

HIPAA Preemption Analysis

The New York State Department of Health has issued an analysis of the New York statutes and regulations that pertain to confidentiality health information and whether the statutes and regulations are preempted by HIPAA. The summary is available on the NYSDOH website at www.health.state.ny.us. NYSDOH takes the position that the New York State Public Health Law (“PHL”) is NOT PREEMPTED BY HIPAA and NYSDOH will continue to enforce the PHL unless otherwise indicated by the United States Department of Health and Human Services (“HHS”), NYSDOH, or the courts. In releasing its preemption analysis, NYSDOH cautioned that, ultimately, only the courts can resolve preemption issues.

NYSDOH issued a number of general statements.

1. Although HIPAA does not require a consent for treatment, payment and healthcare operations “(TPO)” and states that a consent for TPO activities is optional, state law consent requirements continue to apply. Education law section 6530(23) is not preempted by HIPAA. Education Law section 6530(23) provides that professional misconduct applicable to physicians includes “(r)evealing of personally identifiable facts, data, or information obtained in a professional capacity without the prior consent of the patient, except as authorized or required by law”.

For example, prior to HIPAA, for purposes of complying with state law confidentiality requirements, physicians would obtain a patient’s written consent to make health information available to other health care providers for treatment purposes, or to make health information available to health care payors for payment purposes. NYSDOH states that these consent requirements continue as before. The fact that the HIPAA regulations were modified to remove the consent requirement for TPO activities did not preempt state law consent requirements. The “consent” required under New York is a more generalized consent and need not follow the specific consent elements previously included in the HIPAA Privacy Rule.

2. To the extent that State law provides greater privacy for health information or more complete record keeping, State law prevails.
3. When State law is more restrictive than HIPAA in providing a person access to his/her health information HIPAA prevails. When HIPAA provides the patient greater access and control over patient information than State law HIPAA prevails.
4. State laws that mandate reporting of health information such as disease, certain injuries, child abuse, birth, death or for the conduct of health surveillance and oversight are not affected by HIPAA.
5. Article 27-F of the PHL, which pertains to HIV and AIDS Related Information, is not affected by HIPAA. NYSDOH stated that the model HIV release form, which is

included in 10 N.Y.C.R.R. §63.11, will be amended in order to comply with HIPAA. The new form will appear in the regulations and on the NYSDOH website.

6. PHL 1805-m provides confidentiality to information collected by hospitals for quality assurance and credentialing purposes and incident reporting. The confidentiality provision prevails because information required under PHL 2805-j, 2905-k, and 2805-p are outside of the “designated record set” required to be maintained under HIPAA. (NOTE: Information maintained under PHL 2805-j, 2805-k, 2805-l, and 2805-m should not be placed in the medical record).

The most complex preemption issues related to Public Health Law section 17 and 18.

This memorandum will summarize some of the highlights of the NYSDOH analysis in a Question and Answer format.

- Q. Is PHL §17 preempted to the extent that §17 requires a physician, upon the written request of a patient, to release and deliver copies of medical records regarding that patient to any other designated physician or hospital?
 - A. No. PHL §17 prevails. HIPAA allows a covered entity to disclose protected health information (PHI) to the extent such disclosure is required by law.
- Q. Is PHL §17 preempted to the extent that section 17 provides “...[R]ecords concerning the treatment of an infant patient for venereal disease or the performance of an abortion operation upon such infant patient shall not be released or in any manner made available to the parent or guardian of an infant...”?
 - A. No. HIPAA defers to state law on issues pertaining to parental access to records of minor patients.
- Q. The HIPAA Privacy Rule at 164.524(a) provides that an individual has a right of access to inspect and obtain a copy of PHI about the individual in a designated record set, for as long as the PHI is maintained in the designated record set. An exception is made for psychotherapy notes as defined by §164.524(a)(i). Psychotherapy notes is defined by §164.501 as:

“Psychotherapy notes means notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint or family counseling session and that are separated from the rest of the individual’s medical record. Psychotherapy notes excludes medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: Diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date”.

Under HIPAA, the individual does not have a right of access to “psychotherapy notes” as “psychotherapy notes” is defined by HIPAA.

PHL §18 requires patient information to be made available upon written request to certain individuals referred to as “qualified persons”. Section 18 provides no exception for psychotherapy notes. Is there any HIPAA preemption?

A. No. For psychotherapy notes as defined by HIPAA, section 18 prevails because section 18 provides a right of access where HIPAA does not.

Q. PHL §18 allows a health care provider to deny access to the health care provider’s “personal notes and observations”. PHL §18(1)(f) defines “personal notes and observations” as “... a practitioner’s speculations, impressions (other than tentative or actual diagnosis) and reminders, provided such data is maintained by a practitioner”. Is the “personal notes and observations” exception under PHL §18 preempted by HIPAA?

