

HIPAA Privacy *An innovative approach to self-implementation* **WorkGroups®**

Teleconference

Patient Representatives & Verification - Advanced Issues

[Ver 1.0]

Rules and Resources

Wednesday, October 1, 2003
10:00 a.m. – 11:00 a.m., CDT



“Personal Representatives and Verification ”
– Setting the Stage –

Five Basic Features of Privacy Regulations

I. Basic Rule and general concepts

II. Permitted uses & disclosures

III. Other Patient Rights

IV. Administrative Requirements

V. Technical Provisions

I. No use or disclosure unless permitted

A. The “Basic Rule”

B. Specific Disclosure Issues

1. Organizational Issues

2. Disclosure Issues

a. De-identification

b. Minimum necessary

c. Personal representative

IV. Administrative Requirements

A. personnel designations

B. training

C. safeguards & security

D. complaints to the covered entity

E. sanctions

F. mitigation

G. non-retaliation

H. non-waiver

I. policies and procedures

J. documentation

K. group health plans

L. verification

PERSONAL REPRESENTATIVES**§ 164.502 Uses and disclosures of protected health information: general rules.**

* * *

(g) (1) *Standard: Personal representatives.* As specified in this paragraph, a covered entity must, except as provided in paragraphs (g)(3) and (g)(5) of this section, treat a personal representative as the individual for purposes of this subchapter.

(2) *Implementation specification: adults and emancipated minors.* If under applicable law a person has authority to act on behalf of an individual who is an adult or an emancipated minor in making decisions related to health care, a covered entity must treat such person as a personal representative under this subchapter, with respect to protected health information relevant to such personal representation.

(3) *Implementation specification: unemancipated minors¹.*

(i) If under applicable law a parent, guardian, or other person acting *in loco parentis* has authority to act on behalf of an individual who is an unemancipated minor in making decisions related to health care, a covered entity must treat such person as a personal representative under this subchapter, with respect to protected health information relevant to such personal representation, except that such person may not be a personal representative of an unemancipated minor, and the minor has the authority to act as an individual, with respect to protected health information pertaining to a health care service, if:

(A) The minor consents to such health care service; no other consent to such health care service is required by law, regardless of whether the consent of another person has also been obtained; and the minor has not requested that such person be treated as the personal representative;

(B) The minor may lawfully obtain such health care service without the consent of a parent, guardian, or other person acting *in loco parentis*, and the minor, a court, or another person authorized by law consents to such health care service; or

(C) A parent, guardian, or other person acting *in loco parentis* assents to an agreement of confidentiality between a covered health care provider and the minor with respect to such health care service.

(ii) Notwithstanding the provisions of paragraph (g)(3)(i) of this section²:

(A) If, and to the extent, permitted or required by an applicable provision of State or other law, including applicable case law, a covered entity may disclose, or provide access in accordance with § 164.524 to, protected health information about an unemancipated minor to a parent, guardian, or other person acting *in loco parentis*;

¹ “[T]he Department assumes that the current practices of health care providers with respect to access by parents and confidentiality of minor’s records are consistent with State and other applicable law, and, therefore, can continue under the Privacy Rule. . . . However, this new standard would not permit activity that would be impermissible under State law.” Preamble to final revisions, 67 FR 53201-2.

² “The addition of paragraphs (g)(3)(ii)(A) and (B) of ‘164.502, clarify that State and other applicable law governs when such law explicitly requires, permits, or prohibits disclosure of protected health information to a parent.” Preamble to final revisions, 67 FR 53201.

(B) If, and to the extent, prohibited by an applicable provision of State or other law, including applicable case law, a covered entity may not disclose, or provide access in accordance with § 164.524 to, protected health information about an unemancipated minor to a parent, guardian, or other person acting in *loco parentis*; and

(C) Where the parent, guardian, or other person acting in *loco parentis*, is not the personal representative under paragraph (g)(3)(i)(A), (B), or (C) of this section and where there is no applicable access provision under State or other law, including case law, a covered entity may provide or deny access under § 164.524 to a parent, guardian, or other person acting in *loco parentis*, if such action is consistent with State or other applicable law, provided that such decision must be made by a licensed health care professional³, in the exercise of professional judgment.

(4) *Implementation specification: Deceased individuals.* If under applicable law an executor, administrator, or other person has authority to act on behalf of a deceased individual or of the individual's estate, a covered entity must treat such person as a personal representative under this subchapter, with respect to protected health information relevant to such personal representation.

(5) *Implementation specification: Abuse, neglect, endangerment situations.* Notwithstanding a State law or any requirement of this paragraph to the contrary, a covered entity may elect not to treat a person as the personal representative of an individual if:

(i) The covered entity has a reasonable belief that:

(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 personal representative could endanger the individual; and

(ii) The covered entity, 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 personal representative.

³ This decision should be made by a health care professional, who is accustomed to exercising professional judgment. A health plan may also exercise such discretion if the decision is made by a licensed health care provider. Preamble to final revisions, 67 FR 53201.

