or personal representative of the disclosure. Furthermore, use of a court order overcomes any obstacle to disclosure based on allegations of exploitation or the Covered Entity's lack of reasonable belief that the individual is a victim of abuse or neglect, as discussed under notes (a) and (b), above.

Section 27-7-19 (F): Access to the individual. Although HIPAA § 164.510(a)(1) and (2) afford an individual the right to agree or object to being listed in the facility's directory and to restrict access to that information, HIPAA § 164.512(c)(1)(i) allows a Covered Entity to disclose this information if required by law. Because 27-7-19(F) provides that the Department "shall have" immediate access to an individual who is the subject of an investigation and § 27-7-19(G) imposes misdemeanor penalties for interfering with an investigation, disclosure by a Covered Entity of a person's location in its facility is "required by law" within the meaning of HIPAA and therefore authorized, even if the individual has otherwise restricted disclosure of this information.

Section 27-7-20: Protective services. This section applies to a Covered Entity if the Covered Entity is designated as a protective services agency or is authorized by such an agency to provide health care services to an individual. The section authorizes the provision of services with the individual's consent or, in an emergency, without his consent. These provisions are not contrary to HIPAA because a Covered Entity can comply both with this section and with HIPAA requirements applicable to treatment both with and without consent. See HIPAA § 160.506(a)(1) and (a)(3)(i)(A). The patient's consent must meet HIPAA requirements for consent.

Section 27-7-21: Nature of protective services. N/A

Section 27-7-22: Evaluations. This section requires the Department to establish a process for performing evaluations but does not specify what that process is. Information may be disclosed by a Covered Entity for use in an evaluation as discussed under § 27-7-19(D), above. Medical and psychological evaluations come within the HIPAA definition of health care and health care treatment set forth in HIPAA §§ 160.103 and 164.501; conducting such evaluations, therefore, are subject to HIPAA consent requirements.

Section 27-7-23: Voluntary protective services. This section is not contrary to HIPAA; however, the individual's request for protective services that are health care services must conform to HIPAA's requirements for consent for the use and disclosure of information for treatment.

Section 27-7-24: Involuntary protective services. This section is not contrary to HIPAA; the use and disclosure of information for treatment can be accomplished under HIPAA pursuant to court order, see HIPAA § 164.512(e)(1), or by consent of a personal representative, see HIPAA § 164.502(g).

Section 27-7-29: Confidentiality of records. (*Note: This entire section applies only to records of Covered Entities that are state or local agencies or are designated as protective services agencies.*) The grant of confidentiality provided by § 27-7-19(A) is not contrary to HIPAA, except to the extent that it would prohibit disclosure of protected health information in the possession of a Covered Entity to the Secretary of HHS. Section 27-7-19(B) provides that the subject records “*shall be open to inspection only by the following.*” To the extent this phrase is construed to require disclosure to those listed, which is the interpretation recommended, all of the disclosures authorized are allowed without consent, authorization or the opportunity to agree or object under HIPAA §§ 164.512(a)(2) and 164.512(c)(1)(i). However, if any of the disclosures are deemed to be discretionary (within the list provided), it must be judged on an individual basis, as follows.

Subsection 27-7-29(B)(1) allows an individual to access records concerning him that are “created or maintained pursuant to investigations under the Act,” but prohibits disclosure to him of “second source information such as medical psychological evaluations.” This exclusion is not contrary to HIPAA, however, which recognizes an exception to an individual’s right of access for “information compiled in reasonable anticipation of, or for use in, a civil, criminal or administrative action or proceeding,” HIPAA §§ 164.522(a)(1)(ii). (Disclosure of these records from other sources, however, including the originating health care provider, would be governed by HIPAA regulations without regard to the provisions of this statute.) HIPAA also requires that these records be disclosed to the individual’s personal representative unless the Covered Entity elects not to treat the personal representative as the individual under HIPAA § 164.502(g)(5).

Subsection 27-7-29(B)(7) allows disclosure to and use of the information by health care or mental health professionals involved in the evaluation, treatment, residential care or protection of the adult. This disclosure and use of information (other than psychotherapy notes) is not contrary to HIPAA; if a professional is already involved in the evaluation, treatment or care of the individual, the professional is either acting under court order or has already complied with HIPAA requirements. See discussion of §§ 27-7-20 to –24, above. Under HIPAA § 164.508(a)(2), disclosure of psychotherapy notes requires an authorization.

Subsection 27-7-29(B)(8) authorizes disclosure to parties and their counsel in legal proceedings under the Act or the Probate Code. Even if disclosures under subsection (B) are not mandatory, the disclosure allowed by this paragraph is not contrary to HIPAA, provided that the disclosure is made pursuant to a court order or a qualified protective order as required by HIPAA § 164.512(e), or pursuant to an authorization.

Subsection 27-7-29(B)(9) authorizes disclosure to persons who have been or in the immediate future will be providing care or services (except the alleged abuser). Although this paragraph authorizes disclosures beyond those allowed by HIPAA without consent or

authorization, it is not contrary to HIPAA because [1] if the disclosures under this subsection (B) are mandatory, the disclosures allowed by this paragraph are authorized under § 164.512(a)(1); and [2] if the disclosures under subsection (B) are not mandatory, they can be made pursuant to a consent or authorization or if an exception to those requirements applied per HIPAA § 160.512. The use of protected information by a person who will providing care or services (as opposed to disclosure to that person) requires a consent if that person is a Covered Entity.

Subsection 27-7-29(B)(10) authorizes disclosure to persons appointed by a court to be an adult's personal representative or qualified healthcare professional. This is consistent with HIPAA §§ 164.502(a)(1)(i) and 164.502(g), with respect to the personal representative, and with HIPAA § 164.512(e)(1) with respect to the qualified healthcare professional, provided that the court order appointing the professional authorizes the disclosure. (The use of the information by the qualified healthcare professional for treatment purposes is authorized by HIPAA §164.506(a)(3)(i)(B), which allows a health care provider to use protected health information for treatment if the provider is required by law to treat the individual even if the provider is unable to obtain the individual's consent. The provider must first request the consent.)

Subsection 27-7-29(B)(12) authorizes disclosure under court order. This is consistent with HIPAA § 164.512(e)(i), although the disclosure is limited to that expressly authorized by the order.

Subsection 27-7-29(B)(13) authorizes disclosure to Protection and Advocacy representatives. Such disclosure is required by law and can therefore be made without consent, authorization or the opportunity to agree or object pursuant to HIPAA § 164.512(a)(1) (required by law).

Subsection (C): N/A – these records would be forwarded by the Department and not by the Covered Entity.

Subsection (D): Unlawful release or use of records is a misdemeanor. The imposition of a penalty for the unlawful release or use of records is not contrary to HIPAA.

Sections 27-7-30, -31: Mandatory reporting and immunity. See separate preemption analysis of Adult Protective Services Act: Reporting Provisions.

Are the [contrary] state law requirements more stringent than those of HIPAA?

Section 27-7-29(B) is contrary to HIPAA, but only to the extent it could be construed to prohibit disclosure by a Covered Entity to the Secretary of HHS in connection with the Secretary's compliance activities.

Is an exception warranted?

No.

Comments:

Note that certain provisions of § 27-17-19(D), which would otherwise be contrary to HIPAA, are not because that subsection gives effect to prohibitions on disclosure imposed by other laws. Although such provisions therefore are “not contrary” to HIPAA, disclosures that would otherwise be authorized by the state law are nonetheless prohibited by HIPAA. The effect is the same as if the provisions were pre-empted.

PREEMPTION ANALYSIS

Statute/Regulation: Adult Protective Services Act: Reporting Provisions
NMSA §§ 27-7-30 and 31 (1997)

Agency: Children, Youth and Family Department

Summary: Requires any person who has reasonable cause to believe that an incapacitated adult is being abused, neglected or exploited to report relevant information to the Department.

Conclusion: Not preempted.

**Covered
Entities Affected:** All

Impact: State law and HIPAA requirements apply. Reporting is required per state law and allowed under HIPAA without consent, authorization or the opportunity to agree or object; however, under HIPAA § 164.512(c)(2), a Covered Entity must also promptly inform the individual or his personal representative of the report except to the extent excused under that section.

Summary of Pertinent Provisions:

Section 27-7-30 requires that any person having reasonable cause to believe that an incapacitated adult is being abused, neglected or exploited report that information immediately to the Department. The report is to include the nature and extent of the adult's condition and other relevant information. Any person failing or refusing to report, or obstructing or impeding any investigation is guilty of a misdemeanor.

Section 27-7-31 provides that any person making a report, testifying, participating in an evaluation or providing information under the act is not subject to civil or criminal liability therefor unless the person acted in bad faith or with a malicious purpose.

Does the state law apply to one or more Covered Entities?

Yes. The duty to report applies to all persons and entities.

Does the state law fall within a statutory carve-out category?

Probably not. The carve-out category established by HIPAA § 160.203(c) covers state laws that provide for the reporting of child (not adult) abuse. Although this carve-out also protects laws that provide for the reporting of “disease or injury,” it is not clear that all circumstances that would give rise to “reasonable cause” to believe that an adult is being abused, neglected or exploited under the state law at issue would constitute a “disease or injury” under HIPAA § 160.203(c).

Does the state law fit the carve-out for authorization or prohibition of disclosure of a minor’s protected health information to a parent, guardian or person acting in loco parentis?

No.

Is the state law contrary to HIPAA because it is either impossible for the Covered Entity to comply with both the state and federal requirements, or the state law stands as an obstacle to the purposes of HIPAA?

No. HIPAA § 164.512(a)(1) allows a covered entity to use or disclose protected health information without consent, authorization or the opportunity to agree or object, to the extent that such use or disclosure is required by law and complies with and is limited to the relevant requirements of such law. HIPAA § 164.512(a)(2) provides, however, that when a disclosure is about a child or adult whom the Covered Entity reasonably believes to be a victim of abuse, neglect or domestic violence, the disclosure of information must also comply with the requirements of HIPAA § 164.512(c). Subsection (c)(1)(i) of that section authorizes the disclosure required by the state law at issue here, provided that the disclosure is limited to the requirements of that law. HIPAA § 164.512(c)(2) imposes an additional requirement on a Covered Entity making a report, i.e., the Covered Entity must promptly inform the individual (or his personal representative) that it has made the report, except if

“(i) The covered entity, in the exercise of professional judgment, believes informing the individual would place the individual at risk of serious harm; or

“(ii) The covered entity would be informing a personal representative, and the covered entity reasonably believes the personal representative is responsible for the abuse, neglect or other injury, and that informing such person would not be in the best interests of the individual as determined by the covered entity, in the exercise of professional judgment.”

Are the [contrary] state law requirements more stringent than those of HIPAA?

N/A

Is an exception warranted?

N/A

Comments:

PREEMPTION ANALYSIS

Statute/Regulation:	Alcoholic and Intoxicated Persons, Detoxification (Commitment Procedures): Emergency Commitment, NMSA § 43-2-8 (1989) Commitment, NMSA § 43-2-9 (1989) Voluntary Services, NMSA §§ 43-2-11 and -12 (1989)
Agency:	N/A
Summary:	These sections involve disclosure of protected health information through the examination, certification and testimony of physicians in support of emergency and non-emergency commitment proceedings affecting intoxicated or drug-impaired persons.
Conclusion:	Not preempted.
Covered Entities Affected:	Healthcare Providers, including physicians and licensed alcohol/drug treatment facilities
Impact:	State law and HIPAA requirements apply

Summary of Pertinent Provisions:

Section 43-2-8:

An emergency commitment is authorized under this section if an individual (1) has threatened, attempted or inflicted physical harm on himself or another; (2) is likely to inflict serious physical harm on himself; (3) is likely to inflict serious physical harm on another unless committed; (4) is incapacitated by alcohol or drugs; or (5) has been taken into protective custody a specific number of times for the reasons set forth in the statute. An application for an emergency commitment based on the grounds set forth in (1) through (4) must be accompanied by a physician's certificate stating that the physician has examined the person sought to be committed and setting forth the facts that support the need for emergency commitment. A physician's certificate is not required if the individual has refused an examination or if the application is filed by a law enforcement officer on the grounds specified in (5).

An application for emergency commitment is directed (either directly or through the DA) to the administrator of an approved treatment facility. The administrator is responsible for reviewing and approving or refusing the application.

Subsection (F) of this section requires that a copy of the application and the physician's certificate be provided by the administrator to the individual and to the district attorney within 12 hours after commitment by the administrator. .

Section 43-2-9:

This section requires that a physician's certificate accompany a petition for a non-emergency commitment unless the individual has refused to consent to an examination. The certificate must set forth the physician's findings in support of the petition, which must allege that the individual is an alcoholic or drug impaired and that he has "threatened, attempted or inflicted physical harm on himself or another and that unless committed is likely to inflict physical harm on himself or another or that he is incapacitated by alcohol or drugs." Subsection (C) provides that, if possible, a physician who has examined the individual whose commitment is sought will testify at the hearing held on the petition. Commitment is conditioned on the availability of treatment.

Sections 43-2-11 and -12:

These sections authorize the Department of Health to provide treatment and assistance to individuals on their request.

Does the state law apply to one or more Covered Entities?

Yes, the state law applies to disclosures by and to Health Care Providers.

Does the state law fall within a statutory carve-out category?

No.

Does the state law fit the carve-out for authorization or prohibition of disclosure of a minor's protected health information to a parent, guardian or person acting in loco parentis?

No.

Is the state law contrary to HIPAA because it is either impossible for the Covered Entity to comply with both the state and federal requirements, or the state law stands as an obstacle to the purposes of HIPAA?

No.

Section 43-2-8: Physician's certification to support an emergency commitment. HIPAA §164.512(j) authorizes a Covered Entity to disclose protected health information without consent, authorization or the opportunity to agree or object if the Entity, in good faith, believes that the use or disclosure is "(A) necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public; and (B) is to a person or persons reasonably able to prevent or

lessen the threat....” This state provision is not contrary to HIPAA because it does not *require* a physician to execute a certification under circumstances other than those authorized by HIPAA. A physician may disclose the information required in the referenced certification if the circumstances meet the requirements of HIPAA § 164.512(j) (serious and imminent threat to health or safety), or if he has an authorization from the individual or his personal representative.

Section 43-2-8: Administrator’s use of information in approving or refusing an emergency application. The administrator’s use of the information presented to make this determination is required by law, and is therefore authorized by HIPAA § 164.512(a)(1). (The administrator is required by the statute either to retain the individual or to refuse the application if in his opinion the application and certificate fail to sustain the grounds for commitment. NMSA § 43-2-8(C), (D).)

Section 43-2-9: Physician’s certification to support, and testimony in connection with, a non-emergency commitment. Under HIPAA, a physician may execute the required certification without authorization if the circumstances described in § 164.512(j)(i), above, are present (serious and imminent threat to health or safety), or, after legal proceedings have been initiated, pursuant to court order, § 164.512(e)(1)(i). Testimony can be provided under a court order or subpoena in accordance with § 164.512(e)(1)(i) or (ii) or pursuant to an authorization.

Section 43-2-9: Disclosure of information by administrator to individual committed. This disclosure is authorized by HIPAA § 164.502(a)(1)(i) (disclosure to the individual).

Sections 43-2-11 and –12: Provision of voluntary services. The voluntary treatment contemplated by these sections presume consent; the sections, therefore, are not contrary to HIPAA. HIPAA requirements for consent must be met.

Are the [contrary] state law requirements more stringent than those of HIPAA?

N/A

Is an exception warranted?

N/A

Comments:

Because the disclosures contemplated by the statute are not made to a public health authority, they are not subject to any of the exceptions to consent and authorization requirements that are available for such disclosures.

The confidentiality of substance abuse records is also protected under 42 USC § 290dd-2 and 42 CFR part 2; to the extent those requirements apply and are more protective of personal health information, their provisions are controlling.

PREEMPTION ANALYSIS

Statute/Regulation:	Cardiac Arrest Response Act NMSA §§ 24-10C-1 to -7 (1999)
Agency:	Department of Health
Summary:	Establishes a program to encourage use of automatic external defibrillators and semi-automatic external defibrillation (AED)
Conclusion:	Not preempted.
Covered Entities Affected:	Health Care Providers that own/use AEDs or who act as medical directors of AED programs
Impact:	State law and HIPAA requirements apply

Summary of Pertinent Provisions:

Section 24-10C-4(A) of the Act provides that a person who acquires an AED must ensure that a physician medical director oversees all aspects of the defibrillation program, provides overall quality assurance and reviews each case in which the AED is used by the program. Section 24-10C-4(D) requires any person who renders emergency care or treatment using an AED reports any clinical use of the AED to the medical director.

Does the state law apply to one or more Covered Entities?

Yes. Health care providers who own or use AEDs, including the physicians that act as their medical directors, are subject to the Act.

Does the state law fall within a statutory carve-out category?

No.

Does the state law fit the carve-out for authorization or prohibition of disclosure of a minor's protected health information to a parent, guardian or person acting in loco parentis?

No.

Is the state law contrary to HIPAA because it is either impossible for the Covered Entity to comply with both the state and federal requirements, or the state law stands as an obstacle to the purposes of HIPAA?

No. Quality assurance activities fall within the definition of “health care operations” in HIPAA § 164.501. Covered entities are able to comply both with the state law and with HIPAA by obtaining the HIPAA-required consent for treatment and health care operations or by following the procedures required by HIPAA if consent cannot be obtained because of an emergency. See HIPAA § 164.506(a).

Are the [contrary] state law requirements more stringent than those of HIPAA?

N/A

Is an exception warranted?

N/A

Comments:

PREEMPTION ANALYSIS

Statute/Regulation: Children's Mental Health and Developmental Disabilities Act
NMSA §§ 32A-6-1 to -22 (1995)

Agency: Children, Youth and Family

Summary: The Act governs the provision to children of mental health and habilitation services.

Conclusion: Section 32A-4-15(F) of the Act is to the extent it prohibits disclosure to the Secretary of HHS. No other provision of the Act is preempted, although because the requirements of the Act and HIPPA differ in several instances, the federal rule affects the existing requirements of state law. See detail in attached table.

Covered Entities Affected: Health Care Providers

Impact: See detail in attached table.

Summary of Pertinent Provisions:

See attached table.

Does the state law apply to one or more Covered Entities?

Yes, it applies to Health Care Providers, including both individual and facility providers.

Does the state law fall within a statutory carve-out category?

No.

Does the state law fit the carve-out for authorization or prohibition of disclosure of a minor's protected health information to a parent, guardian or person acting in loco parentis?

In part. Sections 32A-6-10(C) and (F); 32A-6-12(L); 32A-6-14(E) and (I); and 32A-6-15(C)(3) all fall within the protection of the carve-out for disclosure of information to parents, guardians or persons acting in loco parentis.

Is the state law contrary to HIPAA because it is either impossible for the Covered Entity to comply with both the state and federal requirements, or the state law stands as an obstacle to the purposes of HIPAA?

No, with the exception of § 32A-4-15(F), which would prohibit a Covered Entity from disclosing protected health information to the Secretary as required by HIPAA § 164.502(a)(2)(ii). HIPAA, however, does modify how the state law is implemented by Covered Entities. See attached table.

Are the [contrary] state law requirements more stringent than those of HIPAA?

No.

Is an exception warranted?

No.

Comments:

**CHILDREN'S MENTAL HEALTH AND
DEVELOPMENTAL DISABILITIES**
Pertinent Provisions
NMSA §§ 32A-6-1 to -22 (1995)

State Provision		Relevant HIPAA Provision/Impact
Section 32A-6-2 – Definitions	Subsection (F) defines “evaluation facility” to include a medical facility having psychiatric or developmental disability services available, or the office of a physician or psychologist capable of performing a mental status examination.	Identifies Covered Entities affected.
	Subsection (P) defines “residential treatment or habilitation program” to mean the diagnosis, evaluation, care, treatment or habilitation rendered inside or on the premises of a mental health or developmental disability facility, hospital, clinic, institution, supervisory residence or nursing home when the individual resides on the premises and where one or more of the following measures is available for use – restraint, secure seclusion area, program designed to restrict child’s ability to exit voluntarily, or involuntary administration of psychotropic medication.	Identifies Covered Entities affected.
Section 32A-6-10 – Individualized treatment or evaluation plans.	Subsection (C) provides that each child and the child’s parent, guardian or legal custodian are to be involved in the preparation of the child’s own individualized treatment or habilitation plan.	Disclosure protected by carve-out for parents, guardians and persons in loco parentis.

