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ATTORNEY-CLIENT PRIVILEGE

Kristi Harshbarger, Legal Counsel
Iowa State Association of Counties
5500 Westown Parkway, Suite 190
West Des Moines, Iowa 50266

Dear Kristi:

You asked whether third-party health care providers (including mental health care providers) are permitted to access "Level 1" (i.e., demographic information, but not clinical information) client data in the Provider Portal within CSN in order to facilitate the providers' inputting of certain outcomes data for clients that is required by the counties/regions. I understand that in order to facilitate these providers' inputting of the outcomes data into CSN, the provider would search for the specific client in CSN using certain demographic information such as the client's name, address, and/or social security number. It is important for the provider to have confirmation (through matching demographic information) that the file they are uploading outcomes data to is the correct client file.

Below we have provided an explanation of the law that would permit these third party providers to access the Level 1 data in the CSN for purposes of inputting their patient's outcomes information required by the county/region.

A. HIPAA

HIPAA generally prohibits the disclosure of protected health information (PHI) by a covered entity unless authorized under HIPAA. Under HIPAA, PHI means "individually identifiable health information . . . that is: (i) Transmitted by electronic media; (ii) Maintained in electronic media; or (iii) Transmitted or maintained in any other form or medium." 45 C.F.R. § 160.103. Additionally, a covered entity is defined as: "(i) A health plan; (ii) A health care clearinghouse; [or] (iii) A health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter." See 45 C.F.R. § 160.103.

Our understanding is that the data in CSN, even Level 1 data, would be considered to be PHI. We also understand that the outcomes data of a third-party health care provider would be considered to be PHI.

The general rule under HIPAA is that a patient (or the patient's personal representative) must authorize the disclosure of PHI. However, HIPAA provides a number of exceptions to this rule. The relevant exceptions and regulations are described below:

1. HIPAA permits the counties/regions to share the Level 1 client data with the providers through CSN under the facts described above, without a client authorization.

Under HIPAA, 45 C.F.R. § 164.506(c)(1), covered entities, such as the counties/regions in CSN, may disclose PHI (such as the Level 1 data) for the counties'/regions' own treatment, payment or health care operations purposes. The disclosure of the Level 1 data to the health care provider would not be for treatment or payment purposes, but would be for health care operations purposes. 45 C.F.R. § 164.501 defines "health care operations" to include the following activities of the covered entity (i.e., the activities of the counties/regions in CSN): "(1) Conducting quality assessment and improvement activities, **including outcomes evaluation** and development of clinical guidelines, provided that the obtaining of generalizable knowledge is not the primary purpose of any studies resulting from such activities; patient safety activities (as defined in 42 C.F.R. § 3.20); population-based activities relating to improving health or reducing health care costs, protocol development, case management and care coordination, contacting of health care providers and patients with information about treatment alternatives; and related functions that do not include treatment..." (emphasis added).

As long as the Level 1 data being shared with the providers is for the purpose of the counties/regions facilitating the provider's inputting of the data into CSN so that the counties/regions can track the outcomes of the clients they serve, then the sharing of Level 1 data with the providers would meet the definition of "health care operations" of the counties/regions, and thus, HIPAA allows the counties/regions to share PHI (i.e., the Level 1 data) for these purposes.

We note, as discussed further, below, that HIPAA imposes a "reasonable safeguards" and a "minimum necessary" obligation on covered entities. We believe that CSN imposes reasonable safeguards by requiring that third-party providers who access the data have a signed confidentiality agreement in place, and by auditing access to CSN on a regular basis to ensure that inappropriate access is not occurring. We believe that CSN is meeting the minimum necessary standard under HIPAA by only permitting the third party health care providers to access Level 1 data (rather than clinical data) about individuals. As discussed further, below, the limitation to Level 1 data also protects against a violation of Iowa's mental health privacy law because the Level 1 data is likely not considered "mental health information" that is governed by Iowa's mental health privacy law in Iowa Code Chapter 228.

2. HIPAA permits the providers to disclose the outcomes data with the counties/regions through CSN under the facts described above, without a client authorization.

Under HIPAA, 45 C.F.R. § 165.506(c)(4), "A covered entity [such as third-party health care providers] may disclose protected health information [such as the outcomes data] to another covered entity [such as to the counties/regions in the CSN] for health care operations activities of the entity that receives the information [i.e., the counties/regions in the CSN], if each entity either has or had a relationship with the individual who is the subject of the protected

health information being requested, the protected health information pertains to such relationship, and the disclosure is: (i) For a purpose listed in paragraph (1) or (2) of the definition of health care operations; or (ii) For the purpose of health care fraud and abuse detection or compliance."