A. Yes, according to NYSDOH. The HIPAA Privacy Rule does not include any exception for “personal notes and observations”, so it is preempted under HIPAA. Accordingly, if a physician’s personal notes and observations are included in the medical record, they are subject to the access requirements under §164.524 (If the records are psychotherapy notes as defined under HIPAA, there is no right of access under HIPAA. The individual could assert PHL §18 to seek access to psychotherapy notes that otherwise are not available under HIPAA but the personal notes exception would apply under §18).

[Comments: While NYSDOH takes the position that the “personal notes and observations” provision is preempted by HIPAA, it may be argued that certain types of “personal notes and observations” are outside of the purview of HIPAA.

HIPAA at 164.524 states that an individual has a right of access to inspect and obtain a copy of “protected health information” about the individual in a “designated record set”, for so long as the protected health information is maintained in the designated record set.

Generally, the term “protected health information” is defined by HIPAA at §164.501 as “individually identifiable health information” maintained or transmitted in any form or medium. The term “individually identifiable health information” is defined as information that is a subset of “health information”, including demographic information collected from an individual, and:

- (1) “Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
- (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and
 - (i) That identifies the individual; or

- (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.”

The term “designated record set” is defined at 164.501 as:

(1) “A group of records maintained by or for a covered entity that is:

- (i) The medical records and billing records about individuals maintained by or for covered health care provider;
- (ii) The enrollment, payment, claims adjudication and case or medical management record systems maintained by or for a health plan; or
- (iii) Used, in whole or in part, by or for the covered entity to make decisions about individuals.

(2) For the purpose of this paragraph, the term record means any item, collection, or grouping of information that includes protected health information and is maintained, collected, used, or disseminated by or for a covered entity”.

It might be argued that certain types of “personal notes and observations” do not come within HIPAA’s definition of “protected health information” and “individually identifiable health information” and would not be subject to access by the individual under HIPAA. For example, a physician might write a reminder that the patient is “disruptive” in the physician’s office in order to remind the physician’s staff to take certain precautions when the patient visits. Assuming the physician is not treating or diagnosing the patient for the disruptive behavior, it might be argued that the personal note “the patient is disruptive” falls outside of HIPAA’s individual access to protected health information provision at 164.524 because the information about the patient’s disruptive behavior has no bearing to the “past, present, or future physical or mental health or condition” of the individual; has no bearing to the provision of health care to the individual; and no bearing to the “past, present, or future payment for the provision of health care” to the individual.

However, given the possibility that personal notes and observations of the physician may be subject to patient access under HIPAA, each medical practice should evaluate whether there is any benefit to include personal notes and observations that are irrelevant to treatment or diagnosis in the medical record].

Q. PHL §18(1)(e)(iii) provides that information maintained by a practitioner, concerning or relating to the prior examination or treatment of a subject received from another practitioner need not be disclosed to the individual provided such information may be requested by the individual directly from such other practitioner. Is this provision preempted by HIPAA?

A. Yes, There is no similar exception under HIPAA. HIPAA would prevail because it gives the individual greater access to information.

Q. PHL §18(1)(e) provides that a health care practitioner is not required to release information about diagnostic services (except mammography) performed at the request of another health care practitioner, if the information may be requested by the subject directly from the practitioner at whose request such diagnostic services were performed. There is no equivalent exception under HIPAA. Does HIPAA prevail?

A. Yes. HIPAA prevails.

Q. PHL §18(3) provides that a health care provider may deny access to all or a part of the information and may grant access to a prepared summary if the provider determines that the review of all or a part of the information can reasonably be expected to cause substantial and identifiable harm to the subject or others which would outweigh the qualified person's right of access to the information.

HIPAA at 164.524(a)(3)(i) provides where the PHI does not make reference to another person a licensed health professional may withhold access to the individual if the access requested is reasonably likely to endanger the life or physical safety of the individual or another person. Which standard prevails?

A. NYSDOH states that the HIPAA standard prevails. The HIPAA standard "endanger the life or physical safety" of the individual or another person is a more stringent standard than the PHL §18 standard "substantial" and "identifiable" harm.

Q. HIPAA provides at 164.524(a)(3)(ii) that where the PHI makes reference to another person, and a licensed health care professional has determined, in the exercise of professional judgment, that the access requested is reasonably likely to cause substantial harm to such other person, the licensed health professional may deny access. As stated above, PHL §18(3) provides that a health care provider may deny access to all or part of the information if the provider determines that the access would cause substantial and identifiable harm to the subject or other person which would outweigh the qualified person's right of access. Which standard person's prevails?

A. HIPAA prevails if the disclosure would cause substantial harm to the subject but not the other person, because the threshold for the harm to the subject in order for the exception to apply is "endanger the life or physical safety" of the individual. PHL §18 prevails if disclosure would cause substantial harm to the other person.

Q. HIPAA at 164.524(a)(3)(iii) provides that where the request for access is made by the individual's personal representative, and a licensed health care professional has determined, in the exercise of professional judgment, that disclosure is reasonably likely to cause substantial harm to the individual or another person, the licensed health care professional may deny the individual access. Which standard prevails?