State Provision		Relevant HIPAA Provision/Impact
	<p>Subsection (F) provides that the child's individualized treatment or habilitation plan shall be available upon request to the child, the child's parent if the parent has custody of the child, the child's attorney, the child's guardian or legal custodian, the child's guardian ad litem, any mental health or developmental disability professional designated by the child or the child's parent, guardian or legal custodian and the child's treatment guardian if one has been appointed.</p> <p>Subsection (F) further provides that, "Nothing in this subsection shall require disclosure of information to a child or to the child's parent, guardian or legal custodian when the attending clinician believes that disclosure of that particular information would be damaging to the child and so records in the child's medical record."</p>	<p><i>Disclosure:</i> Protected by carve-out for parents, guardians and persons in loco parentis.</p> <hr/> <p><i>Exception to disclosure:</i> The second portion of this subsection, which authorizes withholding information from the child, is problematic because it could unduly restrict the right of the child (or the child's personal representative when treated as the child) to access information. HIPAA § 164.524(a), in pertinent part, allows a Covered Entity to withhold information from an individual requesting it if the information consists of psychotherapy notes, HIPAA § 164.524(a)(1)(i), or if the disclosure "is reasonably likely to endanger the life or physical safety of the individual or another person," HIPAA § 164.524(a)(3)(i). This standard is more rigorous than the standard of the state statute, which would allow a professional to withhold information if it is merely "damaging" to the child. Although the standards are different, the state statute is not contrary to HIPAA within the meaning of HIPAA § 160.202, which requires that it be "impossible" for a Covered Entity to comply with both the state statute and HIPAA. Here, because withholding the information is not mandatory, a Covered Entity can comply both with the statute and with HIPAA by simply applying the more stringent standard of HIPAA. Therefore this portion of the statute is not preempted per se, although the federal rule still controls. (Note that under HIPAA § 164.524(a)(3)(iii), information may be withheld from a personal representative if such access "is reasonably likely to cause substantial harm to the individual or another person," which is a standard closer to the standard adopted here by the state.)</p>

State Provision		Relevant HIPAA Provision/Impact
Section 32A-6-11 – Emergency mental health evaluation and care.	Subsection (A)(3) authorizes a peace officer to detain and transport a child for emergency mental health evaluation and care if, among other reasons, the peace officer has a certification from a clinician that the child, as a result of a mental disorder, presents a likelihood of serious harm to himself or others and that immediate intervention is necessary to prevent him harm.	<p>HIPAA § 164.512(j) allows a Covered Entity to use protected health information without consent, authorization or the opportunity to agree or object if the use is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public.</p> <p>In addition, HIPAA § 164.506(a)(3)(i)(B) authorizes a provider who is required by law to treat an individual (as this statute provides) to do so; however, the provider must first attempt to obtain the consent of the individual, here, the child (or his personal representative if the child is under 14). If the covered entity is unable to obtain this consent, it may treat the child, as the statute requires, but under HIPAA § 164.506(a)(3)(ii) must document the attempts to obtain consent and the reasons why consent was not obtained.</p>
	Subsection (D) requires the director of an evaluation facility to accomplish an emergency evaluation upon the request of a child's parent, guardian or legal custodian, a peace officer, a detention facility administrator or designee or upon the certification of a clinician.	
	Subsection (E) requires the admitting physician or licensed psychologist to evaluate whether reasonable grounds exist to detain the child and, if so, the child is to be detained.	
Section 32A-6-11.1 – Consent to placement: children younger than 14.	Subsections (A) through (C) provide that a child under 14 may receive residential treatment only by court order (see § 32A-6-13) or with the informed consent of the child's parent, guardian or legal custodian. Subsection (C) requires that the parent, guardian or legal custodian must execute a consent to admission document which includes information specified in that subsection.	Parents authorized to act for child per HIPAA § 164.502(g) (personal representative); the consent to admission document must comply with HIPAA consent requirements.
	Subsections (E) and (F) require the director of the program, on the next business day following admission, to notify the district court or special commissioner of the child's name, date of birth and the date and place of admission, and to petition the court to appoint a guardian ad litem.	Disclosure to district court allowed without consent, authorization or opportunity to agree or object under HIPAA § 164.512(a)(1) (required by law).
	Subsections (G) and (K) require the guardian ad litem to meet with the child, the child's parent, guardian or legal custodian and the child's clinician.	Disclosure by clinician to guardian ad litem allowed without consent, authorization or opportunity to agree or object under HIPAA § 164.512(a)(1) (required by law).

State Provision		Relevant HIPAA Provision/Impact
	Subsection (J) provides that if a parent, guardian or legal custodian demands that the child be discharged, the facility must discharge the child unless the physician or psychologist determines that the child meets the criteria for involuntary treatment. In that case, the director of the facility, the physician or licensed psychologist shall request the children's court attorney to initiate involuntary treatment proceedings.	Disclosure allowed without consent, authorization or opportunity to agree or object under HIPAA § 164.512(a)(1) (required by law).
Section 32A-6-12 – Voluntary residential treatment: children 14 and over.	Subsections (A) and (B) provide that a child 14 and over may voluntarily admit himself to a residential treatment or habilitation program with the informed consent of his parent, guardian or legal custodian for a period of up to 60 days. The child and the parent, guardian or legal custodian must both execute a voluntary consent to admission document.	Disclosure protected by carve-out for parents, guardians and persons in loco parentis; the consent to admission document must comply with HIPAA consent requirements.
	Subsection (F) requires the director of a program to notify the district court or the special commissioner of a voluntary admission, giving the child's name, date of birth and the date and place of admission.	Disclosure to district court allowed without consent, authorization or opportunity to agree or object under HIPAA § 164.512(a)(1) (required by law)
	Subsection (L) affirms a child's right to immediate discharge. Upon receipt of the request for discharge, the program must notify the child's parent, guardian or legal custodian to take custody of child and must also notify the child's attorney.	Disclosure protected by carve-out for parents, guardians and persons in loco parentis.
	Subsection (M) requires a clinician to review the child's continued stay within 60 days of the initial admission. If the clinician concludes that continued treatment is in the child's best interest, the program director must so notify the child's attorney. The attorney must certify to the child's voluntary and knowing consent and the clinician's recommendation. A copy of the certification must be sent to the district court "in a manner that preserves the child's anonymity.	Disclosure to attorney allowed without consent, authorization or opportunity to agree or object under HIPAA § 164.512(a)(1) (required by law).

State Provision		Relevant HIPAA Provision/Impact
Section 32A-6-13 – Involuntary residential treatment.	Subsection (B) provides that any person who believes that a child, as a result of a mental disorder or developmental disability, is in need of residential mental health or developmental disability services may request that a children's court attorney file a petition for involuntary residential treatment. The petition must include a detailed description of the symptoms or behaviors that support the allegations as well as a discussion of alternatives that have been considered and rejected.	This subsection is not contrary to HIPAA because it is precatory; if a Covered Entity makes the request or provides the information it must do so pursuant to a valid HIPAA authorization.
Section 32A-6-14 – Treatment and habilitation of children.	Subsection (A) provides that any child has the right, with or without parental consent, to consent to and receive individual psychotherapy, group psychotherapy, guidance, counseling or other forms of verbal therapy.	Under HIPAA, if the child does consent to verbal therapy, the Covered Entity may not treat the child's personal representative as "the individual" for purposes of that treatment unless the child requests that it do so. See HIPAA § 164.502(g)(3)(i) and (g)(3)(ii).
	Subsection (D) prohibits giving a child under 14 psychotropic medications or using interventions with aversive stimuli without the informed consent of the child's parent, guardian or legal custodian. If the child is under 14, the program must also notify the child's guardian ad litem.	HIPAA treats the parent, guardian or legal custodian as a personal representative under § 164.502(g); notification of the guardian ad litem is authorized under HIPAA § 164.512(a)(1) because it is required by law.
	Subsection (E) allows psychotropic medications or aversive stimuli to be administered to a child 14 and over with the informed consent of the child. The program must still notify the parent, guardian, or legal custodian when psychotropic medications or aversive stimuli are administered. If the child does not consent or if the physician proposing a treatment or any other interested party does not believe that the child is capable of informed consent, he may petition the court to appoint a treatment guardian to make a substitute decision. If the child refuses to comply with the decision of treatment guardian, the treatment guardian may apply for an enforcement order.	Disclosure to the parent, guardian or legal custodian is protected by the carve-out for parents, guardians and persons in loco parentis; HIPAA would not allow a Covered Entity to disclose the information necessary to initiate the court proceedings without a valid authorization unless the disclosure was to a personal representative of the child.

	State Provision	Relevant HIPAA Provision/Impact
	<p>Subsection (I) authorizes a licensed physician who believes that the administration of psychotropic medication is necessary to protect the child from harm during the pendency of proceedings may administer the medication on an emergency basis. The program must notify the child's parent, guardian or legal custodian and the child's attorney when medication is administered to the child on an emergency basis.</p>	<p>Administration of medication is covered within the program's initial HIPAA consent to treat; if none, the use of protected health information for this treatment is allowed under HIPAA § 164.506(a)(3)(i)(A) without consent because of the emergency, provided that the provider attempts to obtain consent as soon as reasonably practicable after the delivery of treatment. The disclosure to the parent, guardian or legal custodian is protected by the carve-out for parents, guardians and persons in loco parentis.</p>
<p>Section 32A-6-15 – Disclosure of information.</p>	<p>Subsection (A) states that (except as provided) no person shall, without the authorization of the child, disclose or transmit any confidential information from which a person well acquainted with the child might recognize the child as the described person or any code, number of other means that could be used to match the child with confidential information regarding him.</p>	<p>Consistent with HIPAA.</p>
	<p>Subsection (B) provides that when a child 14 or over is incapable of giving or withholding consent to disclosure and does not have a treatment guardian, the person seeking the authorization shall petition the court for the appointment of a treatment guardian to make the decision. When the child is under 14, the child's parent, guardian or legal custodian is authorized to consent to disclosure on behalf of the child.</p>	<p>If the order is issued, the Covered Entity may treat the treatment guardian as the child's personal representative for the purposes set forth in the order per HIPAA § 164.502(g)(3) (personal representative); HIPAA § 164.502(g) recognizes the personal representative as the individual in this situation so the parent, guardian or legal custodian would be allowed to authorize the disclosure. Note: Under HIPAA § 164.502(g)(3), if the child under 14 was capable of consenting and did consent to verbal therapy treatment per 32A-6-14(A), HIPAA would not allow the personal representative to make the disclosure decision with respect to that treatment.</p>
	<p>Subsection (C) provides that the child's authorization is not required: (1) When the request is from a mental health or developmental disability professional or an employee or trainee working with persons with mental health or developmental disabilities to the extent that his practice, employment or training on behalf of the child requires that he has access to the information;</p>	<p>Subsection (1) is not contrary to HIPAA within the meaning of § 160.202, although a HIPAA authorization is required before a Covered Entity may disclose the information. See HIPAA §164.506(a)(5); 65 FR at 82511.</p>

State Provision	Relevant HIPAA Provision/Impact
(2) When the disclosure is necessary to protect against a clear and substantial risk of imminent serious physical injury or death inflicted by the child on himself or another;	Disclosure without authorization under this section is not contrary to HIPAA; however, the disclosure (if made without consent or authorization) may be made only to a person reasonably able to prevent or lessen the threat, including the target of the threat. HIPAA § 164.512(j).
(3) When the disclosure of the information is to the parent, guardian or legal custodian and is essential for the treatment of the child;	This disclosure is protected by the carve-out for parents, guardians and persons in loco parentis.
(4) When the disclosure of the information is to the primary caregiver of the child and, in the judgment of the treating clinician who discloses the information, is limited to information that is necessary for the continuity of the child's treatment.	Disclosure is not required by this subsection, so the subsection is not contrary to HIPAA within the meaning of HIPAA § 160.202, and is therefore not preempted. Although HIPAA does not require authorization in this instance, it does require the Covered Entity to give the individual the opportunity to agree or object if the individual is present. If the individual does not have the capacity to agree or object or if the individual is not present, the disclosure can be made under HIPAA if it is in the best interests of the child. HIPAA § 164.510(b)(1)(i), (b)(2) and (b)(3). This test would be met by fulfilling the state requirement that the information be "necessary for the continuity of the child's treatment."
(5) When the disclosure is to an insurer contractually obligated to pay part or all of the expenses. The information disclosed must be limited to data identifying the child, facility and treating or supervising physician and the dates and duration of the residential treatment; or	The disclosure is allowed pursuant to the provider's initial HIPAA consent for treatment, payment and healthcare operations.
(6) When the disclosure to a protection and advocacy representative pursuant to federal law.	Disclosure allowed without consent, authorization or opportunity to agree or object under HIPAA § 164.512(a)(1) (required by law)
Subsection (D) requires that an authorization: (1) be in writing and signed, and (2) contain a statement of the child's right to examine and copy the information to be disclosed, the name or title of the proposed recipient of the information and a description of the use that may be made of the information.	This subsection is different from, but not contrary to, HIPAA. A Covered Entity may comply with both statutes by including in a HIPAA authorization the additional elements required by the state statute (notification of the right to copy and examine, description of use). HIPAA § 164.508(b)(ii) allows these elements to be included in the HIPAA authorization itself.

State Provision	Relevant HIPAA Provision/Impact
<p>Subsection (E) provides that the child has the right to access confidential information about himself and to submit clarifying or correcting statements and other documentation of reasonable length for inclusion with the confidential information. The statements and other documentation must be kept with the relevant confidential information and accompany it in the event of disclosure; they are governed by this section to the extent they contain confidential information.</p> <p>Subsection (E) further provides that, "Nothing in this subsection shall prohibit the denial of access to the records when a physician or other mental health or developmental disabilities professional believes and notes in the child's medical records that the disclosure would not be in the best interests of the child. In all cases, the child has the right to petition the court for an order granting access."</p>	<p><i>Disclosure:</i> This part of Subsection (E) is consistent with HIPAA requirements.</p> <p><i>Exception to disclosure:</i> The second portion of this subsection, which authorizes withholding information from the child, is problematic because it could unduly restrict the right of the child (or the child's personal representative when treated as the child) to access information. HIPAA § 164.524(a), in pertinent part, allows a Covered Entity to withhold information from an individual requesting it if the information consists of psychotherapy notes, HIPAA § 164.524(a)(1)(i), or if the disclosure "is reasonably likely to endanger the life or physical safety of the individual or another person." HIPAA § 164.524(a)(3)(i). This standard is more rigorous than the standard of the state statute, which would allow a professional to withhold information if it is "in the best interests" of the child. Although the standards are different, the state statute is not contrary to HIPAA within the meaning of HIPAA § 160.202, which requires that it be "impossible" for a Covered Entity to comply with both the state statute and HIPAA. Here, because withholding the information is not mandatory, a Covered Entity can comply both with the statute and with HIPAA by simply applying the more stringent standard of HIPAA. Therefore this portion of the statute is not preempted per se, although the federal rule still controls.</p>
<p>Subsection (F) prohibits information disclosed under this section to be released to any other person, agency or governmental entity or placed in files or computerized data banks accessible to any persons not otherwise authorized to obtain the information.</p>	<p>This Subsection is preempted to the extent it would prohibit disclosure to the Secretary of HHS. See HIPAA § 164.502(a)(2)(ii).</p>
<p>Subsection (G) provides that nothing in the Act "shall limit the confidentiality rights afforded by federal statute or regulation."</p>	<p>--</p>

PREEMPTION ANALYSIS

Statute/Regulation: Consent to Medical Care
NMSA §§ 24-10-1 to -5 (1963)

Agency:

Summary: Recognizes the right of an emancipated or married minor to consent to health care treatment (without limiting cases in which consent may otherwise be obtained or is not required) and authorizes a person standing in loco parentis to the minor to give consent for emergency care if the minor's parents cannot be located.¹

Conclusion: Not preempted.

Covered Entities Affected: Health Care Providers

Impact: State law and HIPAA requirements apply

Summary of Pertinent Provisions:

Section 24-10-1 authorizes an emancipated or married minor to consent to medical treatment. Section 24-10-2 authorizes, in an emergency, the disclosure of protected health information to a person standing in loco parentis to a minor if the minor's parents cannot be located.

Does the state law apply to one or more Covered Entities?

Yes, the law applies to health care providers

Does the state law fall within a statutory carve-out category?

No.

Does the state law fit the carve-out for authorization or prohibition of disclosure of a minor's protected health information to a parent, guardian or person acting in loco parentis?

Yes.

¹ *Note:* Other statutes afford an unemancipated minor the right to consent to treatment, see, e.g., NMSA §§ 24-1-9 (STD), 24-1-13 and -13.1 (pregnancy); 24-2B-3 (HIV test); 32A-6-14 (verbal therapy). Furthermore, this statute does not dictate when consent from someone other than the minor must be obtained.

Is the state law contrary to HIPAA because it is either impossible for the Covered Entity to comply with both the state and federal requirements, or the state law stands as an obstacle to the purposes of HIPAA?

No, an emancipated minor is treated as an adult under state law, and HIPAA does nothing to change this. HIPAA also recognizes the rights of a unemancipated minor who, under state law, needs no consent but his own to obtain healthcare services; in this case, a Covered Entity is prohibited from treating a parent, guardian or other person acting in loco parentis as that minor's personal representative. HIPAA § 164.502(g)(3). In the situation described in § 24-10-2, and unless the minor is capable of giving his own consent, HIPAA authorizes a Covered Entity to treat a person standing in loco parentis to a minor as the minor's personal representative and allows disclosure to that person as if he were the individual. HIPAA§ 164.502(g)(1).

Are the [contrary] state law requirements more stringent than those of HIPAA?

N/A

Is an exception warranted?

N/A

Comments:

PREEMPTION ANALYSIS

Statute/Regulation:	Controlled Substances Act NMSA §§ 30-17-1 to -42 (1972) Controlled Substances Reporting Regulation 16 NMAC 19.20.29
Agency:	Board of Pharmacy
Summary:	Requires pharmacies/pharmacists to report prescription information regarding dispensing of controlled substances to Board of Pharmacy
Conclusion:	Not preempted except to the extent that § 30-31-40(D) of the Act, which allows a practitioner engaged in medical practice or research not to disclose the name or identity of a patient or research subject, would prohibit disclosure to the Secretary of HHS as required by HIPAA.
Covered Entities Affected:	Pharmacies, including those maintained by other Covered Entities
Impact:	State law and HIPAA requirements apply.

Summary of Pertinent Provisions:

Section 30-31-15(F) of the Controlled Substances Act requires each pharmacy licensed in the state to provide information relating to the dispensing of any controlled substance designated by the Board of Pharmacy. The reporting regulation implements this provision by conditioning the dispensing of controlled substances on the weekly submission of certain personal health information to a central repository maintained by the Board, 16 NMAC 29.2.2. The information required includes:

- Recipient's ID number (SSN, driver's license number, military ID or other photo ID)
- Recipient's date of birth
- National Drug Code number of substance dispensed
- Date of dispensing
- Quantity dispensed
- Prescriber's DEA registration number
- Dispensing pharmacy's NABP number

16 NMAC 29.3.1.

Records relating to the dispensing of controlled substances are to be maintained by a pharmacy for three years and made available for inspection and copying by authorized Drug Inspectors employed by the Board and other law enforcement officers conducting a criminal investigation. NMSA § 31-30-15(D); 16 NMAC 29.3.3.

Sections 30-31-31 and –32 of the Act authorize the issuance of administrative inspection warrants which may authorize an officer or other designee of the Board to inspect and copy any records that the Act requires the pharmacy to maintain. Access without a warrant is authorized if the owner, operator or agent in charge of the pharmacy consents, in situations presenting substantial imminent danger to health or safety, or in other instances in which a warrant is not constitutionally required.

Section 30-31-40 of the Act instructs the Board to encourage research on the misuse and abuse of controlled substances. Subsection (D) of that section, which addresses confidentiality, provides that “a practitioner engaged in medical practice or research shall not be required to furnish the name or identify of a patient or research subject to the board, nor may he be compelled in any state or local civil, criminal, administrative, legislative or other proceedings to furnish the name or identity of an individual that the practitioner is obligated to keep confidential.”

Does the state law apply to one or more covered entities?

Yes. Pharmacies are covered entities.

Does the state law fall within a statutory carve-out category?

No.

Does the state law fit the carve-out for authorization or prohibition of disclosure of a minor’s protected health information to a parent, guardian or person acting in loco parentis?

No.

Is the state law contrary to HIPAA because it is either impossible for the covered entity to comply with both the state and federal requirements, or the state law stands as an obstacle to the purposes of HIPAA?

No. HIPAA § 164.512(a)(1) provides that reports “required by law” may be made without the need for consent, authorization or the opportunity to agree or object. “Required by law,” as defined by HIPAA § 164.501, refers to “a mandate contained in law that requires a covered entity to make a use or disclosure of protected health information and that is enforceable in a court of law,” including “statutes or regulations that require the production of information.” The critical inquiry is whether the reporting is required or merely optional; the exception to consent and authorization requirements is recognized by HIPAA only if the reporting is mandatory. See 65 FR 82462, 82485 (Dec. 28, 2000). The reporting required under the Controlled Substances Act and reporting regulation clearly is mandatory and not permissive. The intentional refusal or failure to report the

required information, and the omission of any material information, are fourth degree felonies under NMSA §§ 30-31-24 and -25 (1980).

The disclosure of information in the course of administrative inspections is also allowed under HIPAA, whether a warrant is procured or not. HIPAA § 164.512(d)(1)(iii) allows for the disclosure, without consent, authorization or the opportunity to agree or object, to a health oversight agency in connection with its oversight activities. Disclosure pursuant to a warrant is allowed under HIPAA § 164.512(e)(1)(i).

The confidentiality provisions of § 30-31-40 are contrary to HIPAA and are preempted to the extent they would prohibit disclosure to the Secretary of HHS for HIPAA compliance purposes.

Are the [contrary] state law requirements more stringent than those of HIPAA?

No.

Is an exception warranted?

No.

Comments:

The comments to the final regulations clarify that the exception for reports required by law in § 164.512(a)(1) is not limited to those circumstances referenced in 164.512(a)(2), which involve child or domestic abuse, reports to law enforcement officials and disclosures made pursuant to judicial process. 65 FR 82462, 82485 (Dec. 28, 2000).

PREEMPTION ANALYSIS

Statute/Regulation:	Delinquency Act NMSA §§ 32A-2-1 to -33 (1993)
Agency:	Children, Youth and Families
Summary:	The Act is intended to remove the adult consequences of criminal behavior from children committing delinquent acts; to hold children accountable for such acts and to provide a program of supervision, care and rehabilitation; and to provide effective deterrents to acts of juvenile delinquency.
Conclusion:	Not preempted.
Covered Entities Affected:	The records protected by this Act are not records of a Covered Entity; treating health care professionals are authorized to access these records and may use them with HIPAA consent
Impact:	None

Summary of Pertinent Provisions:

Section 32A-2-26 authorizes a court to order records relating to the delinquency proceedings sealed. Subsection (D) allows a clinic, hospital or agency that has the individual under care or treatment to access those records under a court order.

Section 32A-2-32 protects as confidential all social records, including medical and psychiatric reports, obtained by the juvenile probation office, parole officers and parole board or in the possession of the department. Paragraph (14) of this section authorizes health care or mental health professionals involved in the evaluation or treatment of the child, the child's parents, guardian, custodian or other family members, to access the protected records.

Does the state law apply to one or more Covered Entities?

Health care providers, but only with respect to accessing the protected records.

Does the state law fall within a statutory carve-out category?

N/A

Does the state law fit the carve-out for authorization or prohibition of disclosure of a minor's protected health information to a parent, guardian or person acting in loco parentis?

N/A

Is the state law contrary to HIPAA because it is either impossible for the Covered Entity to comply with both the state and federal requirements, or the state law stands as an obstacle to the purposes of HIPAA?

No, although a treating Health Care Provider must have the individual's consent before using in treatment protected health information obtained from the records protected by this statute.

Are the [contrary] state law requirements more stringent than those of HIPAA?

N/A

Is an exception warranted?

N/A

Comments:

PREEMPTION ANALYSIS

Statute/Regulation: Detoxification Act
NMSA §§ 43-2-16 to -22 (1973)

Agency:

Summary: Authorizes peace or public service officer to transport an intoxicated person to his residence, a health care facility or a city or county jail; requires the person in charge of a health care facility to see that a responsible member of the person's family is notified.

Conclusion: Not preempted.

Covered Entities Affected: Health Care Providers

Impact: State law and HIPAA requirements apply.

Summary of Pertinent Provisions:

Section 43-2-20 of the Detoxification Act provides that, "Whenever an intoxicated person is transported by a peace officer or public service officer to a health care facility or jail, the person in charge of that facility or jail at the time shall see that a responsible member of the intoxicated person's family is notified of his presence there as soon as practicable."

