

## Chapter 18

### Use or Disclosure of Protected Health Information Potentially Related to Reproductive Health Care

#### I. INTRODUCTION

The purpose of this Chapter is to describe the additional requirements that are applicable to when and how PHI potentially related to reproductive health care can be used internally within DMH and/or disclosed by DMH to others outside of DMH without the authorization of the person who is the subject of the reproductive health care PHI information for the following purposes:

- Health oversight activities;
- Judicial or administrative proceedings;
- Law enforcement; or
- Regarding decedents, disclosures to coroners and medical examiners.

It also describes the HIPAA prohibition of use or disclosure of Reproductive Health Care PHI for certain activities.

Reproductive health care is health care that affects the health of an individual in all matters relating to the reproductive system and to its functions and processes. Reproductive health care includes, seeking, obtaining, providing, or facilitating, but is not limited to, any of the following: expressing interest in, using, performing, furnishing, paying for, disseminating information about, arranging, insuring, administering, authorizing, providing coverage for, approving, counseling about, assisting, or otherwise taking action to engage in reproductive health care; or attempting any of the same.

#### II. PROHIBITION ON USE OR DISCLOSURE FOR CERTAIN ACTIVITIES

**(A) Prohibition:** Subject to Sections II [\(B\)](#) and [\(C\)](#) below, DMH and its business associates may not use or disclose PHI for any of the following activities:

- (1) To conduct a criminal, civil, or administrative investigation into any person for the mere act of seeking, obtaining, providing, or facilitating reproductive health care;
- (2) To impose criminal, civil, or administrative liability on any person for the mere act of seeking, obtaining, providing, or facilitating reproductive health care; or
- (3) To identify any person for any purpose described in Sections II [\(A\)\(1\)](#) or [\(2\)](#) above.

**(B) Applicability:** The prohibition at [Section II\(A\)](#) above applies only when DMH has reasonably determined that one or more of the following conditions exists:

- The reproductive health care is lawful under the law of the state in which such health care is provided under the circumstances in which it is provided.
  - For example, if a resident of one state traveled to another state to receive reproductive health care, such as an abortion, that is lawful in the state where such health care was provided.
- The reproductive health care is protected, required, or authorized by Federal law, including the U.S. Constitution, regardless of the state in which such health care is provided.
  - For example, if use of the reproductive health care, such as contraception, is protected by the Constitution.
- The reproductive health care was provided by a person/entity other than DMH (or business associates) and the presumption described in [Section \(II\)\(C\)](#) below applies.

**(C) Presumed Lawful:** Reproductive health care provided by a person/entity other than DMH is presumed lawful under this Section II unless DMH has either of the following:

- (1) Actual knowledge that the reproductive health care was not lawful under the circumstances in which it was provided; or
- (2) Factual information supplied by the person requesting the use or disclosure of PHI that demonstrates a substantial factual basis that the reproductive health care was not lawful under the specific circumstances in which it was provided.

**NOTE:** DMH may not make a disclosure if the requestor indicates that the PHI is to investigate or impose liability on any person for the mere act of seeking, obtaining, providing, or facilitating reproductive health care, or to identify any person for such purposes, but the reproductive health care at issue was **not lawful** under the circumstances in which it was provided, **unless** the requestor supplies information that demonstrates a substantial factual basis that the reproductive health care was not lawful under the specific circumstances in which it was provided. Legal must be consulted if this is the case.

**(D) Implementation in Abuse, Neglect, and Endangerment Situations:**

- (1) **Reporting:** DMH cannot use or disclose PHI potentially related to reproductive health care for reports of abuse, neglect, or domestic violence if the report is based solely on the provision or facilitation of reproductive health care.
- (2) **Legally Authorized Representatives (LAR):** Notwithstanding any law to the contrary, DMH may elect not to treat a person as the LAR of an individual for purpose of authorizing use or disclosure of the individual's PHI and/or exercise of the individual's HIPAA privacy rights, if the following conditions are met:
  - (i) DMH has a reasonable belief that either of the following is true:

- (a) The individual has been or may be subjected to domestic violence, abuse, or neglect by such person; or
- (b) Treating such person as the LAR could endanger the individual; **and**
- (ii) DMH, in the exercise of professional judgment, decides that it is not in the best interest of the individual to treat the person as the individual's LAR for HIPAA privacy purposes. (See [Chapter 6](#) regarding best interest determinations.)

DMH does not have a reasonable belief under [Section II\(D\)\(2\)\(i\)](#) above if the basis for the belief is the provision or facilitation of reproductive health care by the LAR for and at the request of the individual.