OCR HIPAA Privacy
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GUIDANCE

PERSONAL REPRESENTATIVES

[45 CFR 164.502(g)]

Background

The HIPAA Privacy Rule establishes a foundation of Federally-protected rights which permit individuals to control certain uses and disclosures of their protected health information. Along with these rights, the Privacy Rule provides individuals with the ability to access and amend this information, and the right to an accounting of certain disclosures. The Department recognizes that there may be times when individuals are legally or otherwise incapable of exercising their rights, or simply choose to designate another to act on their behalf with respect to these rights. Under the Rule, a person authorized (under State or other applicable law, e.g., tribal or military law) to act on behalf of the individual in making health care related decisions is the individual's "personal representative." Section 164.502(g) provides when, and to what extent, the personal representative must be treated as the individual for purposes of the Rule. In addition to these formal designations of a personal representative, the Rule at 45 CFR 164.510(b) addresses situations in which persons are involved in the individual's health care but are not expressly authorized to act on the individual's behalf.

How the Rule Works

General Provisions. Except as otherwise provided in 45 CFR 164.502(g), the Privacy Rule requires covered entities to treat an individual's personal representative as the individual with respect to uses and disclosures of the individual's protected health information, as well as the individual's rights under the Rule.

The personal representative stands in the shoes of the individual and has the ability to act for the individual and exercise the individual's rights. For instance, covered entities must provide the individual's personal representative with an accounting of disclosures in accordance with 45 CFR 164.528, as well as provide the personal representative access to the individual's protected health information in accordance with 45 CFR 164.524 to the extent such information is relevant to such representation. In addition to exercising the individual's rights under the Rule, a personal representative may also authorize disclosures of the individual's protected health information.

In general, the scope of the personal representative's authority to act for the individual under the Privacy Rule derives from his or her authority under applicable law to make health care decisions for the individual. Where the person has broad authority to act on the behalf of a living individual in making decisions related to health care, such as a parent with respect to a minor child or a legal guardian of a mentally incompetent adult, the covered entity must treat the personal representative as the individual for all purposes under the Rule, unless an

OCR HIPAA Privacy
December 3, 2002
Revised April 3, 2003

exception applies. (See below with respect to abuse, neglect or endangerment situations, and the application of State law in the context of parents and minors). Where the authority to act for the individual is limited or specific to particular health care decisions, the personal representative is to be treated as the individual only with respect to protected health information that is relevant to the representation. For example, a person with an individual’s limited health care power of attorney regarding only a specific treatment, such as use of artificial life support, is that individual’s personal representative only with respect to protected health information that relates to that health care decision. The covered entity should not treat that person as the individual for other purposes, such as to sign an authorization for the disclosure of protected health information for marketing purposes. Finally, where the person has authority to act on the behalf of a deceased individual or his estate, which does not have to include the authority to make decisions related to health care, the covered entity must treat the personal representative as the individual for all purposes under the Rule. State or other law should be consulted to determine the authority of the personal representative to receive or access the individual’s protected health information.

Who Must Be Recognized as the Individual’s Personal Representative. The following chart displays who must be recognized as the personal representative for a category of individuals:

If the Individual Is:

The Personal Representative Is:

An Adult or
 An Emancipated Minor

A person with legal authority to make health care decisions on behalf of the individual

Examples: Health care power of attorney
 Court appointed legal guardian
 General power of attorney

An Unemancipated Minor

A parent, guardian, or other person acting *in loco parentis* with legal authority to make health care decisions on behalf of the minor child

Exceptions: See parents and minors discussion below.

Deceased

A person with legal authority to act on behalf of the decedent or the estate (not restricted to health care decisions)

Examples: Executor of the estate
 Next of kin or other family member
 Durable power of attorney

OCR HIPAA Privacy
December 3, 2002
Revised April 3, 2003

Parents and Unemancipated Minors. The Privacy Rule defers to State or other applicable laws that address the ability of a parent, guardian, or other person acting *in loco parentis* (collectively, “parent”) to obtain health information about a minor child. In most cases under the Rule, the parent is the personal representative of the minor child and can exercise the minor’s rights with respect to protected health information, because the parent usually has the authority to make health care decisions about his or her minor child. Regardless of whether a parent is the personal representative, the Privacy Rule permits a covered entity to disclose to a parent, or provide the parent with access to, a minor child’s protected health information when and to the extent it is expressly permitted or required by State or other laws (including relevant case law). Likewise, the Privacy Rule prohibits a covered entity from disclosing a minor child’s protected health information to a parent, or providing a parent with access to, such information when and to the extent it is expressly prohibited under State or other laws (including relevant case law). Thus, State and other applicable law governs when such law explicitly requires, permits, or prohibits the disclosure of, or access to, the health information about a minor child.

The Privacy Rule specifies three circumstances in which the parent is not the “personal representative” with respect to certain health information about his or her minor child. These exceptions generally track the ability of certain minors to obtain specified health care without parental consent under State or other laws, or standards of professional practice. In these situations, the parent does not control the minor’s health care decisions, and thus under the Rule, does not control the protected health information related to that care. The three exceptional circumstances when a parent is not the minor’s personal representative are:

- X **When State or other law does not require the consent of a parent or other person before a minor can obtain a particular health care service, and the minor consents to the health care service;**

Example: A State law provides an adolescent the right to obtain mental health treatment without the consent of his or her parent, and the adolescent consents to such treatment without the parent’s consent.

- X **When a court determines or other law authorizes someone other than the parent to make treatment decisions for a minor;**

Example: A court may grant authority to make health care decisions for the minor to an adult other than the parent, to the minor, or the court may make the decision(s) itself.