Does the state law apply to one or more Covered Entities?

The law applies to health care facilities.

Does the state law fall within a statutory carve-out category?

No.

Does the state law fit the carve-out for authorization or prohibition of disclosure of a minor's protected health information to a parent, guardian or person acting in loco parentis?

No.

Is the state law contrary to HIPAA because it is either impossible for the Covered Entity to comply with both the state and federal requirements, or the state law stands as an obstacle to the purposes of HIPAA?

No. The disclosure is required by law within the meaning of § 164.512(a)(1) and can therefore be made without consent, authorization or the opportunity to agree or object.

Are the [contrary] state law requirements more stringent than those of HIPAA?

N/A

Is an exception warranted?

N/A

Comments:

PREEMPTION ANALYSIS

Statute/Regulation: Physician-Patient and Psychotherapist-Patient Privilege
Rules of Evidence, N.M. R.E. 11-504

Agency: Supreme Court

Summary: Establishes an evidentiary privilege for confidential communication if not intended to be disclosed to third persons other than those present to further the interests of the patient in the consultation, examination or interview, persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist.

Conclusion: Not preempted.

Covered

Entities Affected: Health Care Providers

Impact: None

Summary of Pertinent Provisions:

Section (B) of the rule establishes an evidentiary privilege for confidential communication if not intended to be disclosed to third persons other than those present to further the interests of the patient in the consultation, examination or interview, persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist. Section (D) of the rule provides exceptions to the privilege for proceedings to hospitalize the patient for mental illness, examination by court order, conditions relevant to an element of a claim or defense made by the patient, or reports to government agencies required by law.

Does the state law apply to one or more Covered Entities?

The law applies to physicians and psychotherapists, who are Health Care Providers under HIPAA.

Does the state law fall within a statutory carve-out category?

No.

Does the state law fit the carve-out for authorization or prohibition of disclosure of a minor’s protected health information to a parent, guardian or person acting in loco parentis?

No.

Is the state law contrary to HIPAA because it is either impossible for the Covered Entity to comply with both the state and federal requirements, or the state law stands as an obstacle to the purposes of HIPAA?

No. Disclosures in the course of judicial or administrative proceedings under HIPAA § 164.512 are allowed but not required. See 65 FR at 82513, 82521 (consents and authorizations should not be construed to waive, directly or indirectly, any privilege granted under federal, state or local law or procedure); 65 FR at 82567 (“[w]hether and when to assert a claim of privilege on a patient's behalf is a matter for other law and for the ethics of the individual health care provider. This is not a decision that can or should be made by the federal government”); 65 FR at 82596 (“[w]e do not intend for the privacy regulation to interfere with federal or state rules of evidence that create privileges”).

Are the [contrary] state law requirements more stringent than those of HIPAA?

N/A

Is an exception warranted?

N/A

Comments:

PREEMPTION ANALYSIS

Statute/Regulation: Families in Need of Court-Ordered Services
NMSAA §§ 32A-3B-1 to -22 (1993)

Agency: Children, Youth and Families

Summary: Provides for court-ordered services for families when voluntary services have been exhausted and court intervention is required. Protects as confidential the records of the court and of the department.

Conclusion: The records protected by this Act are not records of a Covered Entity; treating health care professionals are authorized to access these records and may use them with HIPAA consent.

Covered Entities Affected: None in connection with disclosure; Health Care Providers in connection with use.

Impact: None.

Summary of Pertinent Provisions:

Section 32A-3B-22 affords confidentiality protection to all records concerning a family in need of services that are “in the possession of the court or the department or that were produced or obtained by the department during an investigation...” Paragraph (13) of § 32A-3B-22 authorizes health care or mental health professionals involved in the evaluation or treatment of the child, the child’s parents, guardian, custodian or other family members, to access the protected records.

Does the state law apply to one or more Covered Entities?

Health care providers, but only with respect to accessing the protected records.

Does the state law fall within a statutory carve-out category?

N/A.

Does the state law fit the carve-out for authorization or prohibition of disclosure of a minor’s protected health information to a parent, guardian or person acting in loco parentis?

N/A

Is the state law contrary to HIPAA because it is either impossible for the Covered Entity to comply with both the state and federal requirements, or the state law stands as an obstacle to the purposes of HIPAA?

No, although a treating Health Care Provider must have the individual's consent before using in treatment protected health information obtained from the records protected by this statute.

Are the [contrary] state law requirements more stringent than those of HIPAA?

No.

Is an exception warranted?

N/A

Comments:

PREEMPTION ANALYSIS

Statute/Regulation: Genetic Information Privacy Act
NMSA §§ 24-21-1 to -6 (1998)

Agency: N/A

Summary: Governs the collection, retention, transmission and use of genetic information

Conclusion: The Act is not preempted except to the extent it would prohibit disclosure to the Secretary of HHS as required by HIPAA. HIPAA, however, prevents the disclosure of genetic information in many instances where the state law would allow it. (These provisions are not preempted because the statute only allows for disclosure, disclosure is not required. A Covered Entity therefore may comply both with the statute and with HIPAA by simply choosing not to make the disclosure.) See detail in attached table.

**Covered
Entities Affected:** All

Impact: See detail in attached table.

Summary of Pertinent Provisions:

See attached table.

Does the state law apply to one or more Covered Entities?

Yes. The law applies to all Covered Entities. The exception provisions of 24-21-3(D) and 24-21-5(C) apply to issuers of long-term care insurance, which are included within the definition of Health Plans under HIPAA § 160.103.

Does the state law fall within a statutory carve-out category?

No.

Does the state law fit the carve-out for authorization or prohibition of disclosure of a minor's protected health information to a parent, guardian or person acting in loco parentis?

No. The statute does not specifically address minors or disclosure to guardians.

Is the state law contrary to HIPAA because it is either impossible for the Covered Entity to comply with both the state and federal requirements, or the state law stands as an obstacle to the purposes of HIPAA?

No, except to the extent that § 24-21-3(C) would prohibit the disclosure of protected health information to the Secretary of HHS as required by HIPAA § 164.502(a)(2)(ii).

Because disclosure under the exceptions to consent and authorization requirements set forth in HIPAA § 164.512 are permissive and not mandatory, HHS takes the position that a state law is not “contrary” to HIPAA if it declines to recognize one or more of the exceptions that HIPAA would allow under § 164.512. A Covered Entity can comply with both the state law and with HIPAA merely by refusing to disclose information under those HIPAA exceptions that the state law does not recognize. Therefore, to the extent that HIPAA allows exceptions other than those specified in subsection (C) of § 24-21-3, the state law controls.

The only specific requirements of the state law that are more stringent than HIPAA relate to the use and disclosure of information in connection with research. NMSA § 24-21-3(C)(9) limits more strictly the ability of a Covered Entity to use or disclose genetic information without the consent or authorization of the individual. Although these provisions control, they are not contrary to HIPAA because HIPAA § 164.512(i)(1)(ii) and (iii) only authorize but do not require the use or disclosure.

Are the [contrary] state law requirements more stringent than those of HIPAA?

No.

Is an exception warranted?

No.

Comments:

Section 24-21-4 imposes restrictions on the retention of genetic information. As this section does not deal with the use or disclosure of information, it is not addressed in this analysis.

GENETIC INFORMATION PRIVACY ACT
NMSA §§ 24-21-1 to -6 (1998)

State Provision		Relevant HIPAA Provision/Impact
24-21-3(A)	Prohibits any person from obtaining genetic information or samples for genetic analysis from anyone without first obtaining informed and written consent from the person or the person's authorized representative, with the exceptions listed in subsection (C).	This subsection is not contrary to HIPAA. Covered Entities can comply with both statutes by obtaining written informed consent, as required by this subsection, and a consent or authorization, as required by HIPAA
24-21-3(B)	Prohibits the genetic analysis of a person or the collection, retention, transmission or use of genetic information without the informed and written consent from the person or the person's authorized representative except as specified in subsection (C).	Covered Entities can comply with both statutes by obtaining written informed consent, as required by this subsection, and a consent or authorization, as required by HIPAA. To the extent that this subsection might prohibit the collection, use or analysis of genetic information where HIPAA might allow the same without a consent or authorization, the subsection is more stringent than HIPAA and is be saved.
24-21-3(C)	Genetic information or results of analysis may be obtained, retained, transmitted or used without the person's written and informed consent pursuant to federal or state law or regulations only	<p>The non-emergency-related exceptions to HIPAA consent and authorization requirements are set forth in HIPAA § 164.512, which details the circumstances under which neither a consent, an authorization nor an opportunity to agree or object is required. To the extent that any exception allowed under state law to the informed consent requirement would authorize the use, collection, or disclosure of genetic information without any consent where HIPAA would prohibit the same, the HIPAA rules control. Each of the state-authorized exceptions, i.e., where the state statute authorizes use or disclosure without consent, is addressed separately below. Unless otherwise noted below, if HIPAA doesn't recognize the exception, the use or disclosure of genetic information must be made pursuant to either an authorization or a court order or other similar judicial or administrative mandate per HIPAA §§ 164.512(e)(1) and 164.512(f)(1)(ii)(A).</p> <p>This section is preempted to the extent it would prohibit the disclosure of protected health information to the Secretary of HHS as required by HIPAA § 164.502(a)(2)(ii).</p>

State Provision	Relevant HIPAA Provision/Impact
(1) To identify a person in the course of a criminal investigation by a law enforcement agency;	HIPAA § 164.512(f)(2)(ii) expressly prohibits a Covered Entity from disclosing to law enforcement officials, without a court order (including a grand jury subpoena) or authorization, DNA or DNA analysis for the purpose of identifying a suspect, fugitive, material witness or missing person. Under the very limited circumstances described in § 164.512(f)(3), a Covered Entity may, without authorization or consent, disclose to law enforcement officials information concerning a victim of a crime.
(2) If the person has been convicted of a felony, for purposes of maintaining a DNA database for law enforcement purposes;	Absent a statutory requirement to report this information to law enforcement per HIPAA 164.512(f)(1)(i), HIPAA does not recognize this exception.
(3) To identify deceased persons;	This is consistent with HIPAA § 164.512(g), provided that the disclosure is made to a coroner or medical examiner; otherwise, either a court order (or similar mandate under HIPAA § 164.512(e)(1) or § 164.512(f)(1)(ii)) or an authorization from the decedent's personal representative is required.
(4) To establish parental identity;	HIPAA does not recognize this exception.
(5) To screen newborns;	Unless the disclosure of this information is to a public health authority as authorized under HIPAA § 164.512(b), HIPAA § 164.512(e)(1) requires a court order to disclose or use the information without the authorization or consent (if treatment is involved) of the newborn's personal representative.
(6) If the DNA, genetic information or results of genetic analysis are not identified with the person or person's family members;	This provision is not contrary to HIPAA, provided that the additional, and more detailed, de-identification specifications of HIPAA § 164.514(b) are met.
(7) By a court for determination of damage awards pursuant to the Genetic Information Privacy Act;	Under HIPAA § 164.512(e)(1), the court could access or use this information pursuant to its order.

State Provision		Relevant HIPAA Provision/Impact
	(8) By medical repositories or registries;	A Covered Entity would be prohibited from disclosing this information to a medical repository or registry unless (i) the repository or registry is maintained by a public health authority and the disclosure is made pursuant to HIPAA § 164.512(b); (ii) the repository or registry is maintained by an Organ Procurement Organization or entity engaged in similar activities and the disclosure is made pursuant to HIPAA § 164.512(procurement, banking or transplantation and disclosure was made pursuant to , or (ii) the disclosure was made pursuant to an authorization or court order. If the medical repository or registry is maintained by a Covered Entity, access to the information in that database is governed by HIPAA.
	(9) For the purpose of medical or scientific research and education, including retention of gene products, genetic information or genetic analysis if the identity of the person or person’s family members is not disclosed;	This provision is not contrary to HIPAA, provided that the additional, and more detailed, de-identification specifications of HIPAA § 164.514(b) are met. Note that this provision is actually more narrow than the research-related exceptions that are set forth in HIPAA § 164.512(i)(1)(ii) and (iii). These provisions allow for the use and disclosure of individually-identifiable health information without authorization, consent, or the opportunity to agree or object if a waiver is approved by an IRB or privacy board, or certain representations regarding the use of the information are made to the Covered Entity.
	(10) For the purpose of emergency medical treatment consistent with applicable law.	This is consistent with HIPAA § 164.506(a)(2)(A) provided that the emergency is such that consent cannot be obtained; HIPAA documentation requirements must still be met.
24-21-3(D)	Actions of an insurer and third parties dealing with an insurer in the ordinary course of conducting and administering the business of life, disability income or long-term care insurance are exempt from the provisions of this section if the use of genetic analysis or genetic information for underwriting purposes is based on sound actuarial principles or related to actual or reasonably anticipated experience. Prior to or at time of collecting the information, the insurer must notify the applicant that the information may be used, transmitted or retained solely for the purpose of conducting and administering the business of life, disability income or long-term care insurance.	Issuers of long-term care insurance are included within the definition of Health Plans under HIPAA § 160.103. This section is consistent with HIPAA, which does not require that a Health Plan obtain consent for health care operations. Use and disclosure under HIPAA is limited by HIPAA § 164.514(g) (addressing use and disclosure of information relating to an applicant if the applicant does not then obtain insurance through the Health Plan).
24-21-5(A)	Provisions requiring that informed consent be obtained before genetic information is retained “[do] not affect the status of	Consistent with HIPAA.

State Provision		Relevant HIPAA Provision/Impact
	original medical records of patients, and the rules of confidentiality and accessibility applicable to the records continue in force.”	
24-21-5(C)	Exception for business of life, disability income or long-term care insurance as in 24-21-3(D) above.	Issuers of long-term care insurance are included within the definition of Health Plans under HIPAA § 160.103. This section is consistent with HIPAA, which does not require that a Health Plan obtain consent for health care operations. Use and disclosure under HIPAA is limited by HIPAA § 164.514(g) (addressing use and disclosure of information relating to an applicant if the applicant does not then obtain insurance through the Health Plan).

PREEMPTION ANALYSIS

Statute/Regulation: Health and Hospital Records: Access to records by applicants for disability benefits.
NMSA § 14-6-3 (1999)

Agency: Department of Health

Summary: Requires a healthcare provider to provide copies of medical records to any person applying for disability benefits or appealing a denial of same, provided that documentation of the appeal or denial is provided; a violation of the statute may be punished by the imposition of a civil penalty of up to \$100.

Conclusion: Not preempted, although individual may also proceed under HIPAA.

Covered

Entities Affected: Health Care Providers

Impact: State law and HIPAA requirements apply.

Summary of Pertinent Provisions:

Requires a health care provider to furnish medical records within 30 days of the request to a patient or former patient applying for benefits based on social security disability or appealing a denial of such benefits. The request must include a statement or document from the agency that administers the benefits that confirms the application or appeal. The statute authorizes the health care provider to charge a fee established by the Department of Health for the copies or for the service provided in obtaining the copies if the patient has the ability to pay. Subsection (E) of § 14-6-3 provides that “nothing in this section shall be interpreted to grant access for a patient or patient’s representative to medical records that are otherwise protected by law.” Subsection (F) authorizes the Department of Health to impose a civil penalty of up to \$100 for a violation of this section.

Does the state law apply to one or more Covered Entities?

Yes. The state law applies to all individual health care practitioners, including facilities that employ or contract with them. See NMSA § 14-6-3(C)(1).

Does the state law fall within a statutory carve-out category?

No.

Does the state law fit the carve-out for authorization or prohibition of disclosure of a minor's protected health information to a parent, guardian or person acting in loco parentis?

No.

Is the state law contrary to HIPAA because it is either impossible for the Covered Entity to comply with both the state and federal requirements, or the state law stands as an obstacle to the purposes of HIPAA?

No. Although the state law imposes an additional requirement not recognized by HIPAA on an individual seeking access to his records under the statute (documentation of the application or appeal from the agency administering the benefits), the statute does not prohibit or prevent an individual from obtaining copies of his records under HIPAA without such documentation. If an individual chooses to proceed under the state law, the provider must comply with the other provisions of the statute, none of which are contrary to HIPAA.

Are the [contrary] state law requirements more stringent than those of HIPAA?

N/A

Is an exception warranted?

N/A

Comments:

PREEMPTION ANALYSIS

- Statute/Regulation:** Health and Hospital Records: Health information, confidentiality
NMSA § 14-6-1 (1977) and
DOH Regulation Relating to Health Records
7 NMAC 1.3.1 et seq.
- Agency:** Department of Health, others
- Summary:** Protects health information as confidential and excepted from Public Records Act, but authorizes disclosure to government agencies, educational institutions, state medical/dental associations, and health facilities; authorizes disclosure and publication of statistical studies and research reports provided that individual patients are not identified directly or indirectly.
- Conclusion:** Protection of health information as confidential: Not contrary to HIPAA; HIPAA and state requirements can both be met so both apply.
- Authorization for disclosure: Not contrary to HIPAA except to the extent the statute could be construed to affect penalties otherwise imposed by HIPAA for wrongful disclosure; HIPAA and state requirements can both be met so both apply; HIPAA requirements for disclosure apply as do HIPAA requirements applicable to Covered Entities making the request for information.
- Statistical studies and research reports: Not contrary to HIPAA; HIPAA and state requirements can both be met so both apply.
- Covered Entities Affected:** All, but principally Health Care Providers
- Impact:** The state confidentiality protection remains in place; however, health information may no longer be provided to specified entities “on request;” HIPAA consent and authorization requirements (including exceptions) apply to individual situations as if the state provision authorizing disclosure did not exist. See comments.
- HIPAA requirements for de-identification apply to published reports of statistical information and research reports.
-

Summary of Pertinent Provisions:

Section 14-6-1:

Subsection (A): This subsection provides that “all health information that relates to and identifies specific individuals as patients is strictly confidential,” and protects such information from disclosure under the Public Records Act even if the information is in the possession of a governmental entity.

Subsection (B): This subsection allows the custodian of information otherwise protected under subsection (A) to furnish the information “upon request” to “a governmental agency or its agent, a state educational institution, a duly organized state or county association of licensed physicians or dentists, a licensed health facility or staff committees of such facilities,” and provides that the custodian furnishing such information cannot be held liable for damages for having done so.

Subsection (C): Authorizes the publication of statistical studies and research reports based on confidential information provided that they do not directly or indirectly identify patient information or violate the privileged or confidential nature of the relationship and communications between practitioner and patient.

Subsection (D): Provides that the statute does not affect the status of original medical records of individual patients and that the rules of confidentiality and accessibility applicable to those records continue in force. Also provides that the statute does not affect records of vital statistics maintained by the state.

7 NMAC 1.3

This regulation address access to public records maintained by the Department of Health. Section 1.3.19 recognizes the public records exemption for medical and confidential records protected under state or federal law.

Does the state law apply to one or more Covered Entities?

Yes. The state law applies to all Covered Entities.

Does the state law fall within a statutory carve-out category?

No.

Does the state law fit the carve-out for authorization or prohibition of disclosure of a minor’s protected health information to a parent, guardian or person acting in loco parentis?

No.

Is the state law contrary to HIPAA because it is either impossible for the Covered Entity to comply with both the state and federal requirements, or the state law stands as an obstacle to the purposes of HIPAA?

Subsection (A): No.

Subsection (B): No, except to the extent the statute could be construed to protect wrongful disclosure from penalties authorized by HIPAA. This subsection authorizes the provision of individually identifiable health information to a variety of agencies and organizations on their request, regardless of whether the subject of the information has been notified, or has consented to or authorized the disclosure, and without restricting the circumstances under which such a disclosure can be made. Because the statute does not impose a mandatory duty to disclose or to report (a custodian “may” – not “must” – furnish the information on request), a responding Covered Entity could comply with HIPAA by declining to furnish the information requested if to do so would violate HIPAA. The permitted disclosures, however, are not automatically excepted from consent and authorization requirements under HIPAA § 164.512(a)(1), which only excepts from those requirements the reporting of information “required by law.” Certain of the named entities authorized to request information under this statute are Covered Entities. Any Covered Entities making such a request would be required to comply with applicable “minimum necessary” requirements under HIPAA. The “no damages” provision of this subsection is preempted to the extent it is construed to excuse any penalties otherwise authorized by HIPAA.

Subsection (C): No. Covered entities may comply with this subsection and with HIPAA by de-identifying the information in accordance with the requirements of HIPAA § 164.514.

Subsection (D): No.

Are the [contrary] state law requirements more stringent than those of HIPAA?

No.

Is an exception warranted?

No.

Comments:

PREEMPTION ANALYSIS

- Statute/Regulation:** Health Information System Act
NMSA §§ 24-14A-1 to -10 (1989)
Data Reporting Requirements for Health Care Facilities
7 NMAC Chapter 1, Parts 21-25
Access to Health Information System Data and Reports
7 NMA 1.20.1 et seq.
- Agency:** Health Policy Commission
- Summary:** This Act establishes a state Health Information System, under the direction of the New Mexico Health Policy Commission, and requires persons subject to the data reporting requirements established by the Act and the regulations promulgated thereunder to comply with such requirements
- Conclusion:** Not preempted, although HIPAA limits the circumstances under which a government agency may be granted access to a linking data base
- Covered Entities Affected:** Health Plans, Health Care Providers and Health Care Clearinghouses
- Impact:** State law and HIPAA requirements apply.

Summary of Pertinent Provisions:

Section 24-14A-3 – Health Information System:

Subsections (A) and (C) create the “health information system,” to be administered by the Health Policy Commission for the purpose of assisting the Commission, the legislature and others in collecting, analyzing and disseminating health information to assist in health planning, policy making and in administering, monitoring and evaluating a statewide health plan, and to assist consumers in making informed decisions.

Subsection (B) requires every governmental entity to provide the Commission with access to its health-related data as needed by the Commission.

Subsection (D)(1) lists the health factors on which the Commission is to obtain information. These include (a) mortality and natality; (b) morbidity; (c) health behavior; (d) disability; (e) health system costs, availability, utilization and revenues; (f) environmental factors; (g) health personnel; (h) demographic factors; (i) social, cultural and economic conditions affecting health; (j) family

status; and (k) medical and practice outcomes as measured by nationally accepted standards and quality of care.

Subsection (D)(4) requires the Commission to take “adequate measures to provide system security for all health data acquired under the Act and protect individual patient and provider confidentiality. The right to privacy for the individual shall be a major consideration in the collection and analysis of health data and shall be protected in the reporting of results.”