Paragraph 1 of the definition of "health care operations" states as follows: "(1) Conducting quality assessment and improvement activities, **including outcomes evaluation** and development of clinical guidelines, provided that the obtaining of generalizable knowledge is not the primary purpose of any studies resulting from such activities; patient safety activities (as defined in 42 C.F.R. § 3.20); population-based activities relating to improving health or reducing health care costs, protocol development, case management and care coordination, contacting of health care providers and patients with information about treatment alternatives; and related functions that do not include treatment…" 45 C.F.R. § 164.501 (emphasis added).

Under the facts described above, the third-party health care providers' disclosures of the outcomes data to CSN fits squarely within this rule because it is for the purposes listed in paragraph 1 of the definition of "health care operations". The provider would be sharing the outcomes information with another covered entity (i.e., the counties/regions) for the counties'/regions' health care operations activities (under paragraph 1 of the definition of "health care operations") and both the providers and the counties/regions had or have a relationship with the individual who is the subject of the information. Thus, no patient authorization is needed under HIPAA for the provider to disclose this information to the counties/regions under these circumstances.

3. HIPAA's minimum necessary and reasonable safeguards requirements appear to be met.

HIPAA contains both minimum necessary and reasonable safeguard requirements that apply to almost all disclosures, and would apply to the disclosures addressed in this memo. Under the minimum necessary rule, all uses and disclosures of PHI must only be the minimum necessary to accomplish the intended purposes. Under the reasonable safeguards rule, covered entities must implement reasonable administrative, technical and physical safeguards to protect patient privacy.

In this case, these requirements would be met from CSN's perspective if the providers sign confidentiality agreements prior to accessing the CSN, and if the providers are limited to accessing only Level 1 data. Furthermore, CSN audits access within CSN and if there is any suspicious access, CSN will investigate and discipline appropriately, which could include terminating the offending provider's access to CSN. Thus, CSN is able to support its compliance with HIPAA's reasonable safeguards and minimum necessary obligations.

In this case, these requirements also appear to be met from the providers' perspective because they are only disclosing the narrow amount and type of information that is needed by the counties and regions to track outcomes of the clients they serve. Thus, the provider would be reporting only the minimum necessary information. Also, from the providers' perspective,

there are reasonable safeguards in place associated with these disclosures. The providers would be submitting the outcomes data through a secure system (the CSN) to covered entities who are bound by the confidentiality obligations of federal and state law.

B. Iowa's Mental Health Privacy Law

State laws that are more restrictive than HIPAA must also be followed. Iowa's mental health privacy law, set out in Iowa Code Chapter 228, provides greater protection for the confidentiality of "mental health information" than HIPAA provides, generally, for PHI.

"Mental health information" is defined as "oral, written, or recorded information which indicates the identity of individual receiving professional services and which relates to the diagnosis, course, or treatment of the individual's mental or emotional condition." Iowa Code § 228.1(5). The Level 1 data to which the third party providers have access would not likely be considered "mental health information" that is governed by Iowa's mental health privacy law in Iowa Code Chapter 228.

However, we understand that some of the information that third-party health care providers would be uploading to the CSN *may* contain "mental health information." If the outcomes data would not meet the definition of "mental health information", then this Iowa law would not apply. But, if the outcomes data does fall within the definition of "mental health information", then in addition to complying with HIPAA, the providers' disclosures of the data to the CSN without an authorization from the patient must be permitted under Iowa Code Chapter 228.

Iowa Code Chapter 228 prohibits the disclosure of mental health information without written authorization except under limited exceptions. One exception to the written authorization requirement is for "administrative disclosures." *See* Iowa Code § 228.2(1).

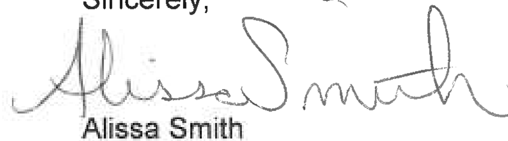
The following are the relevant provisions under Iowa law that, read together, provide an argument that the law would support disclosures of mental health information under the circumstances described above, without the patient's authorization, because the disclosures are necessary to facilitate the provision of administrative and professional services to the individual. Iowa Code § 228.5 ("Administrative disclosures") provides that:

> "(1) An individual or an individual's legal representative shall be informed that mental health information relating to the individual may be disclosed to employees or agents of or for the same mental health facility **or to other providers of professional services or their employees or agents if and to the extent necessary to facilitate the provision of administrative and professional services to the individual**. ...
>
> (4) Mental health information relating to an individual may be disclosed **to other providers of professional services or their employees or agents if and to the extent necessary to facilitate the provision of administrative and professional services to the individual**." (emphasis added).

Because Iowa Code Chapter 228 allows for the disclosure of mental health information as necessary to facilitate and administrate professional mental health services to individuals, we believe the type of disclosures described (for purposes of reporting outcomes information to the counties/regions who are also providing professional mental health services to the individuals) would arguably fall within the "administrative disclosures" exception and thus, would carry low risk under Iowa's mental health privacy law.

Please contact me if you have additional questions about this matter.

Sincerely,



Alissa Smith

AS/jln