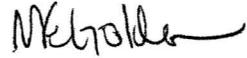


Colorado Department of Health Care Policy and Financing 1575 Sherman St., Denver, CO 80203-1714	NUMBER: HCPF 03-008
	CROSS REFERENCE:
DIVISION OR OFFICE: Division of Information Technology	DATE: April 14, 2003
SUBJECT AREA: HIPAA Compliance	
SUBJECT: Medicaid's HIPAA Privacy Expectations	APPROVED BY:  Marilyn Golden
TYPE: A - ACTION	

*Medicaid Agency Letters can be accessed online at:
www.chcpf.state.co.us >>Departmental Reference Material >>Agency Letters*

Purpose:

To inform County Departments of Social/Human Services what is expected by the Department of Health Care Policy and Financing under the new HIPAA Privacy Rule as to the use and disclosure of Medicaid client (or potential Medicaid client) protected health information. County Department of Social/Human Services Directors, Supervisors, and Medicaid technicians should review this agency letter.

Background:

The Department of Health Care Policy and Financing (Department) is the single state agency responsible for the administration of the Medicaid program and the children's health insurance program and is a "covered entity" under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) privacy regulations. As such, the Department is bound by the new federal privacy regulations to safeguard the privacy of client "protected health information" (45 C.F.R., Parts 160 and 164).

One of the responsibilities of the Department, as a covered entity under HIPAA, is to identify any person or entity who qualifies as a "business associate" of the Department. A business associate is a person or entity who performs, or assists in the performance of, a function or activity involving the use or disclosure of protected health information, on behalf of Medicaid, other than in the capacity as a member of the Department's workforce.

The Department may disclose protected health information to a business associate and may allow a business associate to create or use protected health information on its behalf, if the Department obtains satisfactory assurances (through a written contract or agreement) that the business associate will appropriately safeguard the protected health information.

The requirement for a business associate contract does not apply, however, in the following circumstance:

(ii) With respect to uses or disclosures by a health plan that is a government program providing public benefits, if eligibility for, or enrollment in, the health plan is determined by an agency other than the agency administering the health plan, or if the protected health information used to determine enrollment or eligibility in the health plan is collected by an agency other than the agency administering the health plan, and such activity is authorized by law, with respect to the collection and sharing of individually identifiable health information for the performance of such functions by the health plan and the agency other than the agency administering the health plan. 45 C.F.R. § 164.502(e)(1)(ii) (2002).

Procedure or Information:

The Department of Health Care Policy and Financing (Department) has determined that a business associate contract or written memorandum of understanding is *not* required with each County Department of Social/Human Services because their *primary responsibility* is to determine Medicaid eligibility and enroll individuals in Medicaid. Activities of County Departments of Social/Human Services relating to appeals, overpayment, and periodic reviews are also related to an individual's Medicaid eligibility. To the extent a County Department of Social/Human Services is performing *any* other business associate functions beyond enrollment and determination of Medicaid eligibility, a memorandum of understanding with the Department is required.

The only information County Departments of Social/Human Services have authority to use for an eligibility assessment based on a disability is: the eligibility determination decision by Disability Determination Services (DDS) and/or the eligibility determination for long term care services.

Even though a written memorandum of understanding is not required, County Departments of Social/Human Services are still considered business associates of the Department. As business associates of the Department, HIPAA and the Department require County Departments of Social/Human Services to take appropriate actions to safeguard protected health information received for the purposes of determining eligibility for Medicaid, pursuant to the requirements of the HIPAA Privacy Rules, 45 C.F.R. Parts 160 and 164.

For purposes of this document, "protected health information" (PHI) is information created or received by a health care provider, health plan, employer, or health care clearinghouse; that relates to the past, present, or future physical or mental health or condition or treatment of an individual, or the payment for health care to an individual; *and* that identifies the individual or can be used to identify the individual. This information can be transmitted or maintained in any other form or medium.

For purposes of this document, "use" of protected health information is the sharing, utilization, examination, or analysis of such information *within* a County Department of Social/Human Services. "Disclosure" of protected health information is the release, transfer, or sharing of such information *outside* a County Department of Social/Human Services. Any request for a release of protected health information provided to a County Department of Social/Human Services, which is not directly related to Medicaid eligibility or enrollment, should be referred to the Department.

The business associate requirements in 45 C.F.R. § 164.504(e)(2) that are normally contained in a written memorandum of understanding also apply to County Departments of Social/Human

Services that receive protected health information from or on behalf of Medicaid. In summary, those requirements are:

1. Permitted Uses. County Departments of Social/Human Services are not to use protected health information except for the limited purpose of enrolling an individual in, or determining an individual's eligibility for Medicaid, hearing the first level of appeal on eligibility determinations, and resolving overpayments due to inappropriate eligibility determination.

