

New York State Office of Mental Health HIPAA Preemption Analysis

NYS Statute	HIPAA Regulation (45 CFR Parts 160, 164)	Preemption Analysis
<p>MHL Article 45: Commission on Quality of Care for the Mentally Disabled - REPEALED</p>		
<p>Executive Law Article 550 – Justice Center for the Protection of People with Special Needs (JC)</p>		
<p>EL §558: Access to records and facilities.. (a) The Justice Center must be granted access at any and all times to any facility or provider agency as defined in Social Services Law §488(4) and, consistent with federal law, to all books, records, and data pertaining to any such facility or provider agency deemed necessary for carrying out the justice center's functions, powers and duties. The justice center or any employee of the justice center designated by the executive director may require from the officers or employees of such facility or provider agency or from the commissioners of the state oversight agencies as defined in Social Services Law §488(4), any information deemed necessary for the purpose of carrying out the justice center's functions, powers and duties, including otherwise confidential information and such entities shall be required to provide such requested information. The executive director or any employee of the justice center</p>	<p>§164.501: Health oversight agency means an agency or authority of the United States, a State, a territory, a political subdivision of a State or territory...or a person or entity operating under a grant of authority from or contract with such public agency....that is authorized by law to oversee the health care system (whether public or private) or government programs in which health information is necessary to determine eligibility or compliance, or to enforce civil rights laws for which health information is relevant.</p> <p>§164.512(a)</p> <p>(a) Standard: Uses and disclosures required by law.</p> <p>(1) A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the</p>	<p>No Preemption: The JC meets the definition of a "health oversight agency" under HIPAA. As such:</p> <ol style="list-style-type: none"> 1. Disclosures by covered entities to the JC are permitted under the "health oversight exception" to HIPAA. 2. Assuming the JC is not a covered entity (as it is neither a health plan, health care clearinghouse, or health care provider engaging in electronic transactions), disclosures made by it to other oversight agencies are not within the jurisdiction of HIPAA. <i>In this regard, State law including the Mental Hygiene Law, which continues to protect the confidentiality of information so disclosed, prevails.</i> 3. With regard to the independent agency designated by the Governor (i.e., Disability Advocates NY), authorizations are generally required, with some exceptions (see analysis re: Federal Protection & Advocacy for the Mentally Ill, 42 USCA §10806). 4. In cases where the JC has

<p>designated by the executive director may require from any hospital, as defined under Article 28 of the public health law, any information, report or record necessary for the purpose of carrying out the functions, powers and duties of the justice center related to the investigation of deaths and complaints of abuse or neglect concerning vulnerable persons who have been treated at such hospitals, and from any adult care facility as defined in Social Services Law §2 (21), such information, report or record, including access to such facility necessary for the purpose of carrying out the functions, powers and duties of the justice center related to the investigation of deaths concerning patients of mental hygiene facilities who resided at such residential care facilities at the time of their death or were former residents of such residential care facilities and the justice center determines that such information, report or record is necessary for the completion of its investigation. Such hospitals and adult care facilities shall be required to provide such requested information, reports, records and access. The results of investigations involving such residents of adult care facilities shall be provided promptly to the</p>	<p>relevant requirements of such law.</p> <p>(2) A covered entity must meet the requirements described in paragraph(c) (Disclosures about victims of abuse, neglect or domestic violence); (e) (Disclosures for judicial or administrative proceedings); or (f) (Disclosures for law enforcement purposes) of Section 164.512 for uses or disclosures required by law</p> <p>§164.512(d): PHI can be released to health oversight agencies for oversight activities authorized by law, including administrative investigations.</p>	<p>exercised its subpoena authority, and/or a court order compelling disclosure has been obtained, PHI can be disclosed under the "required by law" exception.</p>
--	--	--

commissioner of the department of health and shall be treated as a record or personal information within the meaning of §96 of the Public Officers law. Information, books, records or data which are confidential as provided by law shall be kept confidential by the justice center and any limitations on the release thereof imposed by law upon the party furnishing the information, books, records or data shall apply to the justice center except as may otherwise be provided by Article 11 of the social services law.

(b) [Eff. contingent upon filing the Governor's final notice of re-designation. See, L.2013, c. 501, pt. A, § 18.] (i) The governor shall designate an independent public or private agency, hereinafter "independent agency", to conduct and coordinate the protection and advocacy and client assistance programs, as established by federal law to provide federal oversight of the state's system of care for individuals with disabilities, as defined in federal laws and to assist such persons with accessing vocational rehabilitation services. For purposes of this subdivision, individuals with disabilities shall have the same meaning as provided by federal laws. The agency designated must have professional experience in empowering, protecting and

<p>advocating on behalf of individuals with disabilities. Such agency shall be independent of any agency that provides treatment, services or rehabilitation to individuals covered by such protection and advocacy and client assistance programs. To the extent permitted by federal law, the independent agency shall be governed by a board, a majority of the members of which shall be individuals with disabilities, parents, family members, guardians, advocates, or authorized representatives of individuals with disabilities.</p> <p>(ii) The independent agency shall conduct and coordinate the protection and advocacy and client assistance programs, as established by federal law to provide oversight of the state's system of care for individuals with disabilities and to assist such individuals with accessing vocational and rehabilitation services, including but not limited to:</p> <p>(A) Providing information, referrals and technical assistance to address the needs of individuals with disabilities;</p> <p>(B) Pursuing legal, administrative and other appropriate remedies or approaches to ensure the protection of and advocacy for the rights of individuals with disabilities;</p> <p>(C) Investigating incidents of</p>		
--	--	--

abuse and neglect of individuals with disabilities if the incidents are reported to the independent agency or if there is probable cause to believe that the incidents occurred; and

(D) Establishing a grievance procedure for clients or prospective clients of the system to ensure that individuals with disabilities have full access to services of the system.