Subsection (D)(6) requires the Commission to establish definitions, formats and other common information standards for core health data elements in order to provide an integrated financial, statistical and clinical health information system, including a geographic information system that allows data sharing and linking across databases maintained by data sources and federal, state and local public agencies.

Subsections (D)(8) through (11) requires the Commission to collect, analyze and make available health data to support preventive health care practices and facilitate the establishment of appropriate benchmark data to measure performance improvements over time; to use expert system-based protocols to identify individual and population health risk profiles and to assist in the delivery of primary and preventive health care services; to collect health data sufficient for consumers to be able to evaluate health care services, plans, providers and payers and to make informed decisions regarding quality, cost and outcome of care across the spectrum of health care services, providers and payers.

Subsection (D)(13) requires the Commission to serve as a health information clearinghouse, including facilitating private and public collaborative, coordinated data collection and sharing and access to appropriate data and information, maintaining patient and client confidentiality in accordance with state and federal requirements.

Section 24-14A-4 – Applicability:

This section mandates that all data sources participate in the health information system. Data sources include “those categories of persons or entities that possess health information, including any public or private sector licensed health care provider or third-party payer (including HMOs and health insurers), and any public entity that that has health information,” defined by the Act to mean any data relating to health care, health status and factors, the health system or healthcare costs and financing, NMSA § 24-14A-2.

Section 24-14A-4.2 – Investigatory Powers:

This section gives the Commission the right to verify the accuracy of data provided by any data source. The verification may include requiring the data source to submit documentation sufficient to verify the accuracy of the data in question or to provide direct inspection during normal business hours of only the records and documents that pertain directly to the data in question.

Section 24-14A-4.3 – Agency Cooperation.

This section requires all state agencies and political subdivisions to cooperate with and assist the Commission in implementing the Act, including sharing information and joining in any appropriate health information system.

Section 24-14A-5 – Implementation of Health Information System, Regulations

Regulations, to the extent reasonably possible, must provide for the collection of data in a uniform manner through the use of a standardized billing forms as required by law.

Section 24-14A-6 – Access to Data:

Subsection (A) provides that access to data in the system shall be provided in accordance with regulations adopted by the Commission. See 7 NMAC 1.20.1 et seq.

Subsection (B) provides that a data provider may obtain data it has submitted, as well as aggregate data, but it may not access data submitted by another provider which is limited only to that provider. “In no event may a data provider obtain data regarding an individual patient except in instances where that data was originally submitted by the requesting provider.” Anybody may obtain any aggregate data, which is defined by § 24-14A-2(A) as “data which is obtained by combining like data in a manner which precludes specific identification of a single client or provider.”

7 NMAC 1.20.8 – General Provisions on Access

Section 7 NMAC 1.20.8.1 limits access to data and reports to the access and access levels authorized by the Act and the Commission’s rule on access, 7 NMAC 1.20.1 et seq. Section 7 NMAC 1.20.7.1 of the Rule establishes the following sets of information, called access levels:

Aggregate analysis, which is information in report form that contains data combined in a manner that precludes specific identification of patients or health care providers, 7 NMAC 1.20.7.2.

Consumer health information report, which is a report published by the Commission that provides information on which to base health care purchasing decisions, 7 NMAC 1.20.7.5, but does not include proprietary information or patient confidential information, 7 NMAC 1.22.8.

Research data base, which is a set of annual permanent data based on a database that excludes all identifiers of individual patients, health care providers and third-party payers, 7 NMAC 1.20.7.26.

Analytical data base, which is a set of annual permanent data based on a database that excludes all identifiers of individual patients and health care professionals, NMAC 1.20.7.3.

Linking data base, which is defined as the available set of data based on a database that may contain specific patient and/or health care provider demographic and clinical information and identifiers that may be used for the purpose of linking to other existing health data pursuant to 7 NMAC 1.20.13.

Section 7 NMAC 1.20.8.5 prohibits the release of information at a level of specificity that might compromise patient confidentiality, as determined by Commission staff.

Section 7 NMAC 1.20.8.6 gives the Commission the authority (but not the obligation) to deny access to information in the research, clinical or linking database where use of information, as determined by the Commission, could result in violation of a patient's privacy, such as data on certain diagnosis codes or code ranges.

Section 7 NMAC 1.20.8.7 requires the Commission to ensure that any access to data that is subject to restrictions on use pursuant to state, federal or tribal law or regulation, or any other legal agreement, complies with those restrictions.

7 NMAC 1.20.13 – Access to Linking Data Base

The linking data base is the only data base that includes patient identifiers. 7 NMAC 1.20.7.1 . Section 7 NMAC 1.20.13.1 provides that New Mexico state agencies, state agencies of other states, and federal agencies may be authorized to link their databases with the subset or portion of the linking data base that is relevant to the agency's purpose if the Commission approves the request after review by the data access advisory board. No other person has access to this data base.

Section 7.1.20.13.1 provides that all linking to the database must be conducted pursuant to a governing agreement, which must contain specific confidentiality and use requirements. A federal agency may be authorized to link to the linking database only if the agency agrees to fully protect the confidentiality of the data as provided by federal law.

Section 7.1.20.13.5 prohibits the inclusion of any patient identifiers in linked files derived from the linking database.

Section 24-14A-8 – Confidentiality:

This section provides that health information collected and disseminated pursuant to the Act is strictly confidential and shall not be a matter of public record or accessible to the public except as provided by the Act. No data source shall be liable for damages to any person for having furnished the information. The individual forms, computer tapes or other forms of data collected by and

furnished for the health information system are not subject to inspection pursuant to the Public Records Act. Compilations of aggregate data prepared for release or dissemination from the data collected, except for a report prepared for an individual data provider containing information concerning only its transactions, are public records.

Section 24-14A-10 – Violation:

This section makes it unlawful for any person not to comply with the data reporting requirements of the Act, and authorizes the Commission to bring a civil action for temporary or permanent injunctive relief.

Does the state law apply to one or more Covered Entities?

Yes. Health Care Providers and Health Plans are data sources under the Act, required to provide information to the Commission. In performing its functions under the Act, the Commission itself is also a Covered Entity. (HIPAA § 164.103 defines a Health Care Clearinghouse as “a public or private entity, including a ... community health management information system or community health information system, that (1) process or facilitates the processing health information received from another entity in nonstandard format or containing nonstandard data elements or a standard transaction; or (2) receives a standard transaction from another entity and processes or facilitates the processing of health information into nonstandard format or nonstandard data content for the receiving entity.”)

Does the state law fall within a statutory carve-out category?

No.

Does the state law fit the carve-out for authorization or prohibition of disclosure of a minor’s protected health information to a parent, guardian or person acting in loco parentis?

No.

Is the state law contrary to HIPAA because it is either impossible for the Covered Entity to comply with both the state and federal requirements, or the state law stands as an obstacle to the purposes of HIPAA?

No. Disclosures made to (and requested by) the Commission by and of Health Care Providers and Health Plans pursuant to the Act are disclosures required by law; under HIPAA § 164.512(a), they may be made without consent, authorization or the opportunity to agree or object.

Under §§ 24-14A-6 and –8, disclosures made by the Commission may be made only to the original source or in a de-identified format as aggregate data. De-identification must comply with HIPAA requirements as set forth in HIPAA § 164.502(d).

Section 7 NMAC 1.20.13, under the authority of § 24-14A-3(D)(11), authorizes (but does not require) the Commission to allow government agencies to link to a database that does include patient identifiers (the linking database). HIPAA prohibits the Commission from exercising this authority except under those circumstances in which HIPAA requires or allows the disclosure of protected health information by a Covered Entity without authorization, consent or an opportunity to agree or object, i.e., disclosures to the Secretary of HHS pursuant to § 164.502(a)(2), disclosures to a public health authority pursuant to § 160.203(c), or disclosures authorized by § 164.512.

Are the [contrary] state law requirements more stringent than those of HIPAA?

N/A

Is an exception warranted?

N/A

Comments:

PREEMPTION ANALYSIS

Statute/Regulation:	Health Maintenance Organizations Act NMSA §§ 59A-46-1 to -44 (1993)
Agency:	Department of Insurance
Summary:	Requires an HMO to obtain a license to operate from Division of Insurance; imposes organizational and operational standards; and authorizes the Superintendent of Insurance to regulate the conduct of HMOs.
Conclusion:	Not preempted.
Covered Entities Affected:	Health Plans (HMOs)
Impact:	State law and HIPAA requirements apply.

Summary of Pertinent Provisions:

Section 59A-46-7: Quality Assurance Program

Subsection (D) of this section requires an HMO to use clinical information for in evaluating the continuity and coordination of patient care and assessing the quality of health and medical care provided to enrollees.

Section 59A-46-19: Examinations

This section authorizes the Superintendent to examine the affairs of any HMO as well as its contracted and employed providers; authorizes the Superintendent to perform, or to ask the Department of Health to perform, an examination of an HMO's quality assurance program; and requires the HMO to make its books and records available for such examinations. Although the statute provides that medical records of individuals and providers are not subject to examination, protected health information is disclosed in the context of the examination of the overall operations, and the books and records, of the HMO.

Section 59A-46-27: Confidentiality of medical information and limitation of liability.

Subsection (A): Provides that "any data or information pertaining to the diagnosis, treatment or health of any enrollee or applicant obtained from such person or from any provider by an HMO shall be held in confidence" and not disclosed except (1) to the extent necessary to carry out the purposes of the Act; (2) upon the express consent of the enrollee or applicant; (3) pursuant

to statute or court order for the production of evidence or disclosure; (4) in the event of claim or litigation between an enrollee and his HMO.

Subsection (B): Entitles an HMO to claim statutory privileges against disclosure of medical information to the same extent as the provider who furnished the information to the HMO.

Subsection (C): Affords immunity to persons who participate in good faith or furnish records to an HMO health care review committee.

Subsection (D): Provides that information considered and records maintained by a health care review committee are confidential and not subject to subpoena except in proceedings before the appropriate state licensing or certifying or an appeal from the committee's findings or recommendations.

Subsection (E): Provides that the confidentiality requirements applicable to the information referenced in (D), above, follow that information; in other words, the licensing or certifying agency is also subject to the provisions of Subsection (D) of this section.

Subsection (F): Provides that in order to fulfill its obligations under § 59A-46-7, which mandates a quality assurance program, the HMO "shall have access to treatment records and other information pertaining to the diagnosis, treatment or health status of any enrollee."

Does the state law apply to one or more Covered Entities?

Yes, HIPAA includes HMOs in the definition of "Health Plans."

Does the state law fall within a statutory carve-out category?

Yes, to the extent it requires an HMO report or provide access to (in other words, disclose but not use) information for the purpose of "management audits, financial audits, program monitoring and evaluation or the licensure or certification of facilities or individuals." HIPAA § 164.203(d). This exempts the examination provisions of the Act from any preemption. Uses or other disclosures of the information by the HMO are not protected by the carve-out.

Does the state law fit the carve-out for authorization or prohibition of disclosure of a minor's protected health information to a parent, guardian or person acting in loco parentis?

No.

Is the state law contrary to HIPAA because it is either impossible for the Covered Entity to comply with both the state and federal requirements, or the state law stands as an obstacle to the purposes of HIPAA?

No. Subsection 59A-46-27(A) authorizes disclosure of protected health information “to the extent necessary to carry out the purposes of” the HMO Act. This provision is not contrary to HIPAA so long as it is construed to encompass only those activities protected by the carve-out established by HIPAA § 164.203(d), those activities that come within the definition of “health care operations” set forth in HIPAA § 164.501, and those activities that would be excepted from the requirements of consent, authorization or an opportunity to agree or object under HIPAA § 164.512, e.g., health oversight activities of the Division of Insurance per HIPAA § 164.512(d). This construction is reasonable and should be followed.

The other disclosures authorized by Subsection 59A-46-27(A) are allowed by HIPAA pursuant to an authorization under HIPAA § 164.508 or in connection with judicial or administrative procedures in accordance with HIPAA § 164.512(e)(1). Disclosures to the enrollee and to the Secretary required by HIPAA § 164.502(a)(2) are authorized by § 59A-46-A(3).

With respect to uses and other disclosures required under the Act, HIPAA authorizes an HMO to use and disclose health information for its own treatment, payment or health care operations without obtaining either a consent or an authorization. HIPAA § 164.501 defines these terms to include the operations and activities contemplated by the above statutes.

Are the [contrary] state law requirements more stringent than those of HIPAA?

No.

Is an exception warranted?

No.

Comments:

This preemption analysis does not address what types of HIPAA-required agreements need to be in place to allow the flow of information between the HMO and others providing services for or on behalf of the HMO.

PREEMPTION ANALYSIS

Statute/Regulation: Human Immunodeficiency Virus Test Act
§§ 24-2B-1 to -9 (1993)

Agency:

Summary: Specifies when informed consent for HIV test is or is not required; describes to whom and how disclosure of test results may be made.

Conclusion: The provisions of the Act are not pre-empted except to the extent the Act would prohibit disclosure of protected health information to the Secretary of HHS in connection with ascertaining compliance with HIPAA. Additional requirements imposed by HIPAA apply to certain sections.

**Covered
Entities Affected:** All

Impact: State law and HIPAA requirements apply. Except to the extent that HIPAA requires disclosure of protected health information to the Secretary of HHS, state law restrictions on disclosure remain in effect; however, HIPAA imposes conditions on making some of those disclosures. See attached table.

Summary of Pertinent Provisions:

The Act requires that informed consent be obtained before an HIV test is administered except under limited circumstances that are specified in the Act. The Act also specifies the persons to whom test results may be disclosed, and requires that a disclosure statement accompany any disclosure. Specific provisions are detailed on the attached table.

Does the state law apply to one or more Covered Entities?

Yes. The state law applies to all Covered Entities.

Does the state law fall within a statutory carve-out category?

No.

Does the state law fit the carve-out for authorization or prohibition of disclosure of a minor's protected health information to a parent, guardian or person acting in loco parentis?

No.

Is the state law contrary to HIPAA because it is either impossible for the Covered Entity to comply with both the state and federal requirements, or the state law stands as an obstacle to the purposes of HIPAA?

Because disclosure under the exceptions to consent and authorization requirements set forth in HIPAA § 164.512 are permissive and not mandatory, HHS takes the position that a state law is not “contrary” to HIPAA if it declines to recognize one or more of the exceptions that HIPAA would allow under § 164.512. A Covered Entity can comply with both the state law and with HIPAA merely by refusing to disclose information under those HIPAA exceptions that the state law does not recognize. Therefore, to the extent that HIPAA allows exceptions other than those specified in this Act, the state law controls.

The Act is contrary to HIPAA to the extent it would prohibit the HIPAA-mandated disclosure to the Secretary of HHS for purposes of ascertaining compliance with HIPAA. See definition of “more stringent” in HIPAA § 160.202.

Are the [contrary] state law requirements more stringent than those of HIPAA?

No.

Is an exception warranted?

No

Comments:

The Act authorizes a minor to give consent to the test. If a minor consents to the test, HIPAA § 164.502(g)(3)(i) and (ii) prohibit a Covered Entity from treating a parent, guardian or person in loco parentis as the personal representative of the minor (for purposes of consent, authorization or disclosure in connection with these services) unless the minor requests that it do so.

HUMAN IMMUNODEFICIENCY VIRUS TEST ACT
NMSA §§ 24-2B-1 to -9 (1993)

State Provision		Relevant HIPAA Provision/Impact
25-2B-2	<p>Informed consent:</p> <ul style="list-style-type: none"> • Informed consent required except per sections 5, 5.1-5.3 • Consent need not be in writing if record documents that the test has been explained and the consent obtained 	<p>Not contrary, but HIPAA consent to treat requirements also apply (written v. oral consent requirements are different) per HIPAA § 164.506(a), (b).</p>
24-2B-3	<p>Substituted consent:</p> <ul style="list-style-type: none"> • Informed consent to be obtained from a legal guardian or other person authorized by law when the person is not competent. • A minor has capacity to give informed consent to have test performed on himself 	<p>Same as above.</p> <p>If a minor consents to the test, HIPAA § 164.502(g)(3)(i) and (ii) prohibit a Covered Entity from treating a parent, guardian or person in loco parentis as the personal representative of the minor (for purposes of consent, authorization or disclosure in connection with these services) unless the minor requests that it do so.</p>
24-2B-4	<p>Mandatory counseling: No positive test result disclosed to individual without providing or referring individual for counseling</p>	<p>N/A (not separate from test)</p>
24-2B-5	<p>Informed consent not required when test performed</p> <ul style="list-style-type: none"> • On donor or recipient for a purpose specified under Uniform Anatomical Gift Act or for transplant recipients or semen provided for artificial insemination and test is necessary to assure medical acceptability • In medical emergencies where subject of test is unable to grant or withhold consent and test is necessary for care or treatment; post-test counseling is required as per section 3 • For research if the identity of the test subject is not known and may not be retrieved by the researcher • Performance of a test is done in a setting where the identity of the test subject is not known, such as in public health testing programs and sexually transmitted disease clinics. 	<ul style="list-style-type: none"> • HIPAA consent required • HIPAA consent excused per § 164.506(3)(a), but must be sought as soon as possible • Disclosure of the test result to the researcher can be made if HIPAA de-identification standards are followed per §164.514(b) • HIPAA consent required unless the Covered Entity is a public health authority (see §§ 164.512(b)(1)(i) and 164.512(b)(2)).
24-2B-5.1	<p>Informed consent not required – persons convicted of certain criminal defenses.</p> <ul style="list-style-type: none"> • Test may be performed on offender convicted of crimes involving sexual contact without his consent pursuant to court 	<ul style="list-style-type: none"> • Consent, authorization or opportunity to object or agree not required per § 164.512(e)(1)(i) (court order); if consent is obtained, it must comply with

	State Provision	Relevant HIPAA Provision/Impact
	<p>order obtained on petition of the victim or, if the victim is a minor, his parent or guardian</p> <ul style="list-style-type: none"> • Petition and all proceedings are under seal. • Results of the test may be disclosed only to the offender and the victim or the victim’s parent or legal guardian • If the test is positive, both the offender and the victim are provided post-test counseling • The Department of Health is responsible for administration of the test, payment and distribution of results unless the offender is a minor who has been adjudicated as a delinquent child and is in the legal custody of CYFD, in which case CYFD is responsible for administration, payment and distribution. 	<p>HIPAA requirements</p> <ul style="list-style-type: none"> • Disclosure must be expressly authorized in court order or made pursuant to a HIPAA authorization • Disclosure to Department of Health must be expressly authorized in court order; CYFD in these circumstances is a personal representative and disclosure can be made to CYFD as such (Communicable disease exception to consent and authorization requirements in § 164.512(b)(1)(iv) is available if the disclosure is made in the course of a public health intervention, probably not in the context of the specific criminal proceedings envisioned here.)
24-2B-5.2	<p>Informed consent not required – persons formally charged for allegedly committing certain criminal offenses</p> <ul style="list-style-type: none"> • Test may be performed on alleged offender by court order issued on petition of the victim provided that the victim is tested first. • Petition and all proceedings are under seal. • Results of the test may be disclosed only to the offender and the victim or the victim’s parent or legal guardian • Department of Health is responsible for administration of and payment for the test and for distribution of the results 	<ul style="list-style-type: none"> • Consent, authorization or opportunity to object or agree not required per § 164.512(e)(1)(i) (court order); if consent is obtained, it must comply with HIPAA requirements • Disclosure to Department of Health must be expressly authorized in court order; CYFD in these circumstances is a personal representative and disclosure can be made to CYFD as such (Communicable disease exception to consent and authorization requirements in § 164.512(b)(1)(iv) is available if the disclosure is made in the course of a public health intervention, probably not in the context of the specific criminal proceedings envisioned here.)
24-2B-5.3	<p>Informed consent not required – persons who are source individuals (persons whose blood or other potentially infectious material may have been or has been the source of a significant exposure to a healthcare provider, first responder, etc. or to a person receiving services from a healthcare provider.</p> <ul style="list-style-type: none"> • Test performed under court order on petition of exposed individual, parent or guardian, provided that same test is first performed on exposed individual. 	<ul style="list-style-type: none"> • Consent, authorization or opportunity to object or agree not required per § 164.512(e)(1)(i) (court order); if consent is obtained, it must comply with HIPAA requirements

	State Provision	Relevant HIPAA Provision/Impact
	<ul style="list-style-type: none"> • Petition and all proceedings are under seal • Results of the test disclosed only to the source individual and the exposed individual or his parent or guardian. 	<ul style="list-style-type: none"> • Disclosures must be expressly authorized in court order or made pursuant to an authorization
24-2B-6	<p>Authorized disclosure: No person who requires or administers the test shall disclose the identify of any person upon whom a test is performed or the result of the test in a manner that permits identification of the subject of the test, except to the following:</p> <ul style="list-style-type: none"> • The subject of the test or his legally authorized representative • Any person designated in a legally effective release • An authorized agent, a credentialed or privileged physician or employee of a health facility or health care provider if the facility or provider is authorized to obtain the test results, the agent or employee provides patient care or handles or processes body fluids or tissues and has a need to know • The Department of Health in accordance with reporting requirements established by regulation • Health facility or health care provider that procures, processes, distributes or uses: <ul style="list-style-type: none"> • A human body part from a deceased person with respect to medical information regarding that person • Semen provided prior to the date of the HIV Act (1993) for the purpose of artificial insemination • Blood or blood products for transfusion or injection • Human body parts for transplant with respect to medical information regarding the donor or recipient • Health facility staff committees or oversight review organizations which are conducting program monitoring, 	<p>HIPAA authorization required except as noted below; disclosure to the Secretary of HHS for purposes of ascertaining compliance with HIPAA is required and overrides the state prohibition.</p> <ul style="list-style-type: none"> • Permitted per § 164.502(a)(1) • Release must comply with HIPAA authorization requirements • Consent, authorization, opportunity to agree or object not required per § 164.512(b)(1)(iv) (communicable disease) • Consent, authorization, opportunity to agree or object not required per § 164.512(a) (1) (required by law) • Consent, authorization, opportunity to agree or object not required per § 164.512(b)(1)(iv) (communicable disease) • Consent, authorization, opportunity to agree or object not required per § 164.512(b)(1)(iv) (communicable disease) • Consent, authorization, opportunity to agree or object not required per § 164.512(b)(1)(iv) (communicable disease) • Consent, authorization, opportunity to agree or object not required per § 164.512(b)(1)(iv) (communicable disease) • Consent required for health care operations unless de-identification standards are met per § 164.514(b) or requirements for exception for oversight

State Provision		Relevant HIPAA Provision/Impact
	<p>program evaluation or service reviews, so long as any identity remains confidential</p> <ul style="list-style-type: none"> • Authorized medical or epidemiological researchers who may not further disclose any identifying characteristics or information • For purposes of application or reapplication for insurance coverage, an insurer or reinsurer upon whose request the test is performed. 	<p>activities are met per § 164.512(d)(iii)</p> <ul style="list-style-type: none"> • Authorization required unless research exception requirements are met per § 164.512(i)(1)(i) (IRB or Privacy Board approval of waiver); § 164.512(i)(1)(ii) (reviews preparatory to research); or § 164.512(i)(1)(iii) (research on decedent’s information) • The information may be used by health care insurer (health plan) without consent (for health care operations), but disclosure by health care provider to insurer requires an authorization unless the provider and the insurer are part of an organized health care arrangement. See definitions of “health care operations” and “organized health care arrangement” in § 164.501. Use of the information by the health plan is subject to the restrictions set forth in § 164.514(g).
24-2B-7	Disclosure statement: Details a specific statement that must accompany any disclosure of test results.	None.
24-2B-8	Disclosure: Nothing in the Act prevents an individual from disclosing his own test results or a victim of an alleged criminal offense from disclosing results to protect his health and safety or the health and safety of his family or sexual partner.	N/A
24-2B-9	Penalty.	N/A

PREEMPTION ANALYSIS

Statute/Regulation:	Insurance Administrators NMSA §§ 59A-12A-1 to -17 (1989)
Agency:	Division of Insurance
Summary:	Imposes licensure requirements on third-party administrators, including administrators of both insured and self-funded health plans; requires administrators to submit to the jurisdiction of the Division of Insurance and comply with specified provisions of the Insurance Code.
Conclusion:	The statute is preempted, but only to the extent that it authorizes disclosure to a plan sponsor beyond the disclosures allowed, and without the restrictions on such disclosures required by, HIPAA.
Covered Entities Affected:	Health Plans and Health Care Clearinghouses
Impact:	HIPAA requirements apply.