- X **When a parent agrees to a confidential relationship between the minor and the physician.**

OCR HIPAA Privacy
December 3, 2002
Revised April 3, 2003

Example: A physician asks the parent of a 16-year-old if the physician can talk with the child confidentially about a medical condition and the parent agrees.

Even in these exceptional circumstances, where the parent is not the “personal representative” of the minor, the Privacy Rule defers to State or other laws that require, permit, or prohibit the covered entity to disclose to a parent, or provide the parent access to, a minor child’s protected health information. Further, in these situations, if State or other law is silent or unclear concerning parental access to the minor’s protected health information, a covered entity has discretion to provide or deny a parent with access to the minor’s health information, if doing so is consistent with State or other applicable law, and provided the decision is made by a licensed health care professional in the exercise of professional judgment.

Abuse, Neglect, and Endangerment Situations. When a physician or other covered entity reasonably believes that an individual, including an unemancipated minor, has been or may be subjected to domestic violence, abuse or neglect by the personal representative, or that treating a person as an individual’s personal representative could endanger the individual, the covered entity may choose not to treat that person as the individual’s personal representative, if in the exercise of professional judgment, doing so would not be in the best interests of the individual. For example, if a physician reasonably believes that disclosing information about an incompetent elderly individual to the individual’s personal representative would endanger that individual, the Privacy Rule permits the physician to decline to make such disclosure.

Frequently Asked Questions

To see Privacy Rule FAQs, click the desired link below:

[FAQs on Personal Reps/Parents and Minors](#)

[FAQs on ALL Privacy Rule Topics](#)

(You can also go to http://answers.hhs.gov/cgi-bin/hhs.cfg/php/enduser/std_alp.php, then select "Privacy of Health Information/HIPAA" from the Category drop down list and click the Search button.)

FREQUENTLY ASKED QUESTIONS

Does the HIPAA Privacy Rule change the way in which a person can grant another person health care power of attorney?

No. Nothing in the Privacy Rule changes the way in which an individual grants another person power of attorney for health care decisions. State law (or other law) regarding health care powers of attorney continue to apply. The intent of the provisions regarding personal representatives was to complement, not interfere with or change, current practice regarding health care powers of attorney or the designation of other personal representatives. Such designations are formal, legal actions which give others the ability to exercise the rights of, or make treatment decisions related to, an individual. The Privacy Rule provisions regarding personal representatives generally grant persons, who have authority to make health care decisions for an individual under other law, the ability to exercise the rights of that individual with respect to health information. OCR FAQ ID 219 07/18/2003

If someone has health care power of attorney for an individual, can they obtain access to that individual's medical record?

Yes, an individual that has been given a health care power of attorney will have the right to access the medical records of the individual related to such representation to the extent permitted by the HIPAA Privacy Rule at 45 CFR 164.524. However, when a physician or other covered entity reasonably believes that an individual, including an unemancipated minor, has been or may be subjected to domestic violence, abuse or neglect by the personal representative, or that treating a person as an individual's personal representative could endanger the individual, the covered entity may choose not to treat that person as the individual's personal representative, if in the exercise of professional judgment, doing so would not be in the best interests of the individual. OCR FAQ ID 220 07/18/2003

Can the personal representative of an adult or emancipated minor obtain access to the individual's medical record?

The HIPAA Privacy Rule treats an adult or emancipated minor's personal representative as the individual for purposes of the Rule regarding the health care matters that relate to the representation, including the right of access under 45 CFR 164.524. The scope of access will depend on the authority granted to the personal representative by other law. If the personal representative is authorized to make health care decisions, generally, then the personal representative may have access to the individual's protected health information regarding health care in general. On the other hand, if the authority is limited, the personal representative may have access only to protected health information that may be relevant to making decisions within the personal representative's authority. For example, if a personal representative's authority is limited to authorizing artificial life support, then the personal representative's access to protected health information is limited to that information which may be relevant to decisions about artificial life support.

There is an exception to the general rule that a covered entity must treat an adult or emancipated minor's

personal representative as the individual. Specifically, the Privacy Rule does not require a covered entity to treat a personal representative as the individual if, in the exercise of professional judgment, it believes doing so would not be in the best interest of the individual because of a reasonable belief that the individual has been or may be subject to domestic violence, abuse or neglect by the personal representative, or that doing so would otherwise endanger the individual. This exception applies to adults and both emancipated and unemancipated minors who may be subject to abuse or neglect by their personal representatives. OCR FAQ ID 221 07/18/2003

How can family members of a deceased individual obtain the deceased individual's protected health information that is relevant to their own health care?

The HIPAA Privacy Rule recognizes that a deceased individual's protected health information may be relevant to a family member's health care. The Rule provides two ways for a surviving family member to obtain the protected health information of a deceased relative. First, disclosures of protected health information for treatment purposes—even the treatment of another individual—do not require an authorization; thus, a covered entity may disclose a decedent's protected health information, without authorization, to the health care provider who is treating the surviving relative. Second, a covered entity must treat a deceased individual's legally authorized executor or administrator, or a person who is otherwise legally authorized to act on the behalf of the deceased individual or his estate, as a personal representative with respect to protected health information relevant to such representation. Therefore, if it is within the scope of such personal representative's authority under other law, the Rule permits the personal representative to obtain the information or provide the appropriate authorization for its disclosure. OCR FAQ ID 222 07/18/2003

Does the HIPAA Privacy Rule address when a person may not be the appropriate person to control an individual's protected health information?

