

STATE LAWS GOVERNING THE CONFIDENTIALITY OF PROTECTED HEALTH INFORMATION POLICY

RESPONSIBILITY: Designated Attorney for the Bureau of Behavioral Health and Health Facilities, Privacy Official or Designee(s)

BACKGROUND:

The confidentiality of protected health information (PHI) is governed by both federal and state law. Federal privacy regulations preempt state law except when the state law is more stringent than the federal regulations, or when the Secretary of the United States Department of Health and Human Services exempts a particular state law from the federal preemption and in certain other instances.

Meaning of the term “more stringent”

A state law is more stringent than the federal privacy regulations, and therefore takes precedence over the federal regulations, in the following circumstances:

1. A state law that prohibits or restricts a use or disclosure of PHI, that would otherwise be permitted under federal privacy regulations, is more stringent than the federal regulations.
 - 1.1. However, the federal regulations preempt any state law that would:
 - 1.1.1. Limit disclosure of PHI to the Secretary of DHHS if it is required in connection with determining compliance with the federal privacy regulations; or
 - 1.1.2. Impose limits on the right of an individual (or the individual’s personal representative) to have access to his or her own protected health information, if the resulting access is more limited than that granted by the federal regulations.
2. A state law that grants an individual (or the individual’s personal representative) greater rights of access to or amendment of his or her own PHI is more stringent than the federal regulations.
 - 2.1. However, the federal regulations do not preempt any state law that:
 - 2.1.1. Prohibits the disclosure of protected health information about a minor to a parent, guardian, or person acting in loco parentis of such minor; or,

- 2.1.2. Authorizes the disclosure of protected health information about a minor to a parent, guardian, or person acting in loco parentis of such minor.
3. A state law that provides a greater amount of information to an individual about a use or disclosure of his or her protected health information, or more information about his or her rights and remedies, is more stringent than the federal regulations.
4. A state law that requires written consent for use or disclosure of certain PHI, or narrows the scope or duration of an authorization or consent, relative to the federal regulations, is more stringent. Similarly, a state law that increases the privacy protection afforded by a consent or authorization, or reduces the coercive effect of the circumstances surrounding the consent or authorization, is more stringent and is not preempted by the federal privacy regulations.
5. A state law that requires a longer record retention period, or requires more detailed information in an accounting of disclosures, is more stringent than the federal regulations and is not preempted.
6. With respect to any other matter, a state law that provides greater privacy protection for the individual who is the subject of the individually identifiable health information is more stringent and is not preempted by the federal regulations.

Also, federal law does not preempt state laws that require reporting protected health information. For instance, federal law does not preempt state laws requiring birth and death certificates, child abuse reporting, infectious disease reporting, reports from health plans, or reports for public health purposes.

The purpose of this policy is to establish responsibility for reviewing state laws relating to the privacy and confidentiality of protected health information, to determine which state laws are more stringent, and which are, and are not, preempted by federal law.

POLICY:

The Designated Attorney for Behavioral Health and Health Facilities (BHHF) is responsible:

1. To know the requirements of both federal and state laws that relate to the privacy, security and confidentiality of protected health information (PHI);
2. To monitor changes in federal and state laws that relate to the privacy, security and confidentiality of protected health information

3. To maintain an up to date listing of which state laws involving protected health information are not preempted by federal laws;
4. To identify which state laws have been excepted from the federal preemption;
5. To identify when an exception to the federal preemption has been revoked; and,
6. To routinely review policies, procedures and training materials regarding the use, disclosure, transmission and safeguarding of protected health information to assure that they comply with applicable federal and state law.

Effective Date: 4/14/03

Dates Revised:



Jerome E. Lovrien, Commissioner, Bureau for Behavioral Health and Health Facilities