Summary of Pertinent Provisions:

Sections 59A-12A-1 and -2 – Scope and Definitions:

This Act governs licensure and provides for the oversight of administrators, defined to include any “person who receives any form of administrative or service fee, consideration, payment, premium, reimbursement or compensation for performing or providing any service, function or duty, or activity respecting insurance or alternatives to insurance in any administrative or management capacity, including but not limited to claims or expense review, underwriting, administration and management under a contract or other agreement to be performed in this state with respect to risks located or partially located in this state or on behalf of persons in this state for any (1) plan; (2) insurance carrier; or (3) person that self-insures.” NMSA § 59A-12A-1.

The term administrator does not include (and the Act does not apply to) an employer or a union on behalf of its employees or members, provided that only the functions of a group policyholder are performed; insurance companies, insurance agents, HMOs and nonprofit health care plan; and other persons or entities specified in § 59A-12A-2(C).

Sections 59A-12A-4 and -6 – Written Agreement and Maintenance of Information:

These sections require an administrator to provide services pursuant to a written agreement, which must be retained as part of the administrator's official records for the duration of the agreement and for five years thereafter. During that period, the administrator must maintain adequate books and records of all transactions between it, insurers and insured persons in accordance with prudent standards of insurance record keeping. Section 59A-12A-5 provides that the Superintendent shall have access to such books and records for the purpose of examination, audit and inspection, and that the trade secrets contained in such books and records, "including but not limited to the identify and addresses of policyholders and certificate holders, shall be confidential, except that the superintendent may use such information in any proceedings instituted against the administrator." That section also requires an insurer to retain the right to continuing access to books and records sufficient to permit the insurer to fulfill all of its contractual obligations to insured persons.

Section 59A-12A-14 – Confidentiality:

Subsection (A) requires an administrator to provide for the confidentiality of personal data identifying individuals covered by plans or insurance carriers or data concerning persons who self-insure. "An administrator shall not disclose records containing personal information that may be associated with an identifiable individual covered by a plan or insurance carrier or data relating to a person that self-insures to a person other than the individual to whom the information pertains, except as necessary to comply with the superintendent's inquiry or a court order. Other than to comply with the superintendent's inquiry or a court order, an administrator shall not disclose personal data without the prior consent of the covered individual or person that self insures."

Subsection (B) allows disclosure of the information that would otherwise be protected from by subsection (A) for "(1) claims adjudication; (2) claims verification; (3) other proper plan or insurance carrier administration; (4) an audit conducted pursuant to ERISA; (5) disclosure to an insurer or plan for the purchase of excess loss insurance and for claims under the excess loss insurance provided that an insurer obtaining the information shall be subject to subsection A.; (6) disclosure to the plan, carrier, person that self insures or a fiduciary of the plan; (7) disclosure to the superintendent or the superintendent's designee, provided that the information obtained is confidential, except that the superintendent may use the information in any proceeding instituted against the administrator; or (8) as required by law.

Does the state law apply to one or more Covered Entities?

Yes. The Act applies to Health Plans and Healthcare Clearinghouses and to the TPAs performing services for them as business associates (for whose compliance the Health Plans and/or Healthcare Clearinghouses are responsible).

Does the state law fall within a statutory carve-out category?

No.

Does the state law fit the carve-out for authorization or prohibition of disclosure of a minor's protected health information to a parent, guardian or person acting in loco parentis?

No.

Is the state law contrary to HIPAA because it is either impossible for the Covered Entity to comply with both the state and federal requirements, or the state law stands as an obstacle to the purposes of HIPAA?

No, except to the extent that the state statute authorizes disclosure to a plan sponsor beyond those disclosures allowed, and without the restrictions required by, HIPAA §§ 164.504(f), 164.512(b)(1)(v), and 164.512(l). With these exceptions, the provisions of the statute are compatible with HIPAA requirements, as described below.

The written agreement required by § 59A-12A-4 is compatible with HIPAA, but must also comply with HIPAA documentation requirements, and must require the administrator to comply with HIPAA. Under § 59A-12A-6, records must be maintained by the administrator for five years, but nothing in the Act prohibits the administrator from maintaining records for the six years required by HIPAA. The disclosure to the Superintendent contemplated by § 59A-12A-6 is allowed by HIPAA § 164.512(d) without consent, authorization or the opportunity to agree or object because the Superintendent is acting as a health oversight agency for these purposes.

The confidentiality obligations of § 59A-12A-14(A) are consistent with HIPAA, and the disclosures authorized therein to the superintendent and pursuant to court order are allowed under HIPAA without consent, authorization or the opportunity to agree or object pursuant to HIPAA § 164.512(d) (health agency oversight) and § 164.512(e)(1) (in the course of judicial or administrative proceedings). Any consent by the individual to disclose the information protected by § 59A-12A-14(A) must comply with HIPAA consent and authorization requirements.

The disclosures authorized by § 59A-12A-14(B)(1) through (5) are disclosures for the purpose of treatment, payment and health care operations and may be made by a health plan or health care clearinghouse without consent or authorization. The disclosures authorized by § 59A-12A-14(B)(6), "to the plan, carrier, person that self insures or a fiduciary of the plan" are allowed by HIPAA, except that disclosures to an plan sponsor are restricted by HIPAA §§ 164.504(f), 164.512(b)(1)(v), and 164.512(l). Disclosure to the superintendent or the superintendent's designee as contemplated by § 59A-12A-14(7) is consistent with HIPAA § 164.512(a) (required by law, pursuant to the mandate of § 59A-12A-6) and HIPAA § 164.512(d) (disclosure to a health oversight agency). Section 59A-12A-14(B)(8), which authorizes disclosure required by law, complies with the mandatory disclosure requirements of HIPAA §§ 164.502(a)(2)(i) (to the individual) and 164.502(a)(2)(ii) (when required by the Secretary).

Are the [contrary] state law requirements more stringent than those of HIPAA?

No.

Is an exception warranted?

No.

Comments:

PREEMPTION ANALYSIS

Statute/Regulation:	Long-Term Care Ombudsman Act NMSA §§ 28-17-1 to -19 (1989)
Agency:	State Agency on Aging
Summary:	The Act establishes a long-term care ombudsman program pursuant to the requirements of the federal Older Americans Act, 42 USC §§ 3001 <i>et seq.</i>
Conclusion:	Not preempted.
Covered Entities Affected:	Health Care Providers, specifically long-term care facilities as defined in § 28-17-3(F).
Impact:	State law and HIPAA requirements apply

Summary of Pertinent Provisions:

Section 28-17-4(C): Establishment of the office

Subsection (C) requires the ombudsman to: identify, investigate and resolve complaints made by or on behalf of residents that relate to action, inaction or decisions of providers of long-term care services and others that may adversely affect the health, safety, welfare or rights of the residents; provide services to assist the residents in protecting their health, safety welfare and rights; seek administrative, legal and other remedies on behalf of residents to protect their health, safety, welfare and rights.

Section 28-17-8: Investigations

This section requires the ombudsman to investigate and seek to resolve complaints and concerns communicated by or on behalf of patients, residents or clients of any long-term care facility; authorizes ombudsman to initiate investigations based on his observations.

Section 28-17-12: Access to Long-term care facilities

Representatives of the office are required to have immediate access to any patient, resident or client for the purpose of carrying out the provisions of the Act

Section 28-17-13(A): Access to records of patients, residents or clients

Subsection (A) provides that the Ombudsman “shall have access” to the medical and personal records of a resident, patient or client that are retained by a long-term care facility as follows:

- (1) if the individual has the ability to consent in writing, access is authorized only if the individual consents in writing;
- (2) if the individual is unable to consent in writing, access is authorized on the individual’s oral consent if given before a third party as witness;
- (3) if the individual has a legally appointed surrogate decision maker authorized to approve review of records, access is authorized only if the surrogate consents unless:
 - (a) neither the office nor the facility is aware of the existence of the decision maker;
 - (b) the surrogate decision maker cannot be reached within five working days; or
 - (c) access to the records is necessary to investigate a complaint and the surrogate decision maker refuses to give the permission and a representative of the ombudsman “has reasonable cause to believe” that the surrogate is not following the wishes of the client.

The facility and persons who disclose records pursuant to this section are not liable for such disclosure.

Sections 28-17-13(E) and 14: Records and information

These provisions impose confidentiality requirements affecting records and information disclosed to or maintained by the ombudsman.

Section 28-17-19: Interference prohibited

This section provides that “no person shall willfully interfere with the lawful actions of the office, including the request for immediate entry into a long-term care facility.” Violations are subject to a civil penalty of up to \$5,000 per occurrence.

Does the state law apply to one or more Covered Entities?

Yes. Health care providers that are or who work in long-term care facilities.

Does the state law fall within a statutory carve-out category?

No.

Does the state law fit the carve-out for authorization or prohibition of disclosure of a minor's protected health information to a parent, guardian or person acting in loco parentis?

No.

Is the state law contrary to HIPAA because it is either impossible for the Covered Entity to comply with both the state and federal requirements, or the state law stands as an obstacle to the purposes of HIPAA?

No. The disclosures required by this statute are excepted from HIPAA's requirements of consent, authorization or the opportunity to agree or object under the following provisions.

- HIPAA § 164.512(a)(1) – Disclosure as required by law. Although the Act does not specifically authorize a court to order production of the information, it does impose substantial civil penalties, the imposition of which is subject to appeal to the district court. See definition of “required by law” in HIPAA § 164.501.
- HIPAA § 164.512(i) –Disclosure to a health oversight agency for oversight activities authorized by law, including civil investigations and inspections, and other activities necessary for the appropriate oversight of the health care system. A “health oversight agency” includes an agency of the state or person acting under a grant of authority from a public agency, that is authorized by law to oversee the health care system (whether public or private) ...or to enforce civil rights laws for which health information is relevant.” The ombudsman’s office is established within the state agency on aging, and one of the express purposes of the Act is to provide assistance to residents and clients of long-term care facilities in the “assertion of their civil and human rights.” NMSA § 28-17-2.

Because HIPAA does not require consent or authorization under these circumstances the more informal consent requirements of the state law remain in effect.

Note that HIPAA § 164.502(g)(2) requires that a Covered Entity treat a surrogate decision maker as an individual’s personal representative “[i]f under applicable law a person has the authority to act on behalf of an individual who is an adult or emancipated minor.” Here, the Act authorizes the ombudsman to override a surrogate’s refusal to disclose the relevant information, thereby restricting by law the authority of the surrogate decision maker in this instance and under the circumstances specified.

Are the [contrary] state law requirements more stringent than those of HIPAA?

N/A

Is an exception warranted?

No.

Comments:

The “access to records” provisions of § 28-17-13 are similar to those included in the Adult Protective Services Act, NMSA § 27-7-19(D). The difference in the analyses is due to the fact that § 27-7-19(D) includes a statement that disclosure is not required where it would otherwise be prohibited by law. Access to records under the Long-Term Care Services Act is not subject to this restriction.

PREEMPTION ANALYSIS

Statute/Regulation:	Managed Health Rule and Grievance Procedures Rule 13 NMAC 10.13 and 13 NMAC 10.17
Agency:	Department of Insurance
Summary:	Regulates the operations of HMOs and other managed care plans.
Conclusion:	Not preempted.
Covered Entities Affected:	All
Impact:	State law and HIPAA requirements apply

Summary of Pertinent Provisions:

13 NMAC 10.13.8.2.9 (Managed Health Rule):

This section gives each enrollee the right “to privacy of medical and financial records maintained by the health care insurer and its health care providers, in accordance with existing law.”

13 NMAC 10.13.15.18.2 (Managed Health Rule) and 13 NMAC 10.17.25 (Grievance Procedures):

These sections require a grievant initiating an external (IURB) review to submit with his request a release executed by the enrollee for all medical records pertinent to the grievance. Information provided by the insurer must be sent to the Superintendent and the grievant. 13 NMAC 10.17.26(B). Under 13 NMAC 10.13.15.18.3, the review by staff begins upon receipt of the request and the release. Sections 13 NMAC 10.13.15.18.3.4 and 13 NMAC 10.17.28(B) provides that in determining whether a request is meritorious, staff must consider whether the enrollee has provided all relevant information as well as a copy of a fully executed release.

13 NMAC 10.13.15.18.5 (Managed Health Rule):

This section requires the IURB to take into consideration all pertinent medical records, consulting physician reports and other documents submitted by the parties.

13 NMAC 10.17.31 – Hearing Procedures for External Review (Grievance Procedures):

Subsection (C) of this section authorizes the Superintendent or attorney hearing officer to require the production of additional records, documents and writings relevant to the subject of the grievance.

13 NMAC 10.17.12 – Record of Grievances (Grievance Procedures):

Subsection (A) of this section requires that, “Health care insurers, the Superintendent, independent medical co-hearing officers, and all others who acquire access to identifiable medical records and information of covered persons when reviewing grievances shall treat and maintain such records and information as confidential except as otherwise provided by New Mexico law.” Subsection (B) requires insurers and the Superintendent to establish procedures to ensure the confidential treatment and maintenance of identifiable medical records and information submitted as part of any grievance.

13 NMAC 10.13.16 – Review of Complaints by the Superintendent (Managed Health Rule)

This section authorizes the Superintendent to initiate an investigation when he has reason to believe that an entity subject to the rule is not in compliance, and to “obtain any information he or she considers necessary.”

13 NMAC 10.13.18 – Review of Termination of Coverage (Managed Health Rule)

This section allows an enrollee whose coverage is cancelled to request that the Superintendent review that action and authorizes the Superintendent to obtain information from the plan in connection with such review.

13 NMAC 10.13.20 – Continuous Quality Improvement: External Quality Audit (Managed Health Rule)

13 NMAC 10.13.20.8: External Quality Audit. This section authorizes the Superintendent to require a managed health care plan to submit to an external quality audit conducted by an Independent Quality Review Organization (IQRO) approved by the Division of Insurance.

13 NMAC 10.13.20.9: Performance and Outcome Measures. Section 10.13.20.9.1 authorizes the Division to develop a performance and outcome measurement system for monitoring the quality of care provided to enrollees and to utilize data collected through this system for the purposes set forth in the statute. Section 10.13.20.9.3 requires each managed health care plan to submit such performance and outcome data as the Division may request. Section 10.13.20.9.5 authorizes the Division to conduct enrollee satisfaction surveys and requires plans to submit enrollee mailing lists to the Division for such purpose. Section 10.13.20.9.6 requires the Division to “ensure the confidentiality of patient specific information.”

13 NMAC 10.13.21 – Medical Records (Managed Health Rule)

13 NMAC 10.13.21.1: Transfer of Medical Records. This section requires each plan to develop and implement a policy for the transfer of medical records of enrollees when the enrollee

changes providers or disenrolls from the plan or under other “circumstances where requests by enrollees or former enrollees is reasonable.”

13 NMAC 10.13.21.2: Confidentiality of Medical Records. This section requires that data or information pertaining to the diagnosis, treatment or health of any enrollee be held in confidence and not disclosed to any person except (1) to the extent necessary to carry out the purposes of the rule; (2) upon the express consent of the enrollee; (3) pursuant to state or court order for the production of evidence or discovery; (4) when pertinent, in the event of claim or litigation between and enrollee and the health care insurer; and (5) when otherwise required by law.

13 NMAC 10.13.21.4: Copies of Medical Records. This section provides that enrollees or their legally authorized representatives have the right to inspect and obtain copies of their medical records maintained by the plan, and that charges for copying must be based on actual costs not to exceed the prevailing community market rates for photocopying, or \$.50 per page, whichever is less.

13 NMAC 10.13.21.5: Protection of Medical Records. This section requires plans to protect medical records against loss, destruction or unauthorized use, and to retain records for at least 10 years or until the enrollee reaches age 23, whichever is longer.

13 NMAC 10.13.25.5 – Provider Contracts (Managed Health Rule):

This section requires that provider contracts include provisions regarding the availability and confidentiality of those health records maintained by providers and health care facilities to monitor and evaluate the quality of care, to conduct evaluations and audits and to review necessity or appropriateness of services. The contracts must also include terms requiring the provider to make these records available to “appropriate state and federal authorities” involved in assessing the quality of care or investigating grievances and to comply with applicable state and federal laws related to the confidentiality of medical or health records.

Other:

Both rules include numerous provisions addressing the acquisition and use of information by a health plan; all of these come within the scope of “treatment,” “payment” or “health care operations” as defined by HIPAA § 164.501.

Does the state law apply to one or more covered entities?

Yes – the law applies to all covered entities.

Does the state law fall within a statutory carve-out category?

Yes, in part. HIPAA § 160.203(d) exempts from preemption provisions of state law that require “a health plan to report, or to provide access to, information for the purpose of management

audits, financial audits, program monitoring and evaluation or the licensure or certification of facilities or individuals.”

Does the state law fit the carve-out for authorization or prohibition of disclosure of a minor’s protected health information to a parent, guardian or person acting in loco parentis?

No.

Is the state law contrary to HIPAA because it is either impossible for the covered entity to comply with both the state and federal requirements, or the state law stands as an obstacle to the purposes of HIPAA?

No.

Health Plans/Health Care Clearinghouses: Except as noted here, all of the provisions of these rules that involve use or disclosure of health information fall within the scope of “treatment,” “payment” or “health care operations” as defined by HIPAA § 164.501.

External Review: The Managed Health and Grievance Rules contemplate authorization for disclosure in connection with an external review, which is consistent with HIPAA § 164.508.

Disclosures to the Superintendent or to the IQRO: These disclosures are authorized without consent, authorization or the opportunity to agree or object pursuant to HIPAA § 164.512(d) (disclosure to a health oversight agency) and/or HIPAA § 164.512(a) (required by law).

Medical Records: The provisions relating to medical records (13 NMAC 10.13.21) are not contrary to HIPAA, but HIPAA authorizations must be obtained before medical records can be transferred, and any disclosure of protected health information made pursuant to 13 NMAC 10.13.21.2 must be made in accordance with HIPAA requirements.

Health Care Providers: Pursuant to HIPAA § 164.506(a), the uses and disclosures of health information by health care providers contemplated by these rules require the consent necessary for treatment, payment and health care operations.

Are the [contrary] state law requirements more stringent than those of HIPAA?

N/A

Is an exception warranted?

N/A

Comments:

In the event of a conflict between the Managed Health Rule and the Grievance Rule, the provisions of the Grievance Procedures Rule control. 13 NMAC 10.17.2(C).

In connection with the external review process, the Superintendent currently uses a form authorization that authorizes release of records to the Superintendent (not to the Superintendent and/or the hearing panel). The Superintendent then turns the records over to the hearing panel, which he can do because he is not a covered entity under HIPAA. Use and disclosure in an external review hearing of health information that has not previously been provided (or is not first provided) to the Superintendent, however, likely requires either an authorization or an order (or subpoena or other process) from the panel under HIPAA § 164.512(e). (HIPAA § 164.501 specifically includes within the paragraph (6) of the definition of health care operations (business management and general administrative activities), the “resolution of internal grievances,” but does not reference external grievances. Disclosures made in connection with external review may be allowed under HIPAA § 164.512(d) which allows disclosure to health oversight agencies (or the contractors) for oversight activities, including resolution of “consumer complaints.”)

PREEMPTION ANALYSIS

Statute/Regulation: Medical Investigations
NMSA §§ 24-11-1 to -10 (1971)

Agency: Board of Medical Investigators

Summary: Requires reporting of certain deaths to the Board of Medical Investigators

Conclusion: Not preempted.

Covered Entities Affected: Health Care Providers

Impact: None.

Summary of Pertinent Provisions:

Section 24-11-5 requires that anyone who becomes aware of a sudden, violent or untimely death or a person who is found dead with the cause of death unknown must report the death to law enforcement authorities or the district medical investigator.

Does the state law apply to one or more Covered Entities?

No, except to the extent a Health Care Provider becomes aware of a patient who succumbs to “a sudden, violent or untimely death” or an unknown cause of death. Although the Board of Medical Investigators is not a Covered Entity; nor are the individual provider members of the Board, the state medical investigator, or the individual district or deputy medical investigators when performing their duties under the Act. (Members of the Board include the Dean of the medical school, the Secretary of DOH, the chief of the state police and the chairman of the state board of thanatopractice.)

Does the state law fall within a statutory carve-out category?

No.

Does the state law fit the carve-out for authorization or prohibition of disclosure of a minor’s protected health information to a parent, guardian or person acting in loco parentis?

No

March 7, 2002

Is the state law contrary to HIPAA because it is either impossible for the Covered Entity to comply with both the state and federal requirements, or the state law stands as an obstacle to the purposes of HIPAA?

No. The reporting required by § 24-11-5 is allowed without consent, authorization or the opportunity to agree or object pursuant to HIPAA § 164.512(a) (required by law).

Are the [contrary] state law requirements more stringent than those of HIPAA?