Generally, no. The Rule defers to State and other laws that address the fitness of a person to act on an individual's behalf. However, a covered entity does not have to treat a personal representative as the individual when it reasonably believes, in the exercise of professional judgment, the individual is subject to domestic violence, abuse or neglect by the personal representative, or doing so would otherwise endanger the individual. OCR FAQ ID 223 07/18/2003

Does a power of attorney given to a person for purposes other than health care, such as a power of attorney to close on real estate, authorize that person to access an individual's health information as that individual's personal representative?

No. Except with respect to decedents, a covered entity must treat a personal representative as the individual only when that person has authority under other law to act on the individual's behalf on matters related to health care. A power of attorney that does not include decisions related to health care in its scope would not authorize the holder to exercise the individual's rights under the HIPAA Privacy Rule. Further, a covered entity does not have to treat a personal representative as the individual if, in the exercise of professional judgment, it believes doing so would not be in the best interest of the individual because of a reasonable belief that the individual has been or

may be subject to domestic violence, abuse or neglect by the personal representative, or that doing so would otherwise endanger the individual.

With respect to personal representatives of deceased individuals, the Privacy Rule requires a covered entity to treat the personal representative as the individual as long as the person has the authority under law to act for the decedent or the estate. The power of attorney would have to be valid after the individual's death to qualify the holder as the personal representative of the decedent. OCR FAQ ID 224 07/18/2003

May adults with mental retardation control their protected health information if they are able to authorize uses and disclosures of their protected health information?

Individuals may control their protected health information under the HIPAA Privacy Rule to the extent State or other law permits them to act on their own behalf. Further, even if an individual is deemed incompetent under State or other law to act on his or her own behalf, covered entities may decline a request by a personal representative for protected health information if the individual objects to the disclosure (or for any other reason), and the disclosure is merely permitted, but not required, under the Rule.

However, covered entities must make disclosures that are required under the Rule (i.e., disclosures to the Secretary under subpart C of part 160 regarding enforcement of the Rule, and to the individual under 45 CFR 164.524 and 164.528 with respect to the individual's right of access to his or her protected health information and an accounting of disclosures, respectively). Consequently, with respect to the individual's right of access to protected health information and for an accounting of disclosures, covered entities must provide the individual's personal representative access to the individual's protected health information or an accounting of disclosures upon the request of the personal representative, unless the covered entity, in the exercise of professional judgment, believes doing so would not be in the best interest of the individual because of a reasonable belief that the individual may be subject to domestic violence, abuse or neglect by the personal representative, or that doing so would otherwise endanger the individual. The Rule allows a specified time period before a covered entity must act on such a request; and during this interim period, an individual and his personal representative will have an opportunity to resolve any dispute they may have concerning the request. OCR FAQ ID 225 07/18/2003

How does a covered entity identify an individual's personal representative?

State or other law determines who is authorized to act on an individual's behalf, thus the Privacy Rule does not address how personal representatives should be identified. Covered entities should continue to identify personal representatives the same way they have in the past. However, the HIPAA Privacy Rule does require covered entities to verify a personal representative's authority in accordance with 45 CFR 164.514(h). OCR FAQ ID 226 07/18/2003

Does the HIPAA Privacy Rule allow parents the right to see their children's medical records?

Yes, the Privacy Rule generally allows a parent to have access to the medical records about his or her child, as

his or her minor child's personal representative when such access is not inconsistent with State or other law.

There are three situations when the parent would not be the minor's personal representative under the Privacy Rule. These exceptions are: (1) when the minor is the one who consents to care and the consent of the parent is not required under State or other applicable law; (2) when the minor obtains care at the direction of a court or a person appointed by the court; and (3) when, and to the extent that, the parent agrees that the minor and the health care provider may have a confidential relationship. However, even in these exceptional situations, the parent may have access to the medical records of the minor related to this treatment when State or other applicable law requires or permits such parental access. Parental access would be denied when State or other law prohibits such access. If State or other applicable law is silent on a parent's right of access in these cases, the licensed health care provider may exercise his or her professional judgment to the extent allowed by law to grant or deny parental access to the minor's medical information.

Finally, as is the case with respect to all personal representatives under the Privacy Rule, a provider may choose not to treat a parent as a personal representative when the provider reasonably believes, in his or her professional judgment, that the child has been or may be subjected to domestic violence, abuse or neglect, or that treating the parent as the child's personal representative could endanger the child. OCR FAQ ID 227 07/18/2003

If a child receives emergency medical care without a parent's consent, can the parent get all information about the child's treatment and condition?

Generally, yes. Even though the parent did not consent to the treatment in this situation, the parent would be the child's personal representative under the HIPAA Privacy Rule. This would not be so when the parent does not have authority to act for the child (e.g., parental rights have been terminated), when expressly prohibited by State or other applicable law, or when the covered entity, in the exercise of professional judgment, believes that providing such information would not be in the best interest of the individual because of a reasonable belief that the individual may be subject to abuse or neglect by the personal representative, or that doing so would otherwise endanger the individual. OCR FAQ ID 228 07/18/2003

Does the HIPAA Privacy Rule provide rights for children to be treated without parental consent?