Further, County Departments of Social/Human Services are not to use protected health information in any manner that would constitute a violation of the Privacy Rule if so used by the Department.

County Departments of Social/Human Services may use protected health information: (i) for the proper management and administration of a County Department of Social/Human Services; (ii) to carry out the legal responsibilities of a County Department of Social/Human Services; or (iii) for data aggregation purposes for the health care operations of the Department, as determined by the Department.

2. Permitted Disclosures. County Departments of Social/Human Services are not to disclose protected health information in any manner that would constitute a violation of the Privacy Rule if disclosed by the Department.

County Departments of Social/Human Services may disclose protected health information: (i) for determining an individual's eligibility for, or enrollment in Medicaid; hearing the first level of appeal on eligibility determinations; and resolving overpayments due to inappropriate eligibility determination; (ii) for the proper management and administration of a County Department of Social/Human Services; (iii) as required by law; (iv) for data aggregation purposes for the health care operations of the Department, as determined by the Department; or (v) to report violations of law to appropriate federal or state authorities, consistent with 45 CFR Section 164.502(j)(1).

To the extent that County Departments of Social/Human Services disclose protected health information to a third party, County Departments of Social/Human Services must obtain, prior to making any such disclosure: (i) reasonable assurances that any disclosed protected health information will be held confidential and only disclosed as required by law or for the purposes for which it was disclosed; and (ii) an agreement from such third party to notify the County Department of Social/Human Services within two business days of any known breaches of confidentiality of the protected health information.

3. Appropriate Safeguards. County Departments of Social/Human Services shall implement appropriate safeguards in order to prevent the intentional or unintentional use or disclosure of protected health information other than as permitted by HIPAA and the Department.

County Departments of Social/Human Services shall maintain a comprehensive set of written privacy and security policies and procedures that includes administrative, technical and physical safeguards. Safeguard policies and procedures should include the following: no unauthorized persons have access to PHI, desktops free of PHI if possible, files stored in locked cabinets, documents with PHI not being left on printers or fax machines, limited

emailing of PHI outside Department, and shredding of PHI after use. (See Paragraph 16 below.)

4. Reporting of Improper Use or Disclosure. County Departments of Social/Human Services will report to the Department in writing any improper use or disclosure of protected health information within five (5) business days of becoming aware of such use or disclosure.
5. Associate's Agents. If a County Department of Social/Human Services uses one or more subcontractors or agents to provide services, and such subcontractors or agents receive or have access to Medicaid client protected health information, each subcontractor or agent shall sign an agreement with the County Department of Social/Human Services containing substantially the same provisions as this Agency letter, and further identifying the Department as a third party beneficiary with rights of enforcement and indemnification from such subcontractors or agents in the event of any violation of such subcontractor or agent agreement.

County Departments of Social/Human Services shall implement and maintain appropriate sanctions against agents and subcontractors that violate such restrictions and conditions and shall mitigate the effects of any such violation.

6. Access to Protected Health Information. County Departments of Social/Human Services will make Medicaid client protected health information, maintained by County Departments of Social/Human Services or its agents or subcontractors, available to the Department for inspection and copying within ten (10) business days of a request by the Department, to enable the Department to fulfill its obligations to permit access to client protected health information under the Privacy Rule.

County Departments of Social/Human Services are not to provide access to protected health information to Medicaid clients directly, but provide information to the Department so the Department can provide access to clients.

7. Amendment of PHI. Within ten (10) business days of receipt of a request from the Department for an amendment of protected health information within a Medicaid client record, County Departments of Social/Human Services, or their agents or subcontractors, will make such protected health information available to the Department for amendment, and incorporate any such amendment, to enable the Department to fulfill its obligations with respect to requests by clients to amend their protected health information under the Privacy Rule.

If any Medicaid client requests an amendment of protected health information directly to a County Department of Social/Human Services or its agents or subcontractors, the County Department of Social/Human Services must notify the Department in writing within five (5) business days of the receipt of the request. Any denial of amendment of client protected health information maintained by a County Department of Social/Human Services or its agents or subcontractors shall be the responsibility of the Department.

8. Accounting Rights. Within ten (10) business days notice by the Department of a Medicaid client request for an accounting of disclosures of protected health information, County Departments of Social/Human Services and their agents or subcontractors shall provide to the

Department the information required to provide an accounting of disclosures to enable the Department to fulfill its obligations under the Privacy Rule.