N/A

Is an exception warranted?

N/A

Comments:

PREEMPTION ANALYSIS

Statute/Regulation:	Medical Malpractice Act NMSA §§ 41-5-1 to -29 (1976)
Agency:	Medical Review Commission; Division of Insurance
Summary:	Provides for prelitigation review of malpractice claims asserted against health care providers qualified under the act; establishes a patient compensation fund from which to pay excess judgments.
Conclusion:	Not preempted
Covered Entities Affected:	Health Care Providers
Impact:	State law and HIPAA requirements apply

Summary of Pertinent Provisions:

Sections 45-5-6 and -7:

These sections authorize payment from the patient's compensation fund of judgments and future medical expenses that exceed the maximum liability of a qualified health care provider.

Section 45-5-10:

This section requires an individual who is receiving compensation for ongoing medical claims to be examined by a provider chosen by the defendant to determine the individual's continued need of medical care and related benefits. The individual may forfeit benefits if he refuses to submit to the exam, but may have a physician and/or an attorney of his choice present for the exam. Any physician examining an individual under this section may be required to testify as to his findings.

Sections 45-5-15 to -21:

Section 45-5-15 requires an individual to file an application with the Medical Review Commission prior to commencing any action against a qualified health care provider. The application must include a brief statement of the facts of the case and a statement authorizing the Commission to obtain access to all medical and hospital records and information pertaining to the matter giving rise to the application. Sections 41-5-16 to -21 require the Commission to serve the application on all providers named; they must answer the application and submit statements

authorizing the Commission and the panel reviewing the application to obtain access to all medical and hospital records and information. Copies of the application are forwarded by the Commission to the professional society (or, if none, to the licensing board) of the providers named and of the employer in cases of respondeat superior; this society or board selects three members of the review panel. A copy of the application is also forwarded by the Commission to the state bar, which selects three members of the panel. The director of the Commission or his delegate chairs the panel, and the matter is submitted to the panel in accordance with the procedures established by the Act.

Section 41-5-24:

This section requires the director of the Commission to maintain records of Commission proceedings, which are to include a statement of the nature of the acts or omissions alleged, a brief summary of the evidence presented, the decision of the panel and any opinions filed. The section further provides that these records are not open to the public, are not subject to subpoena, and “shall be used solely for the purpose of compiling statistical data and facilitating ongoing studies of medical malpractice” in the state.

Section 41-5-25:

This section establishes the patient compensation fund, to be administered by the Superintendent of Insurance. Under subsection (F), claims against the fund are paid to the patient and other parties obtaining judgments (or settlements).

Does the state law apply to one or more Covered Entities?

Health care providers.

Does the state law fall within a statutory carve-out category?

No.

Does the state law fit the carve-out for authorization or prohibition of disclosure of a minor’s protected health information to a parent, guardian or person acting in loco parentis?

No.

Is the state law contrary to HIPAA because it is either impossible for the Covered Entity to comply with both the state and federal requirements, or the state law stands as an obstacle to the purposes of HIPAA?

No, the provisions of this Act are compatible with HIPAA. The disclosures required in connection with the payment of claims or judgments and the filing of an initial application with the Commission are disclosures made by the individual and not by a health care provider. The disclosures made in connection with consideration of an application and made pursuant to an authorization from the individual. There is nothing in the Act that would prohibit the use of a

HIPAA-compliant authorization. The examination authorized by § 45-5-10 must be conducted with the individual's consent, and the individual must provide the examining provider with an authorization in order to have his own physician and/or attorney present for the exam. Disclosure of the examination results to the defendant provider, however, if not required by court order or other process as allowed by HIPAA § 164.512(e)(1), requires a HIPAA authorization. (HIPAA § 164.508(b)(4)(iv) would allow the examining provider to condition performance of the exam on receipt of such an authorization.)

The Commission is not a Covered Entity and disclosures made by it are not subject to HIPAA. The use of protected health information by Covered Entities serving on review panels is pursuant to the authorization that is submitted with the individual's initial application (and is required by law and therefore allowed without authorization, consent or the opportunity to agree or object pursuant to HIPAA § 164.512(a)).

Are the [contrary] state law requirements more stringent than those of HIPAA?

N/A

Is an exception warranted?

N/A

Comments:

PREEMPTION ANALYSIS

Statute/Regulation: Mental Health and Developmental Disabilities Code
NMSA §§ 43-1-1 to -25 (1989)

Agency: Department of Health

Summary: The Code governs the provision to adults of mental health and habilitation services.

Conclusion: Not preempted except to the extent that § 43-1-19(F) would prohibit disclosure to the Secretary of HHS. Because the requirements of the Act and HIPPA differ in several instances, however, HIPAA rule affects the existing requirements of state law. See detail in attached table.

Covered Entities Affected: Health Care Providers

Impact: See detail in attached table.

Summary of Pertinent Provisions:

See attached table.

Does the state law apply to one or more Covered Entities?

Yes, it applies to Health Care Providers, including both individual and facility providers.

Does the state law fall within a statutory carve-out category?

No.

Does the state law fit the carve-out for authorization or prohibition of disclosure of a minor's protected health information to a parent, guardian or person acting in loco parentis?

No.

Is the state law contrary to HIPAA because it is either impossible for the Covered Entity to comply with both the state and federal requirements, or the state law stands as an obstacle to the purposes of HIPAA?

No, with the exception of § 43-1-19(F), which would prohibit a Covered Entity from disclosing protected health information to the Secretary as required by HIPAA § 164.502(a)(2)(ii). HIPAA, however, does modify how the state law is implemented by Covered Entities. See attached table.

Are the [contrary] state law requirements more stringent than those of HIPAA?

No.

Is an exception warranted?

No.

Comments:

MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES CODE
Pertinent Provisions
NMSA §§ 43-1-1 to -25 (1989)

State Provision		Relevant HIPAA Provision/Impact
Section 43-1-1 – Mental condition of criminal defendants; evaluation; treatment	Authorizes a district court to obtain an evaluation of the mental condition of a defendant, and may order a defendant committed pursuant to NMSA § 31-9-1.2	HIPAA § 164.512(e)(1)(i) authorizes a Covered Entity to use and disclose protected health information when required to do so by court order.
Section 43-1-3 – Definitions	Subsection (I) defines “evaluation facility” to include a medical facility having psychiatric or developmental disability services available, or the office of a physician or psychologist capable of performing a mental status examination.	Identifies Covered Entities affected.
	Subsection (S) defines “residential treatment or habilitation program” to mean the diagnosis, evaluation, care, treatment or habilitation rendered inside or on the premises of a mental health or developmental disability facility, hospital, clinic, institution, supervisory residence or nursing home when the individual resides on the premises.	Identifies Covered Entities affected.

State Provision		Relevant HIPAA Provision/Impact
<p>Section 43-1-9 – Individualized treatment or evaluation plans.</p>	<p>Subsection (E) provides that the individualized treatment or habilitation plan shall be available upon request to the individual, his attorney, any mental health or developmental disability professional designated by the individual; and guardian or treatment guardian if one has been appointed.</p> <p>Subsection (E) further provides that, “Nothing in this subsection shall require disclosure of information to a client or to his parent [sic]” when the attending clinician “believes that disclosure of that particular information would be damaging to the client and so records in the client’s medical record.”</p>	<p><i>Disclosure:</i> Consistent with HIPAA § 164.502(2)(i) (disclosure to individual) and § 164.506(g) (personal representative); the “designation of professional” by individual as contemplated by this section must comply with HIPAA authorization requirements.</p> <p><i>Exception to disclosure:</i> The second portion of this subsection, which authorizes withholding information from the individual, is problematic because it could unduly restrict the right of the individual to access information. HIPAA § 164.524(a), in pertinent part, allows a Covered Entity to withhold information from an individual requesting it if the information consists of psychotherapy notes, HIPAA § 164.524(a)(1)(i), or if the disclosure “is reasonably likely to endanger the life or physical safety of the individual or another person.” HIPAA § 164.524(a)(3)(i). This standard is more rigorous than the standard of the state statute, which would allow a professional to withhold information if it is merely “damaging” to the individual. Although the standards are different, the state statute is not contrary to HIPAA within the meaning of HIPAA § 160.202, which requires that it be “impossible” for a Covered Entity to comply with both the state statute and HIPAA. Here, because withholding the information is not mandatory, a Covered Entity can comply both with the statute and with HIPAA simply by applying the more stringent standard of HIPAA. Therefore this portion of the statute is not preempted per se, although the federal rule still controls. (Note that under HIPAA § 164.524(a)(3)(iii), information may be withheld from a personal representative if such access “is reasonably likely to cause substantial harm to the individual or another person,” which is a standard closer to the standard adopted here by the state.)</p>

State Provision		Relevant HIPAA Provision/Impact
Section 43-1-10 – Emergency mental health evaluation and care.	Subsection (A)(3) authorizes a peace officer to detain and transport a person for emergency mental health evaluation and care if he has reason to believe the person presents a likelihood of serious harm to himself or others and that immediate detention is necessary to prevent such harm. That subsection further provides that “Immediately upon arrival at he evaluation facility, the peace officer shall be interviewed by the admitting physician or his designee.”	<p>The admitting physician can obtain the information from the peace officer, who is not a covered entity. However, in order to <i>use</i> the information for treatment (or payment or healthcare operations) the individual must present as an emergency (in which case the physician must attempt to get consent as soon as reasonably practicable after treatment has been delivered), HIPAA § 164.506(a)(3)(i)(A), or the physician must first attempt to obtain consent. If the physician is unable to obtain consent, he may still use the information because he is required by law to treat the individual, HIPAA § 164.506(a)(3)(i)(B). In either case, if the physician does not obtain the individual’s consent, he must document his attempt to obtain consent and the reasons why consent was not obtained. HIPAA § 164.506.</p> <p>Alternatively, the physician can use the information without consent, authorization or the opportunity to agree or object pursuant to HIPAA § 164.512(j) if the use of the information is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public.</p>
	Subsection (A)(4) authorizes a peace officer to detain and transport a person for emergency mental health evaluation and care if a licensed physician or certified psychologist has certified that, as a result of a mental disorder, the individual presents a likelihood of serious harm to himself or others and that immediate detention is necessary to prevent him harm.	The certification can be made with the individual’s consent, in the context of an emergency, as described above, or pursuant to HIPAA § 164.512(j)(1)(A)(i) if the certification is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public <u>and</u> the person making the certification believes that the peace officer is reasonably able to prevent or lessen the threat. (Note that HIPAA § 164.512(j)(1)(A)(ii) restricts the information that can be disclosed to law enforcement officials if the disclosure is to identify or apprehend an individual because of the individual’s participation in a violent crime or where it appears that the individual is an escapee.)

State Provision		Relevant HIPAA Provision/Impact
	Subsection (E) requires the admitting physician or licensed psychologist to evaluate whether reasonable grounds exist to detain the individual and, if so, the individual is to be detained.	<p>HIPAA consent is not required if the individual presents as an emergency (in which case the clinician must attempt to get consent as soon as reasonably practicable after treatment has been delivered). HIPAA § 164.506(a)(3)(i)(A). The clinician can also proceed under HIPAA § 164.506(a)(3)(i)(B), which allows a provider to use and disclose information if the provider is required by law to treat the individual. Under that section, the clinician must first attempt to obtain consent, but can proceed even if the consent is denied or not obtained. Under either provision, if the clinician does not obtain the individual's consent, he must document his attempt to obtain consent and the reasons why consent was not obtained. HIPAA § 164.506(3)(ii).</p> <p>Alternatively, the physician can use the information without consent, authorization or the opportunity to agree or object pursuant to HIPAA § 164.512(j) if the use of the information is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public.</p>
Section 43-1-11 – Commitment of adults for 30-day period	Subsection (A) provides that a petition for commitment (after an involuntary admission) must include a description of specific behavior or symptoms which evidence a likelihood of serious harm to the client or others and an initial screening report by the evaluating physician and/or mental health professional.	Although the decision that commitment is necessary is not mandatory, once that decision is made the disclosure to the district court is required. That disclosure is therefore allowed without consent, authorization or opportunity to agree or object under HIPAA § 164.512(a)(1) (required by law).
	Subsection (E) provides that any person who believes that an adult is suffering from a mental disorder and presents a likelihood of serious harm to self or others, but does not require emergency care may request the DA to investigate. Applicant may present medical evidence to the DA but shall not be required to do so. If reasonable grounds exist, the DA may petition the court for a hearing.	HIPAA does not allow the health care provider to make the initial request to the DA without an authorization unless the conditions of HIPAA § 164.512(j)(1)(A)(i) are met, i.e., if the disclosure is necessary to prevent or lessen a serious and <u>imminent</u> threat to the health or safety of a person or the public and the provider making the disclosure believes that DA is reasonably able to prevent or lessen the threat by pursuing the commitment. This section would only apply, however, if the imminent threat did not constitute an emergency, in which case § 43-1-10 would apply. Disclosure in connection with the court proceedings may be made without consent, authorization or the opportunity to agree or object if made pursuant to a court order or subpoena. HIPAA § 164.512(e)(1)(i) or (ii).

State Provision		Relevant HIPAA Provision/Impact
Section 43-1-12 – Extended commitment	Subsection (A) provides that the department, a physician or an evaluation facility may file a petition for extended commitment.	This subsection is not contrary to HIPAA because it is precatory; HIPAA would not allow a Covered Entity to disclose the information necessary to initiate the court proceedings without a valid authorization unless the disclosure is to a personal representative or the conditions of HIPAA § 164.512(j)(1)(A)(i) (serious and imminent threat of injury) are met, although it may be difficult to prove that any threat of injury is imminent, as required by that section, since the person is already committed.
Section 43-1-13 – Involuntary commitment of DD adults to residential care	Subsection (A) authorizes an appointed guardian to file on behalf of the individual an application for residential habilitation services with DOH or an evaluation facility. The application must include copies of pertinent medical and psychological evaluations.	The provider’s disclosure to the guardian (for inclusion in the application) is authorized pursuant to HIPAA § 164.502(g).
	Subsection (B) provides that DOH or the evaluation facility “may accept” the individual for a period of evaluation and treatment. An evaluation facility must prepare an individual habilitation plan.	A health care provider could not accept the individual for evaluation without consent except in an emergency pursuant to HIPAA§ 164.506(a)(3)(i)(A) or to prevent or lessen a serious and imminent threat to health or safety of the individual or the public pursuant to HIPAA § 164.512(j)(1)(A)(i). Once the individual is accepted, the development of the habilitation plan is allowed within the scope of the individual or guardian’s initial consent or (without consent, authorization or the opportunity to agree or object) because it is required by law. HIPAA § 164.512(a).
	Subsection (C) provides that if the habilitation plan recommends residential services, DOH or the evaluation facility “shall file” a petition for extended residential placement	The disclosure is allowed under HIPAA § 164.512(a) (required by law).
Section 43-1-14 – Voluntary admission to residential treatment or habilitation	Subsection (B) affords an individual voluntarily admitted to residential treatment or habilitation the right on request to immediate discharge unless the director of the facility or a physician determines that the client requires continued confinement under the criteria established by the Code. If the director or physician so determines, he “shall ... request” the DA to initiate commitment proceedings.	Use of information to make the required determination is covered by the initial consent for treatment, payment and health care operations. Once the determination is made to continue the confinement, the provider’s disclosure to the DA is mandatory and therefore allowed without an authorization pursuant to HIPAA § 164.512(a) (required by law).

State Provision		Relevant HIPAA Provision/Impact
Section 43-1-15 – Consent to treatment, adult clients	Subsection (A) requires that the informed consent of an individual capable of giving such consent be obtained before initiating the use of psychotropic medications, pyschosurgery, convulsive therapy, experimental treatment or behavior modification program involving aversive stimuli or substantial deprivation.	HIPAA consent also required.
	Subsection (B) provides that if the professional or physician who is proposing the treatment or any other interested person believes that the client is incapable of informed consent, he “may petition” the court for appointment of a treatment guardian. If a nonresidential individual refuses to follow the decision of the treatment guardian, the treatment guardian may apply for an order requiring a peace officer to take the individual into custody and authorizing a treatment facility to treat the individual. The treatment guardian shall consult with the physician or professional proposing the treatment before making his decision.	Under the circumstances described, the provider could not, without authorization of the guardian, initiate the petition unless necessary to prevent or lessen a serious and imminent threat to health or safety of the individual or the public pursuant to HIPAA § 164.512(j)(1)(A)(i). If the order is issued, the Covered Entity may treat the treatment guardian as the individual’s personal representative for the purposes set forth in the order per HIPAA § 164.502(g)(3).
	Subsection (D) provides that if, during a period of a treatment guardian’s authority, certain persons, including a treatment provider, believe that an individual has regained competence to make his own treatment decisions that person “shall petition” the court for a termination of the treatment guardianship.	The disclosure (petition), if made by a Covered Entity, is required by law under the circumstances described in this section; it can therefore be made without consent, authorization or the opportunity to agree or object pursuant to HIPAA § 164.512(a) (required by law).
	Subsection (F) authorizes the physician or professional who believes that the administration of psychotropic medication is necessary to protect the individual from serious harm during the pendency of proceedings may administer the medication on an emergency basis. Upon sworn application of the treating physician, the court may issue an order permitting the physician to continue administering the medications until a treatment guardian is appointed.	Administration of medication is covered within the program’s initial HIPAA consent to treat; if none, the use of protected health information for this treatment is allowed without consent, authorization or the opportunity to agree or object under HIPAA § 164.512(j)(1)(A)(i) (to prevent an imminent and serious threat to health or safety). If that standard cannot be met, the treatment can be provided without prior consent § 164.506(a)(3)(i)(A) if an emergency exists and the Covered Entity seeks to obtain consent as soon as reasonably practicable after treatment.

	State Provision	Relevant HIPAA Provision/Impact
Section 43-1-19 – Disclosure of Information	Subsection (A) states that (except as provided) no person shall, without the authorization of the individual, disclose or transmit any confidential information from which a person well acquainted with the individual might recognize the individual as the described person or any code, number or other means that could be used to match the individual with confidential information regarding him.	Consistent with HIPAA.
	Subsection (B) provides that the individual’s authorization is not required: (1) When the request is from a mental health or developmental disability professional or an employee or trainee working with persons with mental health or developmental disabilities to the extent that his practice, employment or training on behalf of the child requires that he has access to the information;	Subsection (1) is not contrary to HIPAA within the meaning of § 160.202, although a HIPAA authorization is required before a Covered Entity may disclose the information. See HIPAA §164.506(a)(5); 65 FR at 82511.
	(2) When the disclosure is necessary to protect against a clear and substantial risk of imminent serious physical injury or death inflicted by the individual on himself or another;	Disclosure without authorization under this section is not contrary to HIPAA; however, the disclosure (if made without consent or authorization) may be made only to a person reasonably able to prevent or lessen the threat, including the target of the threat. HIPAA § 164.512(j) (disclosure to prevent or lessen serious and imminent threat to health or safety).
	(3) When the disclosure of the information is to the primary caregiver of the individual and, in the judgment of the treating clinician who discloses the information, is limited to information that is necessary for the continuity of the individual’s treatment.	Disclosure is not required by this subsection, so the subsection is not contrary to HIPAA within the meaning of HIPAA § 160.202, and is therefore not preempted. Although HIPAA does not require authorization in this instance, it does require the Covered Entity to give the individual the opportunity to agree or object if the individual is present. If the individual does not have the capacity to agree or object or if the individual is not present, the disclosure can be made under HIPAA if it is in the individual’s best interests. This test would be met by fulfilling the state requirement that the information be “necessary for the continuity of the client’s treatment.” HIPAA § 164.510(b)(1)(i), (b)(2) and (b)(3).

State Provision	Relevant HIPAA Provision/Impact
<p>Subsection (C) requires that an authorization:</p> <ol style="list-style-type: none"> (1) be in writing and signed, and (2) contain a statement of the individual’s right to examine and copy the information to be disclosed, the name or title of the proposed recipient of the information and a description of the use that may be made of the information. 	<p>This subsection is different from, but not contrary to, HIPAA. A Covered Entity may comply with both statutes by including in a HIPAA authorization the additional elements required by the state statute (notification of the right to copy and examine, description of use). HIPAA § 164.508(b)(ii) allows these elements to be included in the HIPAA authorization itself..</p>
<p>Subsection (D) provides that the individual has the right to access confidential information about himself and to submit clarifying or correcting statements and other documentation of reasonable length for inclusion with the confidential information. The statements and other documentation must be kept with the relevant confidential information and accompany it in the event of disclosure; they are governed by this section to the extent they contain confidential information.</p>	<p><i>Disclosure:</i> This part of Subsection (D) is consistent with HIPAA requirements.</p>
<p>Subsection (D) further provides that, nothing in the subsection prohibits the denial of access to the records when a physician or other mental health or developmental disabilities professional believes and notes in the individual’s medical records that the disclosure would not be in his best interests. In such cases, the individual has the right to petition the court for an order granting access.</p>	<p><i>Exception to disclosure:</i> The second portion of this subsection, which authorizes withholding information from the individual, is problematic because it could unduly restrict the right of the individual to access information. HIPAA § 164.524(a), in pertinent part, allows a Covered Entity to withhold information from an individual requesting it if the information consists of psychotherapy notes, HIPAA § 164.524(a)(1)(i), or if the disclosure “is reasonably likely to endanger the life or physical safety of the individual or another person.” HIPAA § 164.524(a)(3)(i). This standard is more rigorous than the standard of the state statute, which would allow a professional to withhold information if it is “in the best interests” of the individual. Although the standards are different, the state statute is not contrary to HIPAA within the meaning of HIPAA § 160.202, which requires that it be “impossible” for a Covered Entity to comply with both the state statute and HIPAA. Here, because withholding the information is not mandatory, a Covered Entity can comply both with the statute and with HIPAA by simply applying the more stringent standard of HIPAA. Therefore this portion of the statute is not preempted per se, although the federal rule still controls.</p>

State Provision		Relevant HIPAA Provision/Impact
	Subsection (E) allows a person seeking disclosure to petition for the appointment of a treatment guardian to make the decision whether to disclose if the individual is not capable of doing so. A parent or guardian may make the decision if the individual is under 14.	If the order is issued, the Covered Entity may treat the treatment guardian as the child’s personal representative for the purposes set forth in the order per HIPAA § 164.502(g)(3). If the individual is under 14, HIPAA § 164.502(g) allows a Covered Entity to treat the parent or guardian as the personal representative entitled to authorize disclosure as provided by this subsection.
	Subsection (F) prohibits information disclosed under this section to be released to any other person, agency or governmental entity or placed in files or computerized data banks accessible to any persons not otherwise authorized to obtain the information.	This subsection is preempted to the extent it prohibits disclosure to the Secretary of HHS as an agency or governmental entity. See HIPAA § 164.502(a)(2)(ii).
	Subsection (G) provides that nothing in the Act “shall limit the confidentiality rights afforded by federal statute or regulation.”	--
Section 43-1-21 – Convalescent status; rehospitalization	This section authorizes the head of a residential facility to release an involuntary client on convalescent status if in the best interests of that individual. The release shall include provisions for the continuing responsibility to and of the hospital. The director of the facility is required to reexamine the facts prior to the end of the commitment and shall discharge the individual if commitment is no longer appropriate. Prior to discharge, the facility “may readmit” the individual and “may issue” an order for the immediate return of the individual. If the order is not complied with on a voluntary basis, a court order is required.	Use and disclosure for the “reexamination of facts” provided by this section is allowed within the scope of the order authorizing the involuntary commitment or as a disclosure required by law under HIPAA § 164.512(a). The disclosure of any decision to readmit (which is not mandatory) must be made to the individual and/or his personal representative unless the disclosure is made pursuant to HIPAA § 164.512(j)(1)(A)(i) (to prevent an imminent and serious threat to health or safety).