No. The Privacy Rule does not address consent to treatment, nor does it preempt or change State or other laws that address consent to treatment. The Rule addresses access to, and disclosure of, health information, not the underlying treatment. OCR FAQ ID 229 07/18/2003

When an individual reaches the age of majority or becomes emancipated, who controls the protected health information concerning health care services rendered while the individual was an unemancipated minor?

The individual who is the subject of the protected health information can exercise all rights granted by the HIPAA Privacy Rule with respect to all protected health information about him or her, including information

obtained while the individual was an unemancipated minor consistent with State or other law. Generally, the parent would no longer be the personal representative of his or her child once the child reaches the age of majority or becomes emancipated, and therefore, would no longer control the health information about his or her child. Of course, any individual can have a personal representative – which may include a parent – who can exercise rights on his or her behalf. OCR FAQ ID 230 07/18/2003

May a psychologist continue his practice to notify a parent before treating his or her minor child, even though the minor child is able to consent to such health care under State law?

The HIPAA Privacy Rule would defer to State or other applicable law that addresses the disclosure of health information to a parent about a minor child. If the minor child is permitted, under State law, to consent to such health care without the consent of her parent and does consent to such care, the provider may notify the parent when the State law explicitly requires or permits the health provider to do so. If State law permits the minor child to consent to such health care without parental consent, but is silent on parental notification, the provider would need the child's permission to notify a parent. OCR FAQ ID 231 07/18/2003

STATUTES APPLICABLE TO PERSONAL REPRESENTATIVE DETERMINATION

Who is authorized to act for the patient?

R.S. 40:1299.53. Persons who may consent to surgical or medical treatment

A. In addition to such other persons as may be authorized and empowered, any one of the following persons in the following order of priority, if there is no person in a prior class who is reasonably available, willing, and competent to act, is authorized and empowered to consent, either orally or otherwise, to any surgical or medical treatment or procedures including autopsy not prohibited by law which may be suggested, recommended, prescribed, or directed by a duly licensed physician:

- (1) Any adult, for himself.
- (2) The judicially appointed tutor or curator of the patient, if one has been appointed.
- (3) An agent acting pursuant to a valid mandate, specifically authorizing the agent to make health care decisions.
- (4) The patient's spouse not judicially separated.
- (5) An adult child of the patient.
- (6) Any parent, whether adult or minor, for his minor child.
- (7) The patient's sibling.
- (8) The patient's other ascendants or descendants.
- (9) Any person temporarily standing in loco parentis, whether formally serving or not, for the minor under his care and any guardian for his ward.

B. If there is more than one person within the above named class in Paragraphs (A)(1) through (9), the consent for surgical or medical treatment shall be given by a majority of those members of the class available for consultation.

Personal representative vs. access vs. required disclosure

R.S. 40:1299.96. Health care information; records

A. (1) Each health care provider shall furnish each patient, upon request of the patient, a copy of any information related in any way to the patient which the health care provider has transmitted to any company, or any public or private agency, or any person.

* * *

(b) Except as provided in R.S. 44:17, a patient or his legal representative, or in the case of a deceased patient, the executor of his will, the administrator of his estate, the surviving spouse, the parents, or the children of the deceased patient, seeking any medical, hospital, or other record relating to the patient's medical treatment, history, or condition, either personally or through an attorney, shall have a right to obtain a copy of such record upon furnishing a signed authorization and upon payment of a reasonable copying charge, not to exceed one dollar per page for the first twenty-five pages, fifty cents per page for twenty-six to five hundred pages, and twenty-five cents per page thereafter, a handling charge not to exceed fifteen dollars for hospitals and seven dollars and fifty cents for other health care providers, and actual postage. The individuals named herein shall also have the right to obtain copies of patient X-rays, microfilm, and electronic and imaging media, upon payment of reasonable reproduction costs and a handling charge of twenty dollars for hospitals and ten dollars for other health care providers. In the event a hospital record is not complete, the copy of the records furnished hereunder may indicate, through a stamp, coversheet, or otherwise, that the record is incomplete.

Living wills

R.S. 40:1299.58.5. Procedure for making a declaration for a qualified patient who has not previously made a declaration

A. (1) Nothing in this Part shall be construed in any manner to prevent the withholding or the withdrawal of life-sustaining procedures from a qualified patient with a terminal and irreversible condition who is comatose, incompetent, or otherwise physically or mentally incapable of communication and has not made a prior declaration in accordance with this Part.

(2) When a comatose or incompetent person or a person who is physically or mentally incapable of communication has been certified as a qualified patient and has not previously made a declaration, any of the following individuals in the following order of priority, if there is no individual in a prior class who is reasonably available, willing, and competent to act, may make a declaration on the qualified patient's behalf:

(a) Any person or persons previously designated by the patient, while an adult, by written instrument signed by the patient in the presence of at least two witnesses, to have the authority to make a declaration for the patient in the event of the patient's inability to do so. If the instrument so authorizes more than one person, it may include the order in which the persons designated shall have authority to make the declaration.

(b) The judicially appointed tutor or curator of the patient if one has been appointed. This Subparagraph shall not be construed to require such appointment in order that a declaration can be made under this Section.

(c) The patient's spouse not judicially separated.

(d) An adult child of the patient.

(e) The parents of the patient.

(f) The patient's sibling.