A. Section 18 prevails because both HIPAA and PHL 18 have a "substantial harm" threshold.

[Comment The dichotomy is that HIPAA at 164.524(a)(3)(i) has the stricter “endanger the life or physical safety standard, but at 164.524(a)(3)(ii) and 164.524(a)(3)(iii) have the “substantial harm” standard. When the facts fall into the 164.524(a)(3)(i) situation, the stricter HIPAA “endanger the life or physical safety” preempts the PHL “substantial” harm standard. When the facts fall into the 164.524(a)(3)(ii) and 164.524(a)(3)(iii) situations, the “substantial” harm standard is the same as the PHL §18 “substantial” harm standard.

- Q. PHL §18(3)(c) provides that if a minor subject is over the age of 12, the health care provider may notify the minor subject of a request by a qualified person to review his/her patient information, and if the minor objects to the disclosure, the provider may deny the request. Is PHL §18(3)(c) preempted?
- A. No PHL §18(3)(c) prevails. HIPAA defers to state law regarding parental access to records of minor patients.
- Q. PHL §18(3)(c) and §18(3)(d) provide that a health care provider may deny access to all or part of the information and may grant access to a prepared summary of the information if the provider determines that disclosure would have a detrimental effect on the provider’s professional relationship with an infant, or on the care and treatment of the infant, or on the infant’s relationship with his or her parents or guardian. Is this provision preempted by HIPAA?
- A. No. HIPAA defers to state law regarding parental access to records of minors.
- Q. Public Health Law section 18(2)(e) allows a health care provider to charge a “reasonable charge not to exceed costs and not to exceed 75 cents per page. Copies of records such as x-rays which cannot be photocopied is subject to “reasonable charge” requirement not to exceed costs. A provider may not impose a charge for copying an original mammogram when the original has been furnished to the patient. Copies of records cannot be denied solely because of inability to pay. HIPAA at 164.524(c)(4) permits a health care provider to impose a reasonable cost-based fee including (i) copying, includes costs of supplies and labor in copying, (ii) postage, (iii) preparing an explanation or summary of the PHI, if agreed by the individual. Which law prevails?
- A. PHL law section 18 prevails because it is stricter.
- Q. Public Health law section 18(2) provides that a health care provider must permit visual inspection within 10 days of a written request. The health care provider must furnish within a reasonable time a copy of any patient information requested which the person is authorized to inspect. In the event a health care provider does not have space available to permit the inspection of the patient information, the health care provider may, in the alternative, furnish a copy of the information within 10 days. HIPAA at 164.524(b)(2) and 164.524(c)(2) provides that a covered entity must act on a request for access within 30 days following the request. If the PHI is not maintained or accessible to the covered entity on site, the covered entity has 60 days to act on a request. HIPAA at

164.524(b)(2)(iii) provides an extension up to 30 days if the covered entity is unable to take action within the required time period. Which time period prevails, PHL §18 or HIPAA?

A. PHL §18(2) prevails because it is stricter.

Q. Under HIPAA at 164.524(d)(4) if a health care professional denies an individual access to protected health information, in whole or in part, and the individual requests a review of the denial, the health care professional must designate a licensed health care professional who was not directly involved in the denial to review the decision to deny access. Under Public Health Law section (18)(4) the New York State Department of Health appoints a medical record access review committee to hear appeals regarding the denial of access to patient information. In cases involving physicians, the Department of Health appoints licensed physicians from a list of nominees submitted by the Medical Society of the State of New York to hear the appeal. Is there a conflict between HIPAA and the PHL?

A. No. There is not conflict because it is possible to comply with both requirements. If individual seeks rights under HIPAA follow HIPAA procedure. If individual seeks rights under PHL §18, follow §18 procedure.

Q. Under HIPAA at 164.526 an individual has a right to request a covered entity to amend the protected health information. Where the request to make an amendment is denied the covered entity must permit the individual to submit to the covered entity a written statement disagreeing with the denial of all or part of the requested amendment and the basis of the disagreement. The covered entity may prepare a written rebuttal to the individual's statement of disagreement. Pursuant to PHL §18(8) a qualified person may challenge the accuracy of information maintained in the patient information and may require that a brief, written statement prepared by him or her concerning the challenged information be inserted into the patient information. This right, however, only applies to "factual statements" and Public Health Law section 18(8) expressly states that the qualified person's right to challenge the accuracy of information does not include the health care provider's observations, inferences or conclusions. Any conflict between HIPAA and PHL section 18(8)?

A. HIPAA prevails. Unlike PHL §18(8) which provides that the right to challenge accuracy of information does not include the health care provider's observations, inferences, or conclusions, HIPAA's rule giving the individual the right to request an amendment, and the right to submit a statement of disagreement does not include any similar limitation regarding the provider's observations, inferences or conclusions. HIPAA prevails because it gives the individual broader rights.