As set forth in, and as limited by, 45 C.F.R. Section 164.528, County Departments of Social/Human Services do not need to provide any information concerning disclosures made: (i) to carry out treatment, payment or health care operations, as set forth in 45 C.F.R. Section 164.506; (ii) to clients of protected health information about them as set forth in 45 C.F.R. Section 164.502; (iii) pursuant to a client authorization as provided in 45 CFR Section 164.508; (iv) to persons involved in the individual's care as set forth in 45 C.F.R. Section 164.510; (v) for national security or intelligence purposes as set forth in 45 C.F.R. Section 164.512(k)(2); or (vi) to correctional institutions or law enforcement officials as set forth in 45 C.F.R. Section 164.512(k)(5).

County Departments of Social/Human Services agree to implement a process that allows for disclosure information to be collected and maintained by the County Department of Social/Human Services and its agents or subcontractors for at least six (6) years prior to the request, but not before April 14, 2003. At a minimum, such information shall include: (i) the date of disclosure; (ii) the name of the entity or person who received protected health information and, if known, the address of the entity or person; (iii) a brief description of protected health information disclosed; and (iv) a brief statement of the purpose of the disclosure.

In the event that the request for an accounting is delivered directly to a County Department of Social/Human Services or its agents or subcontractors, the County Department of Social/Human Services shall within five (5) business days of the receipt of the request forward it to the Department in writing. It shall be the Department's responsibility to prepare and deliver any such accounting requested. County Departments of Social/Human Services shall not disclose any protected health information except as set forth in this Agency letter.

9. Governmental Access to Records. If a County Department of Social/Human Services receives a request, made on behalf of the Secretary of the U.S. Department of Health and Human Services (Secretary), the County Department of Social/Human Services shall promptly notify the Department that it has received such a request. Upon receipt of a written directive from the Department, the County Department of Social/Human Services shall make its internal practices, books, and records relating to the use and disclosure of protected health information available to the Secretary, for purposes of determining the Department's compliance with the Privacy Rule. The County Department of Social/Human Services shall concurrently provide to the Department a copy of any protected health information that the County Department of Social/Human Services provides to the Secretary.
10. Minimum Necessary. County Departments of Social/Human Services, and their agents or subcontractors, shall only request, use and disclose the minimum amount of protected health information necessary to accomplish the purpose of the request, use or disclosure, in accordance with the minimum necessary requirements of the Privacy Rule.
11. Data Ownership. County Departments of Social/Human Services acknowledge that they have no ownership rights with respect to the protected health information of Medicaid clients.

12. Retention of Protected Health Information. County Departments of Social/Human Services, and their subcontractors or agents, shall retain all required protected health information for a period of at least six (6) years after disclosure. (See Paragraph 16 below.)
13. Notification of Breach. County Departments of Social/Human Services shall notify the Department within two (2) business days of any suspected or actual breach of security, or unauthorized use or disclosure of protected health information. County Departments of Social/Human Services shall take prompt corrective action to cure any such breach or unauthorized use or disclosure.
14. Audits, Inspection and Enforcement. Within ten business (10) days of a written request by the Department, County Departments of Social/Human Services, and their agents or subcontractors, will allow the Department to conduct a reasonable inspection of the facilities, systems, books, records, agreements, and all policies and procedures relating to the use or disclosure of protected health information.

County Departments of Social/Human Services and the Department shall agree in advance as to the scope, timing and location of such an inspection. The Department shall protect the confidentiality of all information provided.

Whether the Department inspects, or fails to inspect, County Department of Social/Human Services facilities, systems, books, records, agreements, and all policies and procedures, does not relieve County Departments of Social/Human Services of their responsibility to comply with these requirements or the Privacy Rule.

15. Safeguards During Transmission. County Departments of Social/Human Services are responsible for using appropriate safeguards to maintain and ensure the confidentiality, privacy and security of any protected health information being transmitted to the Department, until the Department receives such protected health information.
16. Destruction of Medical Records. County Departments of Social/Human Services are responsible for destroying (shredding) medical and financial documentation contained in the disability / DDS file (green folder) of a client at the conclusion of all County action (this includes any time period required by other pertinent state and federal laws, or necessary for the client appeal process to conclude). The only documentation that needs to be retained is the following: application, determination letter, CAASE Development Sheet, Disability Determination and Transmittal (831), Activities of Daily Living and Pain forms, Childhood Disability Evaluation form, Residual Physical Functional Capacity Assessment, Psychiatric Review Technique, Mental Residual Functional Capacity Assessment, Work History, and Vocational Worksheet.
16. HCPF Policies and Procedures. Department HIPAA Privacy policies and procedures can be found at www.chcpf.state.co.us/hipaa/hippaindex.

Effective Date:

April 14, 2003

Contact Person:

HCPF Privacy Officer, (303) 866-4366