(g) The patient's other ascendants or descendants.

(3) If there is more than one person within the above named class in Subparagraphs (d) through (g), then the declaration shall be made by all of that class available for consultation upon good faith efforts to secure participation of all of that class.

B. In any case where the declaration is made by a person specified in Subparagraphs (A)(2)(b), (c), (d), (e), or (f), there shall be at least two witnesses present at the time the declaration is made.

C. The absence of a declaration by an adult patient shall not give rise to any presumption as to the intent to consent to or to refuse life-sustaining procedures.

Minors

R.S. 40:1065.1. Minor's consent for treatment of venereal diseases

A. Consent to the provision of medical or surgical care or services by a hospital or public clinic, or to the performance of medical or surgical care or services by a physician, licensed to practice medicine in this state, when executed by a minor who is or believes himself to be afflicted with a venereal disease, shall be valid and binding as if the minor had achieved his majority. Any such consent shall not be subject to a later disaffirmance by reason of his minority.

B. The consent of a spouse, parent, guardian or any other person standing in a fiduciary capacity to the minor shall not be necessary in order to authorize such hospital care or services or medical or surgical care or services to be provided by a physician licensed to practice medicine to such a minor.

C. Upon the advice and direction of a treating physician, or, in the case of a medical staff, any one of them, a physician or member of a medical staff may, but shall not be obligated to, inform the spouse, parent or guardian of any such minor as to the treatment given or needed, and such information may be given to, or withheld from the spouse, parent or guardian without the consent and over the express objection of the minor.

D. No physician licensed to practice medicine in this state shall incur civil or criminal liability in connection with any examination, diagnosis and treatment authorized by this section except for negligence.

R.S. 40:1095. Medical treatment

A.(1) Consent to the provision of medical or surgical care or services by a hospital or public clinic, or to the performance of medical or surgical care or services by a physician, licensed to practice medicine in this state, when executed by a minor who is or believes himself to be afflicted with an illness or disease, shall be valid and binding as if the minor had achieved his majority. Any such consent shall not be subject to a later disaffirmance by reason of his minority.

(2) A minor may consent to medical care or the administration of medication by a hospital licensed to provide hospital services or by a physician licensed to practice medicine in this state for the purpose of alleviating or reducing pain, discomfort, or distress of and during labor and childbirth. The manner of administration of medications includes but is not limited to intravenous, intramuscular, epidural, and spinal. This consent shall be

valid and binding as if the minor had achieved her majority, and it shall not be subject to a later disaffirmance by reason of her minority.

B. The consent of a spouse, parent, guardian, or any other person standing in a fiduciary capacity to the minor shall not be necessary in order to authorize such hospital care or services or medical or surgical care or services, or administration of drugs to be provided by a physician licensed to practice medicine to such a minor.

C. Upon the advice and direction of a treating physician, or, in the case of a medical staff, any one of them, a physician or member of a medical staff may, but shall not be obligated to, inform the spouse, parent or guardian of any such minor as to the treatment given or needed, and such information may be given to, or withheld from the spouse, parent or guardian without the consent and over the express objection of the minor.

D. No hospital and no physician licensed to practice medicine in this state shall incur civil or criminal liability in connection with any examination, diagnosis and treatment authorized by this section except for negligence.

R.S. 40:1096. Treatment for drug abuse

A. Consent to the provision of medical or surgical care or services by a hospital or public clinic, or to the performance of medical or surgical care or services by a physician, licensed to practice medicine in this state, when executed by a minor who is or believes himself to be addicted to a narcotic or other drug, shall be valid and binding as if the minor had achieved his majority. Any such consent shall not be subject to a later disaffirmance by reason of his minority.

B. The consent of a spouse, parent, guardian or any other person standing in a fiduciary capacity to the minor shall not be necessary in order to authorize such hospital care or services or medical or surgical care or services to be provided by a physician licensed to practice medicine to such a minor.

C. Upon the advice and direction of a treating physician, or, in the case of a medical staff, any one of them, a physician or member of a medical staff may, but shall not be obligated to, inform the spouse, parent or guardian of any such minor as to the treatment given or needed, and such information may be given to, or withheld from the spouse, parent or guardian without the consent and over the express objection of the minor.

D. No hospital and no physician licensed to practice medicine in this state shall incur civil or criminal liability in connection with any examination, diagnosis and treatment authorized by this section except for negligence.

R.S. 40:1097. Donation of blood

Notwithstanding any other provision of the laws of the state of Louisiana, a minor who has reached the age of seventeen years may give consent to the donation of his or her blood and to the penetration of tissue necessary to accomplish such donation, but such minor shall not be compensated therefor. Such consent shall not be subject to deferments because of minority, and the consent of the parents or guardian of such a minor shall not be required in order to authorize such donation and penetration of tissue.

See, also;

R.S. 9:975. Non-legal custodian; consent for certain services; affidavit, form of

R.S. 40:1299.58. Consent to surgical or medical treatment for mentally retarded or developmentally disabled persons and residents of state-operated nursing homes

VERIFICATION

§ 164.514 Other requirements relating to uses and disclosures of protected health information.

* * *

(h) (1) *Standard: verification requirements.* Prior to any disclosure permitted by this subpart, a covered entity must:

(i) Except with respect to disclosures under § 164.510⁴, verify the identity of a person requesting protected health information and the authority of any such person to have access to protected health information under this subpart, if the identity or any such authority of such person is not known⁵ to the covered entity; and

(ii) Obtain any documentation, statements, or representations, whether oral or written, from the person requesting the protected health information when such documentation, statement, or representation is a condition of the disclosure under this subpart.

(2) *Implementation specifications: verification*⁶.

(i) Conditions on disclosures. If a disclosure is conditioned by this subpart on particular documentation, statements, or representations from the person requesting the protected health information, a covered entity may rely, if such reliance is reasonable under the circumstances, on documentation, statements, or representations that, on their face, meet the applicable requirements.

(A) The conditions in § 164.512(f)(1)(ii)(C)⁷ may be satisfied by the administrative subpoena or similar process or by a separate written statement that, on its face, demonstrates that the applicable requirements have been met.

⁴ Uses and disclosures requiring an opportunity for the individual to agree or object (the “opt-out” situations). See Rules, page 82812.

⁵ The knowledge of the person may take the form of a known place of business, address, phone or fax number, as well a known human being. Preamble, page 82546.

⁶ “The covered entity must establish and use written policies and procedures (which may be standard protocols)....” Preamble, page 82546.

⁷ In the case of “an administrative request, including an administrative subpoena or summons, a civil or an authorized investigative demand, or similar process authorized under law” the following conditions:

(1) The information sought is relevant and material to a legitimate law enforcement inquiry;

(2) The request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought; and

(3) De-identified information could not reasonably be used.

See Rules, page 82815.

(B) The documentation required by § 164.512(i)(2) may be satisfied by one or more written statements, provided that each is appropriately dated and signed in accordance with § 164.512(i)(2)(i) and (v).

(ii) Identity of public officials. A covered entity may rely, if such reliance is reasonable under the circumstances, on any of the following to verify identity when the disclosure of protected health information is to a public official or a person acting on behalf of the public official:

(A) If the request is made in person, presentation of an agency identification badge, other official credentials, or other proof of government status;

(B) If the request is in writing, the request is on the appropriate government letterhead; or

(C) If the disclosure is to a person acting on behalf of a public official, a written statement on appropriate government letterhead that the person is acting under the government's authority or other evidence or documentation of agency, such as a contract for services, memorandum of understanding, or purchase order, that establishes that the person is acting on behalf of the public official.

(iii) Authority of public officials. A covered entity may rely, if such reliance is reasonable under the circumstances, on any of the following to verify authority⁸ when the disclosure of protected health information is to a public official or a person acting on behalf of the public official⁹:

(A) A written statement of the legal authority under which the information is requested, or, if a written statement would be impracticable, an oral statement of such legal authority;

(B) If a request is made pursuant to legal process, warrant, subpoena, order, or other legal process issued by a grand jury or a judicial or administrative tribunal is presumed to constitute legal authority.

(iv) Exercise of professional judgment. The verification requirements of this paragraph are met if the covered entity relies on the exercise of professional judgment in making a use or disclosure in accordance with § 164.510 or acts on a good faith belief in making a disclosure in accordance with § 164.512(j).

⁸ “For most disclosures, verifying the authority for the request means taking reasonable steps to verify that the request is lawful under this regulation.” Preamble, page 82547.

⁹ “Under 164.514(h), a covered entity may reasonably rely on the representation of such public officials.” Preamble, page 82541.

PREAMBLE TO DECEMBER 28, 2003 FINAL RULE**Section 164.514(h)--Verification of Identity and Authority of Persons Requesting Protected Health Information*****Disclosure of Protected Health Information***

We reorganize the provision regarding verification of identity of individuals requesting protected health information to improve clarity, but we retain the substance of requirements proposed in the NPRM in § 164.518(c), as follows.

The covered entity must establish and use written policies and procedures (which may be standard protocols) that are reasonably designed to verify the identity and authority of the requestor where the covered entity does not know the person requesting the protected health information. The knowledge of the person may take the form of a known place of business, address, phone or fax number, as well a known human being. Where documentation, statements or representations, whether oral or written, from the person requesting the protected health information is a condition of disclosure under this rule or other law, this verification must involve obtaining such documentation statement, or representation. In such a case, additional verification is only required where this regulation (or other law) requires additional proof of authority and identity.

The NPRM proposed that covered entities would be permitted to rely on the required documentation of IRB or privacy board approval to constitute sufficient verification that the person making the request was a researcher and that the research is authorized. The final rule retains this provision.

For most disclosures, verifying the authority for the request means taking reasonable steps to verify that the request is lawful under this regulation. Additional proof is required by other provisions of this regulation where the request is made pursuant to § 164.512 for national priority purposes. Where the person requesting the protected health information is a public official, covered entities must verify the identity of the requester by examination of reasonable evidence, such as a written statement of identity on agency letterhead, an identification badge, or similar proof of official status. Similarly, covered entities are required to verify the legal authority supporting the request by examination of reasonable evidence, such as a written request provided on agency letterhead that describes the legal authority for requesting the release. Where § 164.512 explicitly requires written evidence of legal process or other authority before a disclosure may be made, a public official's proof of identity and the official's oral statement that the request is authorized by law are not sufficient to constitute the required reasonable evidence of legal authority; under these provisions, only the required written evidence will suffice.

In some circumstances, a person or entity acting on behalf of a government agency may make a request for disclosure of protected health information under these subsections. For example, public health agencies may contract with a nonprofit agency to collect and analyze certain data. In such cases, the covered entity is required to verify the requestor's identity and authority through examination of reasonable documentation that the requestor is acting on behalf of the government agency. Reasonable evidence includes a written request provided on agency letterhead that describes the legal authority for requesting the release and states that the person or entity is acting under the agency's authority, or other documentation, including a contract, a memorandum of understanding, or purchase order that confirms that the requestor is acting on behalf of the government agency.

In some circumstances, identity or authority will be verified as part of meeting the underlying requirements for disclosure. For example, a disclosure under § 164.512(j)(1)(i) to avert an imminent threat to safety is lawful only if made in the good faith belief that the disclosure is necessary to prevent or lessen a serious and imminent threat

to the health or safety of a person or the public, and to a person reasonably able to prevent or lessen the threat. If these conditions are met, no further verification is needed. In such emergencies, the covered entity is not required to demand written proof that the person requesting the protected health information is legally authorized. Reasonable reliance on verbal representations are appropriate in such situations.

Similarly, disclosures permitted under § 164.510(a) for facility directories may be made to the general public; the covered entity's policies and procedures do not need to address verifying the identity and authority for these disclosures. In § 164.510(b) we do not require verification of identity for persons assisting in an individual's care or for notification purposes. For disclosures when the individual is not present, such as when a friend is picking up a prescription, we allow the covered entity to use professional judgment and experience with common practice to make reasonable inferences.

Under § 164.524, a covered entity is required to give individuals access to protected health information about them (under most circumstances). Under the general verification requirements of § 164.514(h), the covered entity is required to take reasonable steps to verify the identity of the individual making the request. We do not mandate particular identification requirements (e.g., drivers licence, photo ID), but rather leave this to the discretion of the covered entity. The covered entity must also establish and document procedures for verification of identity and authority of personal representatives, if not known to the entity. For example, a health care provider can require a copy of a power of attorney, or can ask questions to determine that an adult acting for a young child has the requisite relationship to the child.

In Subpart C of Part 160, we require disclosure to the Secretary for purposes of enforcing this regulation. When a covered entity is asked by the Secretary to disclose protected health information for compliance purposes, the covered entity must verify the same information that it is required to verify for any other law enforcement or oversight request for disclosure.

Use of Protected Health Information

The proposed rule's verification requirements applied to any person requesting protected health information, whether for a use or a disclosure. In the final regulation, the verification provisions apply only to disclosures of protected health information. The requirements in § 164.514(d), for implementation of policies and procedures for 'minimum necessary' uses of protected health information, are sufficient to ensure that only appropriate persons within a covered entity will have access to protected health information.

OCR ENFORCEMENT POLICY AS A CONSIDERATION

As the discussion above makes clear, the duty to comply with certain of the HIPAA rules is now a reality for many, if not most, covered entities. The immediacy of the compliance obligation brings with it the issue of how these rules will be enforced. Accordingly, we lay out below our general approach to enforcement. We then discuss how the rules below will fit in with the projected Enforcement Rule in its entirety and the basic approach of the interim final rule.

HHS's General Approach to Enforcement

The Department intends to seek and promote voluntary compliance with the rules promulgated to carry out the HIPAA provisions. With respect to the Privacy Rule, OCR has developed and is continuing to produce guidance and a wide array of other technical assistance materials to help covered entities effectively implement the Privacy Rule. These materials are available on the OCR Privacy web site at <http://www.hhs.gov/ocr/hipaa>. These efforts will continue after the April 14, 2003 compliance date, as OCR learns from its compliance activities and from those who are implementing the Privacy Rule where additional guidance and assistance are needed. Other components of the Department are also developing guidance and technical assistance on the Privacy Rule for their partners.

This approach reflects the requirements in 45 CFR part 160, subpart C, that, to the extent practicable, OCR will seek the cooperation of covered entities in obtaining compliance with the Privacy Rule, and may provide technical assistance to help covered entities voluntarily comply with the Rule. See 45 CFR 160.304. As further provided in 45 CFR 160.312(a)(2), OCR will seek to resolve matters by informal means before issuing findings of non-compliance, under its authority to investigate and resolve complaints, and to engage in compliance reviews.

With respect to enforcement of the remainder of the HIPAA rules, the enforcement approach of CMS is similar. "Enforcement activities will focus on obtaining voluntary compliance through technical assistance. The process will be primarily complaint driven and will consist of progressive steps that will provide opportunities to demonstrate compliance or submit a corrective action plan." HHS press release of October 15, 2002, announcing assignment of enforcement responsibility to CMS. CMS provides a wide variety of technical assistance and informational materials on its Web site, at <http://www.cms.gov/hipaa/hipaa2>.

HHS's Approach to the Enforcement Rule

As noted above, HHS intends to issue an Enforcement Rule in furtherance of its implementation of 42 U.S.C. 1320d-5. The Enforcement Rule, in its entirety, will address a number of substantive issues relating to the imposition of CMPs under section 1320d-5, such as the Department's policies for determining violations and calculating CMPs. In addition, the Enforcement Rule will establish various procedures for the imposition of CMPs, including the procedures for providing notice and a hearing on the Secretary's determination to impose a CMP. This interim final rule implements this latter aspect of the Enforcement Rule.