PREEMPTION ANALYSIS

Statute/Regulation: Acupuncture and Oriental Med. Practice, NMSA §§ 61-14A-1 to -22 (1993)
Athletic Trainer Practice, NMSA §§ 61-14D-1 to -19 (1993)
Chiropractic, NMSA §§ 61-4-1 to -17 (1979)
Counseling and Therapy, NMSA §§ 61-9A-1 to -30 (1993)
Dental Health Care, NMSA §§ 61-5A-1 to -30 (1994)
Impaired Dentists and Dental Hygienists, NMSA §§ 61-5B-1 to -11 (1994)
Impaired Health Care Provider, NMSA §§ 61-7-1 to -12 (1976)
Impaired Pharmacists, NMSA §§ 61-11A-1 to -8 (1987)
Massage Therapy Practice, NMSA §§ 61-12C-1 to -28 (1991)
Medical Radiation Health and Safety, NMSA §§ 61-14E-1 -12 (1983)
Medicine and Surgery, NMSA §§ 61-6-1 to -35 (1989)
Nursing Home Administrators, NMSA §§ 61-13-1 to -17 (1970)
Nursing, NMSA §§ 61-3-1 to -31 (1968)
Nutrition and Dietetics Practices, NMSA §§ 61-7A-1 to -15 (1989)
Occupational Therapy, NMSA §§ 61-12A-1 to -24 (1996)
Optometry, NMSA §§ 61-2-1 to -18 (1979)
Osteopathic Medicine and Surgery, NMSA §§ 61-10-1 to -22 (1993)
Osteopathic Physicians' Assistants Act, NMSA 61-10A-1 to -7 (1979)
Pharmacist Prescriptive Authority Act, NMSA §§ 61-11B-1 to -3 (1993)
Pharmacy, NMSA §§ 61-11-1 to -29 (1969)
Physical Therapy Act, NMSA §§ 61-12D-1 to -19 (1997)
Podiatry, NMSA §§ 61-8-1 to -17 (1977)
Psychologists, NMSA §§ 61-9-1 to -19 (1963)
Respiratory Care, NMSA §§ 61-12B-1 to - 17 (1984)
Social Work Practice Act, NMSA §§ 61-31-1 to -25 (1989)
Speech-Language Pathology, Audiology and Hearing Aid Dispensing,
NMSA §§ 61-14B-1 to -25 (1996)

Agency: Multiple

Summary: These statutes establish boards/agencies that license and oversee various health care providers, detail grounds for initial licensure and disciplinary action, establish due process procedures in connection therewith, and establish mechanisms and procedures to support the treatment and monitoring of impaired providers..

Conclusion: Not preempted; statutes remain in effect except to the extent any provision would prohibit the disclosure to the Secretary of HHS of protected health information maintained by Covered Entities that report to or are subject to the oversight of these boards and agencies.

Covered

Entities Affected: Health Care Providers; Health Plans

Impact: State rules and HIPPA apply.

Summary of Pertinent Provisions:

These statutes establish boards/agencies that license and oversee various health care providers, detail grounds for initial licensure and disciplinary action, establish due process procedures in connection therewith, and establish mechanisms and procedures to support the treatment and monitoring of impaired providers.

Does the state law apply to one or more covered entities?

These statutes involve the potential disclosure of protected health information (1) of an applicant in connection with his submission of an application for an initial or renewal license; and (2) of patients/enrollees in connection with the support or defense of licensure decisions and disciplinary proceedings. They apply to Health Care Providers and to Health Plans (the latter because they may be reporting information regarding enrollees and/or providers to these boards/agencies in connection with providers' licensure and disciplinary proceedings).

Does the state law fall within a statutory carve-out category?

No.

Does the state law fit the carve-out for authorization or prohibition of disclosure of a minor's protected health information to a parent, guardian or person acting in loco parentis?

No.

Is the state law contrary to HIPAA because it is either impossible for the covered entity to comply with both the state and federal requirements, or the state law stands as an obstacle to the purposes of HIPAA?

No. The boards/agencies established by these statutes are health oversight agencies within the meaning of HIPAA § 164.501, which defines a health oversight agency to include an agency or authority of a state, or a person or entity acting under a grant of authority from or under contract with such an agency or authority, that is authorized by law to oversee the health care system. Under HIPAA § 164.512(d), a Covered Entity may disclose protected health information, without an consent, authorization or the opportunity to agree or object, "to a health oversight agency for oversight activities authorized by law, including audits; civil, administrative,

or criminal investigations; inspections; licensure or disciplinary actions; civil, administrative, or criminal proceedings or actions; or other activities necessary for appropriate oversight of: (i) The health care system; ...[or] (iii) Entities subject to government regulatory programs for which health information is necessary for determining compliance with program standards....” See 65 FR at 82492 (“Overseeing the health care system,’ which is included in the definition of health oversight, encompasses activities such as: ...oversight of health care providers”); 65 FR at 82680 (oversight of licensed providers generally is included as a health oversight activity at Sec. 164.512(d)).

Other HIPAA exceptions to consent, authorization and opportunity-to-agree-or-object requirements that are relevant to disclosures made pursuant to these statutes under applicable circumstances include:

HIPAA § 164.512(a): Disclosures required by law, to the extent the disclosure is mandatory and not precatory;

HIPAA § 164.512(e)(1)(i): Disclosures made pursuant to an administrative order or subpoena; and

HIPAA § 164.512(e)(1)(ii): Disclosures made in the course of administrative proceedings pursuant to a discovery request or a subpoena not issued by the administrative body or hearing officer (subject to the restrictions of that subsection).

Are the [contrary] state law requirements more stringent than those of HIPAA?

No.

Is an exception warranted?

N/A

Comments:

HIPAA § 164.508(a)(2)(ii) allows for the disclosure and use – without authorization – of psychotherapy notes in connection with the oversight of the originator of the notes pursuant to HIPAA § 164.512(d).

PREEMPTION ANALYSIS

Statute/Regulation: Public Health Act
NMSA §§ 24-1-1 to -22 (1973)

Agency: Department of Health (DOH)
Children, Youth and Families (CYFD) with respect to child-care facilities

Summary: Identifies Department of Health as public health authority; establishes health facility licensing functions; includes provisions relating to various public health activities and treatment of specific conditions

Conclusion: Not preempted except to the extent any provision would prohibit the disclosure of protected health information by a Covered Entity to the Secretary of HHS. The provisions of HIPAA, however, affect the existing requirements of state law. See detail in attached table.

Covered Entities Affected: All, including agency when acting as a Covered Entity

Impact: See detail in attached table.

Summary of Pertinent Provisions:

See attached table.

Does the state law apply to one or more Covered Entities?

Yes, the Act applies primarily to Health Care Providers.

Does the state law fall within a statutory carve-out category?

Yes. Many of the provisions fall within the statutory carve-out for public health activities.

Does the state law fit the carve-out for authorization or prohibition of disclosure of a minor's protected health information to a parent, guardian or person acting in loco parentis?

No.

Is the state law contrary to HIPAA because it is either impossible for the Covered Entity to comply with both the state and federal requirements, or the state law stands as an obstacle to the purposes of HIPAA?

Yes, with respect to the disclosure of STD results, because the state statute would not allow disclosure to the Secretary of HHS, which is a required disclosure under HIPAA § 164.502(a)(2).

Note that because disclosure under the exceptions to consent and authorization requirements set forth in HIPAA § 164.512 are permissive and not mandatory, HHS takes the position that a state law is not “contrary” to HIPAA if it declines to recognize one or more of the exceptions that HIPAA would allow under § 164.512, which is the case here. A Covered Entity can comply with both the state law and with HIPAA merely by refusing to disclose information under those HIPAA exceptions that the state law does not recognize. Therefore, to the extent that HIPAA allows exceptions other than those specified in subsection § 24-1-9.4, the state law controls.

Furthermore, § 24-1-20(E) of the Act provides that, “No person supplying information to the department for use in a research project or any cooperating person in a research project shall be subject to any action for damages or other relief as a result of that activity.” To the extent such disclosure would not be allowed by HIPAA, i.e., if the research were not in furtherance of the Department’s public health activities or if the HIPAA requirements for research disclosures weren’t met, this statute would not afford protection from enforcement action under HIPAA.

See attached table.

Are the [contrary] state law requirements more stringent than those of HIPAA?

No, with respect to the disclosure to the Secretary of STD test results and research immunity as noted above.

Is an exception warranted?

No.

Comments:

Note that where the Public Health Act allows a minor to consent to services, and the minor does consent, HIPAA § 164.502(g)(3)(i) and (ii) prohibit a Covered Entity from treating a parent, guardian or person in loco parentis as the personal representative of the minor (for purposes of consent, authorization or disclosure in connection with these services) unless the minor requests that it do so.

PUBLIC HEALTH ACT – Pertinent Provisions
HOLLY GONZALES EXPERIMENTAL TREATMENT ACT
NMSA §§ 24-1-1 to –22, § 24-1-25

State Provision		Relevant HIPAA Provision/Impact¹
Section 24-1-3: Powers and authority	Subsection (U): Authorizes the department to “request and inspect, while maintaining federal and state confidentiality requirements,” copies of medical records (1) reasonably required for its quality assurance and quality improvement activities, or (2) pertaining to an individual whose death is the subject of inquiry under its mortality review activities.	Disclosure to the Department may be made pursuant to an authorization, or, for the purposes specified in paragraph (2) of this subsection, pursuant to § 164.512(b)(1)(i), which authorizes disclosure to a public health authority for public health activities. It is unclear, however, whether the department’s own QA and QI activities are public health activities within the meaning of that provision of HIPAA. ² Because the authority of the Department under this subsection is limited by “federal and state confidentiality requirements,” the subsection is not contrary to HIPAA. HIPAA requirements must be met.

¹ This table does *not* address the impact of HIPAA on the Department of Health in its capacity as a Covered Entity.

² Under HIPAA § 164.512(b)(1)(i), a Covered Entity may disclose protected health information “for the public health activities and purposes” to a public health authority authorized to collect or receive the information “for the purpose of preventing or controlling disease, injury, or disability, including, but not limited to, the reporting of disease, injury, vital events such as birth or death, and the conduct of public health surveillance, public health investigations, and public health interventions.”

State Provision		Relevant HIPAA Provision/Impact¹
Section 24-1-5: Licensure of health facilities	Subsection (B): Authorizes the department to make inspections and investigations as it deems necessary or desirable to promote the health, safety and welfare of persons using health facilities.	Disclosure may be made without consent, authorization, or the opportunity to agree or object pursuant to § 164.512(d)(1)(iii) (health oversight activities). ³
	Subsection (J): Authorizes the discovery in connection with a hearing requested on any action taken by the department under this section of documents and records, including documents and records pertaining to abuse, neglect or exploitation of a resident, client or patient, or other documents in the custody of the human services department or the state long-term care ombudsman.	Disclosure of information by a Covered Entity is authorized without consent, authorization or the opportunity to agree or object pursuant to a court order, including an administrative order, under § 164.513(e)(1)(i), or pursuant to a subpoena if the requirements of § 164.512(e)(1)(ii) (relating to notice and protective orders, etc.) are met.
	Subsection (L): Requires the department to investigate promptly, and to coordinate with other state agencies in the investigation of, complaints about health facilities, including allegations of abuse, neglect or exploitation of residents, clients or patients in a health facility.	Disclosure may be made without consent, authorization, or the opportunity to agree or object pursuant to § 164.512(d)(1)(iii) (health oversight activities)
	Subsection (M): Provides that complaints received by the department shall not be disclosed publicly in a manner as to identify any individuals or health facilities if upon investigation the complaint is unsubstantiated.	None; subsection addresses disclosure by the Department.
	Subsection (N): Provides that where there are reasonable grounds to believe that any child is in imminent danger of abuse or neglect while in the care of a child-care facility, or upon receipt of a report of abuse or neglect, the department shall consult with the owner or operator and may, after hearing, suspend operation of the facility. Requires the department to make a reasonable effort to notify the parents of children in the facility of the notice and opportunity for hearing given to the owner or operator.	Disclosure may be made without consent, authorization, or the opportunity to agree or object pursuant to § 164.512(d)(1)(iii) (health oversight activities)

³ HIPAA § 164.512(d)(1)(iii) allows for disclosure to a health oversight agency for oversight activities authorized by law, including activities necessary for the oversight of entities subject to regulatory programs for which health information is necessary to determine program compliance.

State Provision		Relevant HIPAA Provision/Impact¹
Section 24-1-6: Tests required for newborns	Requires DOH to adopt tests for the detection of phenylketonuria and other congenital diseases to be given to every newborn, unless the parents waive the requirements in writing; authorizes DOH to provide or contract for laboratory services to detect the presence of phenylketonuria and other congenital diseases; and requires that all hospitals or institutions having facilities for child birth perform or have performed the tests required by this section unless the parents or guardians object to the tests in writing.	State law is saved and remains in effect per § 160.203(b), which protects state laws and procedures established for the reporting of injury or disease or for public health surveillance, investigation or intervention. Blood may be provided to lab, test may be performed and results disclosed to DOH provided the opportunity to object is offered as required by state law.
Section 24-1-6.1: Newborn hearing testing	Requires that infants born in licensed health facilities be screened for hearing sensitivity prior to discharge. Requires the testing of newborns brought to licensed health facilities after birth if they have not previously been screened. Requires notification of results to parents of all screened infants. Screening not required if the infant's parents object on religious grounds.	State law is saved and remains in effect per § 160.203(b), which protects state laws and procedures established for public health surveillance. Screening may be performed provided the opportunity to object on religious grounds is offered as required by state law.
Section 24-1-7: Sexually transmitted diseases (STDs); reports of cases	Requires reporting to DOH of each STD case by: Every physician who diagnoses, treats or prescribes for an STD Every clinic, dispensary or charitable or penal institution in which there is an STD Every laboratory performing a positive STD test	State law is saved and remains in effect per § 160.203(b), which protects state laws and procedures established for the reporting of injury or disease and for public health surveillance, investigation or intervention.
Section 24-1-8: Communication regarding STDs	If a physician knows or has good reason to suspect that a person with an STD may conduct himself so as to expose others to infection, he is required to notify DOH of the name and address of the diseased person and the facts of the case	State law is saved and remains in effect per § 160.203(b), which protects state laws and procedures established for the reporting of injury or disease and for public health surveillance, investigation or intervention.
Section 24-1-9: Capacity to consent to examination and treatment for STDs	Any person regardless of age has the capacity to consent to examination and treatment for any STD	If a minor consents to the services, HIPAA § 164.502(g)(3)(i) and (ii) prohibit a Covered Entity from treating a parent, guardian or person in loco parentis as the personal representative of the minor (for purposes of consent, authorization or disclosure in connection with these services) unless the minor requests that it do so.
Section 24-1-9.1: STD testing of persons convicted of certain criminal offenses	Test may be performed on offender convicted of crimes involving sexual contact with consent or, without consent, pursuant to court order obtained on petition of the victim or his personal representative. Results of the test shall be disclosed only to the offender and the victim or the victim's parent or legal guardian.	If consent obtained, must comply with HIPAA requirements Consent, authorization or opportunity to object or agree not required per § 164.512(e)(1)(i) (court order) Disclosure to victim requires either a HIPAA authorization or a court order expressly authorizing the disclosure.

State Provision		Relevant HIPAA Provision/Impact¹
Section 24-1-9.2: STD testing of persons charged with certain criminal offenses	Test may be performed on person charged with committing certain criminal offenses with consent or, without consent, by court order obtained on petition of the victim provided that the victim is tested first. Petition and all proceedings are under seal. Results of the test shall be disclosed only to the individual and the victim or the victim's parent or legal guardian.	Consent, authorization or opportunity to object or agree not required per § 164.512(e)(1)(i) (court order); if consent is obtained, it must comply with HIPAA requirements Disclosures to victim or personal representative must be expressly authorized in court order or made pursuant to a HIPAA authorization. Disclosure to parents is subject to HIPAA § 164.502(g)(3).
Section 24-1-9.3: STD mandatory counseling	Individual being informed of test results must be provided or referred for counseling	N/A (not separate from test)
Section 24-1-9.4: STD confidentiality	Except as required in 9.2 (9.1?), disclosure of a test result in a manner that identifies the subject of the test may be made only to:	HIPAA authorization required except as noted below for (A) – (H); Disclosure to the Secretary of HHS for purposes of ascertaining compliance with HIPAA is required and overrides the state prohibition.
	(A) the subject of the test or his personal representative	Permitted per § 164.502(a)(1); disclosure to parent or guardian subject to § 164.502(g).
	(B) Any person designated in a legally effective release	Release must comply with HIPAA authorization requirements
	(C) An authorized agent, a credentialed or privileged physician or employee of a health facility or health care provider if the facility or provider is authorized to obtain the test results, the agent or employee provides patient care or handles or processes body fluids or tissues and has a need to know.	Consent, authorization, opportunity to agree or object not required per § 164.512(b)(1)(iv) (communicable disease)
	(D) The Department of Health and the CDC in accordance with reporting requirements for a diagnosed case of an STD	Consent, authorization, opportunity to agree or object not required per § 164.512(a) (1) (required by law) (or saved per § 164.203(b).
	(E) Health facility or health care provider that procures, processes, distributes or uses: (1) A human body part from a deceased person with respect to medical information regarding that person (2) Semen for the purpose of artificial insemination (3) Blood or blood products for transfusion or injection (4) Human body parts for transplant with respect to medical information regarding the donor or recipient	Consent, authorization, opportunity to agree or object not required per § 164.512(b)(1)(iv) (communicable disease)

State Provision		Relevant HIPAA Provision/Impact¹
	(F) Health facility staff committees or oversight review organizations which are conducting program monitoring, program evaluation or service reviews, so long as any identity remains confidential	Consent required for health care operations unless de-identification standards are met per § 164.514(b) or the disclosure is to the Department or other oversight agency and the requirements for the exception for oversight activities are met per § 164.512(d)(iii)
	(G) Authorized medical or epidemiological researchers who may not further disclose any identifying characteristics or information.	Unless the disclosure is made in connection with research conducted under the auspices of the Department and pursuant to its public health surveillance activities, a HIPAA authorization is required unless research exception requirements are met per § 164.512(i)(1)(i) (IRB or Privacy Board approval of waiver); § 164.512(i)(1)(ii) (reviews preparatory to research); or § 164.512(i)(1)(iii) (research on decedent's information)
	(H) For purposes of application or reapplication for insurance coverage, an insurer or reinsurer upon whose request the test is performed.	The information may be used by health care insurer (health plan) without consent (for health care operations), but disclosure by health care provider to insurer requires an authorization unless the provider and the insurer are part of an organized health care arrangement. See definitions of "health care operations" and "organized health care arrangement" in § 164.501. Use of the information by the health plan is subject to the restrictions set forth in § 164.514(g).
Section 24-1-9.5: STD disclosure statement	Disclosure statement: Details a specific statement that must accompany any disclosure of test results.	None
Section 24-1-9.6: STD disclosure	A victim who receives information regarding a test result pursuant to § 24-1-9.2 may disclose the result as is reasonably necessary to protect his health and safety or the health and safety of his family or sexual partner	None
Section 24-1-9.7: Penalty for unauthorized disclosure of STD test results	Unauthorized disclosure is a misdemeanor	Unenforceable under HIPAA in connection with disclosure to the Secretary for purposes of compliance.
Section 24-1-10: Pregnancy; test for syphilis	Every physician examining a pregnant woman for conditions relating to her pregnancy must take a blood sample at the time of first examination to be submitted to the state public health laboratory for syphilis testing	State law is saved and remains in effect per § 160.203(b), which protects state laws and procedures established for the reporting of injury or disease and for public health surveillance, investigation or intervention.

State Provision		Relevant HIPAA Provision/Impact¹
Section 24-1-11: Reporting of blood tests	In reporting every birth and stillbirth, the physician or other person required to report shall state on the certificate whether a syphilis test on the mother was taken and the approximate date of the test	State law is saved and remains in effect per § 160.203(b), which protects state laws and procedures established for the reporting of injury or disease and for public health surveillance, investigation or intervention.
Section 24-1-12: Health certificate requirements for health facility employees and operators	Certificate from physician that person is free from communicable diseases in a transmissible state dangerous to the public health (as defined by regulation) must be presented to and maintained on file by the employer. Certificates are subject to inspection by the facility licensing authority.	None: disclosure by the Covered Entity is made to the individual; the obligation is on the individual to disclose the information his employer
Section 24-1-13: Capacity to consent to examination and diagnosis	Any person, regardless of age, has capacity to consent to examination and diagnosis for pregnancy	If a minor consents to these services, HIPAA § 164.502(g)(3)(i) and (ii) prohibit a Covered Entity from treating a parent, guardian or person in loco parentis as the personal representative of a minor (for purposes of consent, authorization or disclosure in connection with these services) unless the minor requests that it do so.
Section 24-1-13.1: Pregnancy – treatment for a female minor	Female minor has capacity to consent to treatment for pregnancy	If a minor consents to these services, HIPAA § 164.502(g)(3)(i) and (ii) prohibit a Covered Entity from treating a parent, guardian or person in loco parentis as the personal representative of a minor (for purposes of consent, authorization or disclosure in connection with these services) unless the minor requests that it do so.