(iii) Pursuant to the requirements of federal law, upon receipt of a complaint of an incident of abuse or neglect of an individual with a disability, or if there is probable cause to believe that such an incident occurred, the independent agency shall have prompt access, at reasonable times: to any facility or part thereof serving such individual that is operated, certified or licensed by any office or agency of the state; to all books, records and data pertaining to such a facility; to such individual with a disability in a location in which services, supports and other assistance are provided to such individual; to records of a facility or provider agency concerning such individual; and to any other records that are relevant to conducting an investigation. The independent agency also shall have access to records of the justice center as set forth in paragraph (f) of subdivision one and Social Services

Law§496(2)(v).

(iv) All records and documents received by the independent agency shall be received subject to any confidentiality requirements applicable pursuant to state and federal law.

(v) The governor shall be authorized to re-designate the agency implementing the protection and advocacy program and client assistance programs only if there is good cause for the re-designation and in accordance with federal requirements.

(vi) The independent agency may assist in the development of residential councils at facilities and programs.

(vii) To the extent consistent with federal law, the independent agency shall make copies of any of its reports available to the governor, the temporary president of the senate and the speaker of the assembly.

(viii) The independent agency shall take affirmative steps to assure that its programs and services are geographically representative of the state and, to the extent practicable, ensure regional access, and reflect the diversity of the state with respect to race and ethnicity.

(c) In the exercise of its functions, powers and duties, the executive director and any employee designated by him or her is authorized to issue and enforce a subpoena and a subpoena duces tecum, conduct hearings, administer oaths and examine persons under oath, in accordance with and pursuant to civil practice law and rules.

<p>(d) In any case where a person in charge or control of such facility or an officer or employee thereof shall fail to comply with the provisions of subdivision (a) of this section, the justice center may apply to the supreme court for an order directed to such person requiring compliance therewith. Upon such application the court may issue such order as may be just and a failure to comply with the order of the court shall be a contempt of court and punishable as such.</p>		
<p>EL §555-557 :Justice Center Medical Review Board</p> <p>§ 555. Justice center medical review board; organization</p> <p>(a) There shall be within the justice center a medical review board.</p> <p>§ 556. Functions, powers and duties of the board</p> <p>The justice center medical review board shall have the following functions, powers and duties:</p> <p>(a) make a preliminary determination whether the death of a patient or resident in a residential facility within the meaning of Social Services Law §488(4) that is operated, licensed or certified by an office of the department of mental hygiene or the office of children and family services, which has been brought to its attention is unusual or whether such death reasonably appears to have resulted from other than natural causes and warrants investigation;</p>	<p>§164.501: Health oversight agency means an agency or authority of the United States, a State, a territory, a political subdivision of a State or territory...or a person or entity operating under a grant of authority from or contract with such public agency....that is authorized by law to oversee the health care system (whether public or private) or government programs in which health information is necessary to determine eligibility or compliance, or to enforce civil rights laws for which health information is relevant.</p> <p>§164.512(d): PHI can be released to health oversight agencies for oversight activities authorized by law, including administrative investigations.</p>	<p>No preemption: Because the Medical Review Board is established within and is part of the JC and, as such, serves in a health oversight agency capacity, covered entities are permitted to release PHI to such Board under the "health oversight agency" exception to HIPAA.</p>

(b) investigate the causes of and circumstances surrounding such unusual death or deaths from other than natural causes of patients or residents in such facilities;

(c) visit and inspect any facility in which such a death has occurred;

(d) cause the body of the deceased to undergo such examinations including an autopsy as in the opinion of the board are necessary to determine the cause of death, irrespective of whether such examination or autopsy shall have been previously performed;

(e) upon review of the cause of and circumstances surrounding the death of any patient or resident, submit its report thereon to the executive director and, where appropriate, make recommendations to prevent the recurrence of same to the appropriate commissioner of the department of mental hygiene or the commissioner of children and family services and to the director of the facility; and

(f) advise the executive director on medical issues relevant to the functions, powers, and duties of the justice center including allegations of abuse or neglect of a patient or resident referred to it.

§ 557. Reports to the justice center

Every director or other person in charge of a residential facility within the meaning of Social Services Law §488(4) operated, licensed or certified by an office of the department of mental hygiene or the office of children and family services, shall report

<p>immediately to the executive director and the justice center medical review board the death of a patient or resident of any such facility in such manner and such form as the justice center shall prescribe, together with an autopsy report, if any.</p>		
<p>MHL Articles 80, 81:</p> <p>MHL Article 80: Surrogate Decision-Making for Medical Care and Treatment</p> <p>MHL Article 81: Proceedings for Appointment of a Guardian for Personal Needs or Property Management</p>	<p>§164.512(a)</p> <p>(a) Standard: Uses and disclosures required by law.</p> <p>(1) A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.</p> <p>(2) A covered entity must meet the requirements described in paragraph(c) (Disclosures about victims of abuse, neglect or domestic violence); (e) (Disclosures for judicial or administrative proceedings); or (f) (Disclosures for law enforcement purposes) of Section 164.512 for uses or disclosures required by law</p>	<p>No preemption: In cases where covered entities are asked to disclose PHI in the course and context of a surrogate decision-making or guardianship petition, it is probable that these disclosures will be permitted under the "judicial/administrative proceeding" or "required by law" exceptions to</p>