### **III. WHEN AN ATTESTATION IS REQUIRED TO USE OR DISCLOSE REPRODUCTIVE HEALTH CARE INFORMATION**

#### **(A) Use or Disclosures Requiring Attestation:**

- (1) DMH without obtaining a valid attestation under Section III(B), below is not permitted to use or disclose PHI potentially related to reproductive health care for any of the following purposes:

- Health oversight activities;
- Judicial or administrative proceedings;
- Law enforcement; or
- Regarding decedents, disclosures to coroners and medical examiners.

In addition the use and disclosure must meet the requirements of when DMH can use or disclose PHI for these purposes without obtaining authorization (see [Chapter 6](#) regarding additional conditions and limitations on such disclosures.) It is important to understand that even if these requirements are met, DMH is permitted under HIPAA to use and disclose the PHI but is not required to do so.

#### **(B) Valid Attestations:** Required content and other obligations:

The attestation must of the person/entity requesting the use and disclosure.

- (1) **Required elements:** A valid attestation under this section must contain the following elements:

- (i) A description of the information requested that identifies the information in a specific fashion, including one of the following:

- (a) The name of any individual(s) whose PHI is sought, if practicable; or

- (b) If including the name(s) of any individual(s) whose PHI is sought is not practicable, a description of the class of individuals whose PHI is sought.
- (ii) The name or other specific identification of the person(s), or class of persons, who are requested to make the use or disclosure.
- (iii) The name or other specific identification of the person(s), or class of persons, to whom DMH is to make the requested use or disclosure.
- (iv) A clear statement that the use or disclosure is not for a purpose prohibited under [Section II\(A\)](#) above.
- (v) A statement that a person may be subject to criminal penalties pursuant to 42 U.S.C. 1320d-6 if that person knowingly and in violation of HIPAA obtains individually identifiable health information relating to an individual or discloses individually identifiable health information to another person.
- (vi) Signature of the person requesting the PHI, which may be an electronic signature, and date. If the attestation is signed by a representative of the person requesting the information, a description of such representative's authority to act for the person must also be provided.

**(2) Plain language requirement:** The attestation must be written in plain language.

**(C) Defective Attestations:**

**(1) Defects:** An attestation is not valid if it has any of the following defects:

- (i) The attestation lacks an element or statement required by [Section III\(B\)\(1\)](#) above.
- (ii) The attestation contains an element or statement not required by [Section III\(B\)\(1\)](#) above.
- (iii) The attestation violates [Section III\(C\)\(2\)](#) below.
- (iv) DMH has actual knowledge that material information in the attestation is false.
- (v) A reasonable HIPAA Covered Entity in the same position would not believe that the attestation is true with respect to the requirement at [Section III\(B\)\(1\)\(iv\)](#) above.
- (vi) DMH has knowledge that the attestation has been revoked.

**(2) Compound Attestation:** An attestation may not be combined with any other document except where such other document is needed to satisfy the requirements at [Section III\(B\)\(iv\)](#) above or at [Section II\(C\)](#), as applicable.

See the **NOTE** in [Section II\(C\)](#) above.

**(3) Compliance:** If DMH uses or discloses PHI related to reproductive health care for a purpose specified in [Section \(III\)\(A\)\(1\)](#) above, in reliance on an attestation that is defective under [Section \(III\)\(C\)\(1\)](#) above, it is not in compliance with this Chapter and is violation of HIPAA.

**(D) Material Misrepresentations:** If, during the course of using or disclosing PHI in reasonable reliance on a facially valid attestation, DMH discovers information reasonably showing that a representation made in the attestation was materially false DMH must cease such use or disclosure.

#### **IV. DOCUMENTATION**

DMH must obtain a new attestation for each specific use or disclosure request.

Disclosures made under this Chapter may need to be logged for audit trail purposes. (See [Chapter 12](#), Right to an Audit Trail of Certain Disclosures of Protected Health Information.)

DMH must maintain a copy of each attestation it receives pursuant to this Chapter and any relevant supporting documents for a minimum of 6 years.

#### **V. LEGAL REFERENCE AND ATTACHMENT**

HIPAA	45 CFR § 160.103
	45 CFR § 164.502
	45 CFR § 164.509
	45 CFR § 164.512
	45 CFR § 164.530(j)
	42 U.S.C. 1320d-6
	89 FR 32976, 33031

Attestation Regarding a Requested Use or Disclosure of  
Protected Health Information  
Potentially Related to Reproductive Health Care