State Provision		Relevant HIPAA Provision/Impact¹
Section 24-1-15: Reporting of contagious diseases	(A) Requires prompt notification to a public health official of any person “sick with any disease dangerous to the public health”	State law is saved and remains in effect per § 160.203(b), which protects state laws and procedures established for the reporting of injury or disease and for public health surveillance, investigation or intervention.
	(B) Requires public health official who has knowledge that a person currently infected with a threatening communicable disease has refused voluntary treatment, detention or observation to petition the court for an order to detain and treat	None (disclosure is made by Department)
	(C) Petition must include statement under oath that the individual is infected with a threatening communicable disease	State law is saved and remains in effect per § 160.203(b), which protects state laws and procedures established for the reporting of injury or disease and for public health surveillance, investigation or intervention.
	(D) Petition must state that the individual is actively infectious, poses a substantial likelihood of transmitting the disease because of inadequate separation, and has refused treatment	State law is saved and remains in effect per § 160.203(b), which protects state laws and procedures established for the reporting of injury or disease and for public health surveillance, investigation or intervention.
	(E)-(G) Court may issue order for protection by isolation and treatment	N/A
	(H) Provides that section does not permit the forcible administration of medications not reasonably required for treatment of the communicable disease	None.
Sections 24-1-17 to – 19: Inspectorial searches	Authorizes inspection by consent, court order, or in an emergency for the purposes of ascertaining existence of conditions dangerous to health or safety or otherwise relevant to the public interest, in accordance with fire, housing, sanitation, welfare, zoning or other laws enacted for the promotion of public well-being.	To the extent that inspection results in disclosure by a Covered Entity of protected health information, the state law is saved and remains in effect per § 160.203(b), which protects state laws and procedures established for the reporting of injury or disease and for public health surveillance, investigation or intervention.
Section 24-1-20: Records confidential	(A) Records giving identifying information about individuals who have received or are receiving from the department treatment, diagnostic services or preventive care are confidential and not open to inspection except where permitted by rule, as provided in subsection (C) of this section, or to the Secretary of the Department or to an employee in connection with a governmental function of the Secretary or employee.	None. Applies to the Department’s records and disclosure by the Department.

State Provision		Relevant HIPAA Provision/Impact¹
	(B) All information voluntarily provided to the Department in connection with studies designated by him as medical research conducted by or under the authority of the department for the purpose of reducing morbidity or mortality is confidential and may be used only for purposes of the research. The information is not admissible in any court or administrative action.	None. Applies to the Department's records and disclosure by the Department.
	(C) HSD and the long-term care ombudsman have access to all files and records in the possession of the licensing and certification bureau that are related to any health facility investigation.	None. Applies to the Department's records and disclosure by the Department.
	(D) Files and records of the department are subject to subpoena for use in any pending administrative or judicial cause unless otherwise provided by law.	None. Applies to the Department's records and disclosure by the Department.
	(E) No person supplying information to the department for use in a research project or any cooperating person in a research project shall be subject to any action for damages or other relief as a result of that activity.	None, provided that the research is being conducted under the auspices of the Department and pursuant to its public health activities. Otherwise, HIPAA enforcement provisions prevail.
	(F) Penalty for disclosure in violation of this section is a misdemeanor.	None.
Section 24-1-21: Penalty for violating the Public Health Act	Penalty for violation any provision of the Public Health Act or any rule promulgated thereunder is a misdemeanor. The department may also enforce its rules and orders by civil action.	None.
Section 24-1-25: Holly Gonzales Experimental Treatment Fund	Fund is administered by DOH to pay for experimental treatment for children with catastrophic, debilitating or terminal illnesses. Physician must provide the department with certification regarding the child's illness and prognosis. Patients must submit receipts to DOH.	Not contrary to HIPAA; HIPAA consent required to disclose information for payment.

PREEMPTION ANALYSIS

Statute/Regulation: Review Organization Immunity Act
NMSA §§ 41-9-1 to -7 (1979)

Agency:

Summary: Provides that review organization proceedings are confidential; limits the liability of members of review organizations (and other participants/advisors) and persons who provide information to a review organizations

Conclusion: Not preempted except to the extent it would prohibit the disclosure of protected health information by a Covered Entity to the Secretary of HHS

Covered

Entities Affected: Health Care Providers and Health Plans

Impact: None, other than disclosure to the Secretary is required IF records otherwise shielded from disclosure contain protected health information.

Summary of Pertinent Provisions:

Section 41-9-5 provides that all data and information acquired by a review organization are confidential and “shall not be disclosed to anyone” except to the extent necessary to carry out purposes of the organization or in an appeal from the action of such an entity. The Supreme Court has construed this statute narrowly so as to limit protection, at least in peer review situations, to data or information generated *exclusively* for peer review and for no other purpose, and opinions formed *exclusively* as a result of peer review deliberations. *Southwest Community Health Services v. Smith*, 107 NM 196, 755 P.2d 40 (1988).

To qualify as a review organization under the statute, the purpose of the organization must be:

to gather and review information relating to the care and treatment of patients for the purpose of:

- (1) evaluating and improving the quality of health care services rendered in the area or by a health care provider;
- (2) reducing morbidity or mortality;
- (3) obtaining and disseminating statistics and information relative to the treatment and prevention of diseases, illness and injuries;
- (4) developing and publishing guidelines showing the norms of health care services in the area or by health care providers;

(5) developing and publishing guidelines designed to keep within reasonable bounds the cost of health care services

(6) reviewing the nature, quality or cost of health care services provided to enrollees of health maintenance organizations and nonprofit health care plans;

(7) acting as a professional standards review organization pursuant to 42 USC Section 1320c-1, et seq.; or

(8) determining whether a health care provider shall be granted authority to provide health care services using the health care provider's facilities or whether a health care provider's privileges should be limited, suspended or revoked."

NMSA § 41-9-2(E).

Does the state law apply to one or more Covered Entities?

Yes. Hospitals, Health Care Providers that are providers as defined in the Emergency Medical Services Act, NMSA §§ 24-10B-1 to -11, and Health Plans

Does the state law fall within a statutory carve-out category?

No.

Does the state law fit the carve-out for authorization or prohibition of disclosure of a minor's protected health information to a parent, guardian or person acting in loco parentis?

No.

Is the state law contrary to HIPAA because it is either impossible for the Covered Entity to comply with both the state and federal requirements, or the state law stands as an obstacle to the purposes of HIPAA?

Yes, but only with respect to disclosure to the Secretary. The pertinent question is whether the statute would prohibit the two types of disclosures that are required under HIPAA:

(1) disclosure to the individual, and (2) disclosure to the Secretary. HIPAA § 164.502(a)(2).

(1) Disclosure to the individual. Under HIPAA § 164.524(a), an individual has the right to access "protected health information about the individual *in a designated record set*," with certain exceptions not relevant here. A covered entity is not required to disclose to an individual information that is not part of a designated record set. A designated record set is defined by HIPAA § 164.501 to mean:

A group of records maintained by or for a covered entity that is:

(i) The medical records and billing records about individuals maintained by or for a covered health care provider;

(ii) The enrollment, payment, claims, adjudication, and case or medical management record systems maintained by or for a health plan; or

(iii) Used, in whole or in part, by or for the covered entity to make decisions about individuals.

Review organization records are not covered by (i) or (ii); the only question is whether they come within the category of records described in (iii).

As construed by the New Mexico Supreme Court, the Review Organization Immunity Act prohibits disclosure only of those records generated solely to further the purposes of the review organization. Under the statute, these purposes are limited to those specified in § 41-9-2(E), which is quoted above; all of these are addressed to issues more global than decisions about an individual patient. Records generated solely for the purpose of the review organization, as contemplated by statute, are not records “used to make decisions about individuals.” These records do not comprise all or part of a “designated record set.” A covered entity is therefore not required by HIPAA to disclose them. See 65 FR at 82554:

Covered entities often incorporate the same protected health information into a variety of different data systems, not all of which will be utilized to make decisions about individuals. For example, information systems that are used for quality control or peer review analyses may not be used to make decisions about individuals. In that case, the information systems would not fall within the definition of designated record set. We do not require entities to grant an individual access to protected health information maintained in these types of information systems.

See also 65 FR at 82606 (“We do not require a covered entity to provide access to all individually identified health information.... For example, a hospital’s peer review files that include protected health information about many patients but are used only to improve patient care at the hospital, and not to make decisions about individuals, are not part of that hospital’s designated record sets.”); 65 FR at 82607 (“protected health information used for peer review and quality assurance activities typically would not be used to make decisions about individuals, and, thus, typically would not be part of a designated record set.”). Because HIPAA does not require the disclosure of these records to an individual, the statute is not contrary to HIPAA and is not preempted.

(2) Disclosure to the Secretary. A covered entity must disclose protected health information to the Secretary “when required by the Secretary under subpart C of part 160 of this subchapter to investigate or determine the covered entity’s compliance with this subpart.” HIPAA § 164.502(a)(2)(ii). The obligation to disclose protected health information to the Secretary is not limited to information contained in a designated record set. HIPAA § 160.310(c). To the extent that records protected under this statute include protected health information, such records must be made available to the Secretary for purposes of ascertaining compliance with HIPAA requirements.

Are the [contrary] state law requirements more stringent than those of HIPAA?

No.

Is an exception warranted?

No.

Comments:

PREEMPTION ANALYSIS

Statute/Regulation: Traffic Safety Act
NMSA §§ 66-7-501 to -511

Agency: Traffic Safety Bureau

Summary: Establishes a traffic safety bureau to coordinate traffic safety and accident prevention programs, and authorizes the bureau to designate “approved accident-investigation unit.”

Conclusion: Not applicable to Covered Entities

Covered Entities Affected: None

Impact: None

Summary of Pertinent Provisions:

Section 66-7-508 provides that all records of an approved accident-investigation unit are confidential and not available to any person other than a member or employee of the unit.

Does the state law apply to one or more Covered Entities?

No.

Does the state law fall within a statutory carve-out category?

N/A

Does the state law fit the carve-out for authorization or prohibition of disclosure of a minor’s protected health information to a parent, guardian or person acting in loco parentis?

N/A

Is the state law contrary to HIPAA because it is either impossible for the Covered Entity to comply with both the state and federal requirements, or the state law stands as an obstacle to the purposes of HIPAA?

N/A

Are the [contrary] state law requirements more stringent than those of HIPAA?

N/A

Is an exception warranted?

N/A

Comments:

PREEMPTION ANALYSIS

Statute/Regulation: Uniform Health-Care Decisions Act
NMSA §§ 24-7A-1 to -17 (1997)

Agency:

Summary: This Act addresses advance directives and surrogate decision-making..

Conclusion: Not preempted.

**Covered
Entities Affected:** Health Care Providers

Impact: None

Summary of Pertinent Provisions:

Section 24-7A-2:

Recognizes the right of an adult or emancipated minor to make his or her own healthcare decisions, which may be communicated orally to a health care provider, and provides that an adult or emancipated minor may execute a power of attorney for health care that authorizes the agent to make any health care decision the individual could have made.

Section 24-7A-3:

Provides that an individual may revoke the designation of an agent either by a signed writing or by personally informing the supervising health care provider, and may revoke all or any part of an advance directive at any time and in any manner.

Section 24-7A-5:

Addresses when decisions may be made by a surrogate; who may act as a surrogate; and on what principles the surrogate's decision must be based. Provides that a patient has the right to disqualify any person from acting as his surrogate by a signed writing or by personally informing a health care provider of the disqualification, and authorizes a supervising health care provider to require written declaration stating facts reasonably sufficient to establish his authority as a surrogate.

Section 24-7A-6.1:

Provides that unless otherwise specified a parent or guardian of an unemancipated minor (under 15) has the authority to withhold or withdraw life-sustaining treatment. Allows an unemancipated minor with the capacity to render an informed consent the authority to make that decision. Requires that if the minor's primary physician has reason to believe that a parent or guardian has not been informed of a decision to withhold or withdraw life-sustaining treatment, he must make reasonable efforts to determine if the uninformed parent or guardian has maintained substantial and continuous contact with the minor. If so, the physician must make reasonable efforts to notify that parent or guardian before implementing a decision.

Section 24-7A-7:

Specifies the obligations of the health care provider with respect to advance directives and other instructions of the patient and persons authorized to make decisions for the patient. Identifies when a health care provider may decline to comply with an individual instruction and describes the process to be followed when that happens.

Section 24-7A-8:

Provides that, "unless otherwise specified in an advance directive, a person then authorized to make health-care decisions for a patient has the same rights as the patient to request, receive, examine, copy and consent to the disclosure of medical or any other health-care information."

Section 24-7A-11:

Describes how a determination of capacity may be made, and by whom, and how that determination may be challenged.

Section 24-7A-13:

Specifies the effect of the Act with respect to certain presumptions, prohibited acts, and health care standards. Provides that the Act does not authorize an agent or surrogate to consent to the admission of an individual to a mental health-care facility, and limits the effect of an authorization in an advance directive to do so to an authorization to present the individual for evaluation for admission.

Does the state law apply to one or more Covered Entities?

Yes. The Act affects disclosures of protected health information by Health Care Providers.

Does the state law fall within a statutory carve-out category?

No.

Does the state law fit the carve-out for authorization or prohibition of disclosure of a minor’s protected health information to a parent, guardian or person acting in loco parentis?

In part. Section 24-7A-6.1 requires that if a primary physician of a minor has reason to believe that a parent or guardian has not been informed of a decision to withhold or withdraw life-sustaining treatment, that physician must make reasonable efforts to determine if the uninformed parent or guardian has maintained substantial and continuous contact with the minor. If so, the physician must make reasonable efforts to notify that parent or guardian before implementing a decision. This provision is protected from preemption by the carve-out authorizing disclosure of a minor’s protected health information to a parent or guardian.

Is the state law contrary to HIPAA because it is either impossible for the Covered Entity to comply with both the state and federal requirements, or the state law stands as an obstacle to the purposes of HIPAA?

The provisions of the Act are not contrary to HIPAA. Although the Act deals with the question of who can make health care decisions, the ability to make decisions is predicated on access to the information necessary to make those decisions, i.e., protected health information.

The specific provision of the Act that addresses rights to health care information is § 24-7A-8, which provides that a person authorized to make health care decisions for a patient has the same rights as the patient with respect to that patient’s health care information. This provision is not contrary to HIPAA. HIPAA § 164.502(g) requires a Covered Entity to treat a “personal representative” as the individual for purposes of HIPAA privacy rules.** The regulation, however, looks to state law to determine who that personal representative is; it requires a Covered Entity to recognize as a personal representative a person who has authority under applicable law to act on behalf of an individual in making decisions related to health care. Because § 24-7A-8 is limited in scope to persons who have that authority, it is consistent with HIPAA § 164.502(g).

**HIPAA § 164.502(g) does recognize exceptions to this requirement for deceased individuals; in situations involving abuse, neglect or endangerment; and for unemancipated minors who may lawfully consent to health care treatment. The only exception relevant here is the last: in § 24-7A-6.1, the Act gives an unemancipated minor, who has the capacity to decide, the right to make the decision to withhold or withdraw treatment. The statute also requires the minor’s physician, under certain circumstances, to notify a parent of that decision before it is implemented. Even if a parent in this situation could not be treated under HIPAA as a personal representative, however, the disclosure here is allowed under HIPAA pursuant to the carve out for authorized disclosures to parents.

Are the [contrary] state law requirements more stringent than those of HIPAA?

N/A

Is an exception warranted?

N/A

Comments:

The Act allows an individual in certain circumstances to give instructions and grant and revoke authority orally. Because the authority at issue is the authority to act as the individual's personal representative, the requirements of HIPAA authorization are not at issue.

PREEMPTION ANALYSIS

Statute/Regulation: Uniform Parentage Act
NMSA §§ 40-11-1 to -23 (1986)

Agency:

Summary: The Act addresses how the parent and child relationship is established and recognizes certain presumptions to be used in making determinations of parentage. Section 6 of the Act provides for the filing of information relating to an artificial insemination with the vital statistics bureau (in connection with issuance of a birth certificate) and prohibits access except by court order to all papers and records pertaining to artificial insemination.

Conclusion: Not preempted, except to the extent § 40-11-6(C) would prohibit a Covered Entity from disclosing protected health information to the Secretary or (if in a designated record set) to the individual.

Covered Entities Affected: Health Care Providers

Impact: State law and HIPAA requirements apply. The Covered Entity must disclose protected health information to the individual and the Secretary, notwithstanding the prohibition of the state statute.

Summary of Pertinent Provisions:

Subsections (A) and (B) of § 40-11-6 require a physician to certify the date of the artificial insemination and the signatures of the husband or donor and the mother, and to file with the vital statistics bureau the consent of the husband or donor to be treated as the natural father.

Subsection (C) of § 40-11-6 provides that, "All papers and records pertaining to the insemination, whether part of a court, medical or any other file, are subject to inspection only upon an order of the court for good cause shown."

Does the state law apply to one or more Covered Entities?

The law applies to physicians and to health care facilities whose records include records pertaining to an artificial insemination.

Does the state law fall within a statutory carve-out category?

Subsections (A) and (B) of § 40-11-6 fall within the carve-out for statutes that provide for the reporting of vital statistics. (The contemplated disclosures are also allowed by HIPAA § 164.512(a)(1), which authorizes disclosures required by law without consent, authorization or the opportunity to agree or object.)

Does the state law fit the carve-out for authorization or prohibition of disclosure of a minor's protected health information to a parent, guardian or person acting in loco parentis?

No.

Is the state law contrary to HIPAA because it is either impossible for the Covered Entity to comply with both the state and federal requirements, or the state law stands as an obstacle to the purposes of HIPAA?

Yes. HIPAA requires a Covered Entity to disclose protected health information (1) to the Secretary of HHS for purposes of ascertaining compliance with HIPAA, and (2) to the individual if the information is maintained in a designated record set. HIPAA § 164.502(a)(2). The individual's right of access is limited only as follows: The right of access does not extend to psychotherapy notes; information compiled in reasonable anticipation of, or for use in, civil, criminal or administrative actions or proceedings; and protected health information that is subject to certain provisions of CLIA. HIPAA § 164.524(a)(1). In addition, a Covered Entity may deny an individual access (without the opportunity for review) if the covered entity is a correctional institution or a provider acting under the direction of a correctional institution; if the information was created or obtained in the course of research that includes treatment; if the information is subject to the federal Privacy Act and access may be denied under that act; or if the information was obtained from someone other than a healthcare provider under a promise of confidentiality. HIPAA § 164.524(a)(2). Reviewable grounds for denying access all involve a determination that substantial harm or endangerment is reasonably likely to result. HIPAA § 164.524(a)(3).

The information covered by § 40-11-6(C) does not fall within any of the exceptions to an individual's right of access that are recognized by HIPAA. A Covered Entity cannot comply both with HIPAA (which requires disclosure both to the Secretary and to the individual) and with the state statute (which prohibits both disclosures). The obligation under HIPAA is imposed on the Covered Entity; it does not allow a Covered Entity to transfer the decision— and thus the obligation — to disclose to a court, and would not, in any event, recognize the restriction on disclosure to situations where the individual (or the Secretary) could show “good cause.”

Are the [contrary] state law requirements more stringent than those of HIPAA?

No.

Is an exception warranted?

No. This information is not covered by any of the grounds for which an exception may be requested. See HIPAA § 160.203(a).

Comments:

Information pertaining to an artificial insemination would be protected health information of the mother and of the donor. An interesting question is whether information pertaining to the artificial insemination is protected health information of the child that is conceived thereby, and may therefore be accessed by that child.

PREEMPTION ANALYSIS

Statute/Regulation: Vital Statistics Act; Rules relating to Vital Records and Statistics
NMSA §§ 24-14-1 to 31 (1961)
7 NMAC 2.2.1 et. seq.

Agency: Department of Health

Summary: Requires the reporting of vital statistics

Conclusion: Not preempted.

**Covered
Entities Affected:** Health Care Providers

Impact: State law applies.

Summary of Pertinent Provisions:

The statute and regulations establish and implement a system of vital statistics and require disclosures in connection therewith. The regulations also include two provisions that include:

Does the state law apply to one or more Covered Entities?

Yes. Health care providers are required to certify certain disclosures under the Act.

Does the state law fall within a statutory carve-out category?

Yes. HIPAA § 160.203(c) excepts from preemption provisions of state law to the extent those provisions and any procedures established thereunder provide “for the reporting of disease or injury, child abuse, birth, or death, or for the conduct of public health surveillance, investigation or intervention.” Vital statistics acts come within this exception.

Does the state law fit the carve-out for authorization or prohibition of disclosure of a minor’s protected health information to a parent, guardian or person acting in loco parentis?

No.

Is the state law contrary to HIPAA because it is either impossible for the Covered Entity to comply with both the state and federal requirements, or the state law stands as an obstacle to the purposes of HIPAA?

N/A

Are the [contrary] state law requirements more stringent than those of HIPAA?

N/A.

Is an exception warranted?

N/A.

Comments:

PREEMPTION ANALYSIS

Statute/Regulation: Workers' Compensation Act: Release of Medical Records
NMSA § 52-10-1 (1990)

Agency:

Summary: Requires a health care provider to release protected health information to a worker, his employer, his employer's insurer, the appropriate peer review organization or the health care selection board.

Conclusion: Not preempted.

**Covered
Entities Affected:** Health Care Providers

Impact: State law and HIPAA requirements apply.

Summary of Pertinent Provisions:

Section 52-10-1 requires a health care provider to disclose information concerning "any health care or health care service provided to the worker" upon the request of either the worker or the employer to: the worker, that worker's employer, that employer's insurer, the appropriate peer review organization or the health care selection board. An authorization from the worker is required for those records that do NOT directly relate to any injuries or disabilities claimed by a worker for which that worker is receiving benefits from his employer.

Does the state law apply to one or more Covered Entities?

Yes. All health care providers.

Does the state law fall within a statutory carve-out category?

No.

Does the state law fit the carve-out for authorization or prohibition of disclosure of a minor's protected health information to a parent, guardian or person acting in loco parentis?

No.

Is the state law contrary to HIPAA because it is either impossible for the Covered Entity to comply with both the state and federal requirements, or the state law stands as an obstacle to the purposes of HIPAA?

No. The only information that may be disclosed without an authorization under § 52-10-1 are “records that are directly relate to any injuries or disabilities claimed by a worker for which that worker is receiving benefits from his employer. HIPAA § 164.512(l) authorizes a Covered Entity to disclose, without consent, authorization or the opportunity to agree or object, “protected health information as authorized by and to the extent necessary to comply with laws relating to workers’ compensation or other similar programs, established by law, that provide benefits for work-related injuries or illness without regard to fault.”

Are the [contrary] state law requirements more stringent than those of HIPAA?

N/A

Is an exception warranted?

N/A

Comments: