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**SUBJECT: TREATMENT, PAYMENT AND HEALTH CARE OPERATIONS**

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**GENERAL STANDARD (PRIVACY RULE SECTION 164.506):**

An AHS health care provider or health plan may use or disclose PHI for TPO without an individual's authorization, unless the Privacy Rule or an AHS General Standard or Guideline specifies that such use or disclosure requires an authorization. For example, authorizations are often required when using or disclosing psychotherapy notes, or with respect to research or marketing activities.

The Privacy Rule does not require an AHS health care provider or health plan to obtain a consent from an individual to use or disclose that individual's PHI for TPO. However, some Vermont laws may be more stringent than the Privacy Rule in this regard, at least as it concerns the use and disclosure of health information by AHS health care providers. Consequently, AHS health care providers will use a consent form to obtain necessary permissions under Vermont law to use and disclose PHI for TPO.

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**PRIVACY RULE:**

- I.** A CE may use or disclose PHI for TPO as set forth in Paragraph III below, provided that such use or disclosure is consistent with other applicable requirements of the Privacy Rule (e.g., compliance with the minimum necessary rule).
- II.** A CE may obtain consent of the individual to use or disclose PHI to carry out TPO. A consent from an individual is not effective to permit a use or disclosure of PHI when an authorization is required (e.g., when using or disclosing psychotherapy notes or for marketing) or when another condition must be met for such use or disclosure to be permissible under the Privacy Rule (e.g., obtaining an IRB waiver of the authorization requirement for research).
- III.** A CE may:
  - A.** use or disclose PHI for its own TPO;
  - B.** disclose PHI for treatment activities of a health care provider;
  - C.** disclose PHI to another CE or a health care provider for the payment activities of the entity that receives the information;
  - D.** disclose PHI to another CE for health care operations activities of the entity that receives the information, if each entity either has or had a relationship with the

individual who is the subject of the PHI being requested, the PHI pertains to that relationship, and the disclosure is:

1. For the purpose of conducting quality assessment and improvement activities, including outcomes evaluation and development of clinical guidelines, providing that the obtaining of generalizable knowledge is not the primary purpose of any studies resulting from such activities; population-based activities relating to improving health or reducing health care costs, protocol development, case management and care coordination, contacting of health care providers and patients with information about treatment alternatives; and related functions that do not include treatment;
  2. For the purposes of reviewing the competence or qualifications of health care professionals, evaluating practitioner and provider performance, health plan performance, conducting training programs in which students, trainees, or practitioners in areas of health care learn under supervision to practice or improve their skills as health care providers, training of non-health care professionals, accreditation, certification, licensing, or credentialing activities; or
  3. For the purpose of health care fraud and abuse detection or compliance;
- E. to the extent it participates in an organized health care arrangement, disclose PHI about an individual to another CE that participates in the organized health care arrangement for any health care operations activities of the organized health care arrangement.

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## GUIDELINES:

- I. **State Laws:** The following Vermont laws, and Vermont Rule, among others, impact the manner in which AHS health care providers and health plans may use and disclose health information.
  - A. **Patient Privilege (12 VSA 1612).** This state law requires patient waiver of the patient privilege before a person authorized to practice medicine, chiropractic or dentistry, an RN, an LPN, or a mental health professional may disclose certain health information (i.e., information acquired in attending a patient in a professional capacity and which was necessary to enable the provider to act in that capacity).
  - B. **Mental Health (18 VSA 7103).** This state law requires all mental health professionals to keep confidential all certificates, applications, records, and reports that directly or indirectly identify a patient or former patient, as well as all clinical information relating to such patients. In addition, this state law precludes the disclosure of such documents and information, except when the patient or his/her authorized representative (e.g., a health care agent under Title 14, 3453(c), legal

guardian or parent) consents in writing to the disclosure, as may be necessary to carry out any of the provisions of Part 8 of Title 18, or the disclosure is compelled by a court order.

C. **AHS Rule 96-23.** This state rule fundamentally controls how AHS may use and disclose health information, among other types of information. The following provisions are directly relevant to this Standard and Guideline:

1. **Presumption of Confidentiality (Section 2.1):** All information specific to, and identifying of, individuals and families is presumed to be confidential and subject to these standards. Employees shall not *disclose* the information unless a specific exception to the presumption applies or the disclosure is authorized by the client, a court or as otherwise authorized by law or rule (Emphasis Supplied).
2. **Client Consent (Section 3.1):** No information about a client shall be released without prior consent from the client, *unless directly connected with the administration of a program* or necessary for compliance with federal or state laws or regulations (Emphasis Supplied).
3. **Information Sharing for Administrative Purposes (Section 3.4):** Employees may share information which is necessary to satisfy the Agency's administrative obligations. Departments will develop written agreements limiting the kinds of information to be shared when programs are jointly administered by different Departments. No information shall be *released* to a person or entity that is out of state, *unless directly connected with the administration of a program* or necessary for compliance with federal or state laws or regulations (Emphasis Supplied).
4. **Disclosure Without Consent in Limited Circumstances (Section 3.5):** Employees must release sufficient information to comply with mandatory reporting requirements for cases involving the abuse, neglect, or exploitation of children and persons who are elderly or who have disabilities. Information may be released without consent when Vermont law creates a duty to warn identified individuals of potential harm to their person or property, in response to court orders, or to investigate or report criminal activity as required by federal or state law or regulation.
5. **Obtaining Informed Consent (Section 4.1):** Prior to *releasing* confidential information the Agency shall obtain the client's informed consent. This includes providing information about consent in a language and format understandable to the client. Reasonable accommodations shall be made for special needs based on the individual or family's education, culture, or disability. Employees shall inform clients that granting consent is not a prerequisite for receiving services, and shall explain that they may apply for services separately (Emphasis Supplied).

6. **Format for Consent to Share Information (Section 4.3)**: Consent for the sharing or release of information shall ordinarily be in writing. If an emergency situation requires granting of verbal consent, written consent shall be obtained at the next office visit or within thirty days, whichever comes sooner. Required information will include:
  - (i) Names of the people about whom information may be shared.
  - (ii) A checklist of the kinds of information to be shared.
  - (iii) A checklist of the departments within the Agency to receive the information.
  - (iv) A statement or date covering expiration of consent.
  - (v) A statement about procedures for revoking consent.
  - (vi) Signature of individuals covered by the consent, or their parents or guardians.
  - (vii) Signature of the individual explaining the consent process with their position and job title.
  - (viii) A space to provide individualized instructions.
  - (ix) A copy of the consent form shall be provided to all signatories.
7. **Response to Requests for Information (Section 5.2)**: An employee shall not respond to requests from outside the Agency for information about clients even to acknowledge that the person is a client, unless authorized. If a client has consented to or requests that information be *released*, the employee shall comply with the request (Emphasis Supplied).

## II. **State Laws – Relationship to HIPAA Privacy Rule**

- A. The HIPAA Privacy Rule does not preempt all state laws addressing the use and disclosure of health information. In particular, the Privacy Rule does not preempt any state law, or rule, that is more stringent in terms of privacy protection than a specific Privacy Rule provision. In Vermont, the laws set forth above (but not AHS Rule 96-23) are arguably more stringent than Section 164.506 of the Privacy Rule, as it concerns the use and disclosure of health information for TPO.
- B. The HIPAA Privacy Rule does not require a consent for the use or disclosure of PHI for TPO, as set forth in Section 164.506 of the Privacy Rule (reiterated above: this section makes the use of a consent optional). However, these Vermont laws

arguably require such a consent and as such, AHS health care providers will adhere to a consent process as outlined below. AHS will not use a consent process with respect to its health plans, as these laws do not apply to such plans.

- C. Significantly, AHS Rule 96-23 is primarily concerned with placing restrictions on the release or disclosure of information outside AHS – in other words, it does not place many restrictions on the internal use of such information (although it does employ a “need to know” concept, in Section 2.3). In addition, AHS Rule 96-23 does not require consent in a number of situations, including when AHS releases or discloses information for the administration of a program. AHS believes that the “administration of a program” is generally consistent with uses and disclosures of PHI for TPO. Consequently, AHS concludes that Rule 96-23 does not require consent for the use or disclosure of health information for TPO, as permitted by Section 164.506 of the Privacy Rule.
- D. Furthermore, Rule 96-23 applies with respect to “clients”, and the Rule defines clients as those who are “voluntarily served by a department, office, program, contractor or grantee of the Agency of Human Services” (See, Section 1.3 of the Rule). Consequently, the Rule does not apply to those served in an involuntary manner (e.g., inmates at Department of Corrections facilities, involuntary patients of the Vermont State Hospital, and those confined to the Woodside Detention Facility).

### **III. Form of Consent**

- A. This Standard and Guideline does not require the use of a single consent form, to permit each AHS health care provider flexibility in shaping a form to its specific needs. However, the consent form attached to this Standard and Guideline is offered as a model.

### **IV. Delivery of Consent**

- A. AHS health care providers will provide each patient or his/her personal representative (e.g., a guardian or parent) with a copy of the consent form (“Consent Form”). In all cases (except with respect to inmates), AHS will offer the patient/personal representative an opportunity to review the applicable Notice of Privacy Practices, before asking for signature of the Consent Form.
- B. AHS will have the Consent Form signed one-time only, with respect to all health care provided by the AHS health care provider.
- C. AHS will not use the Consent Form in circumstances where the HIPAA Privacy Rule would require an authorization. For example, AHS will not assert that the Consent Form, by itself, permits AHS to conduct marketing activities or clinical research.
- D. AHS health care providers will deliver the Consent Form as follows:

1. AHS will give the Consent Form to each patient/personal representative, prior to the time that treatment is provided (in the event of an emergency, the Consent Form will be provided as soon as reasonably practicable after the emergency ends).
  2. AHS will ask the patient/personal representative to read and sign the Consent Form.
  3. AHS will explain that the Consent Form, once signed, gives permission to AHS to use and disclose the patient's health information for the items designated in the form (e.g., treatment and payment activities).
  4. AHS will explain that the Consent Form is signed one-time only, though the patient/personal representative can revoke it at any time.
  5. AHS will provide a copy of the Consent Form to the patient/personal representative. The original will be kept in the patient's medical record.
- E. AHS health care providers will direct any inquiries or concerns a patient/personal representative has with the Consent Form to the Privacy Official.
- F. AHS health care providers will not treat a patient if the patient/personal representative refuses to sign the Consent Form; however, should AHS be legally obligated to provide care, it will do so, after following the steps outlined in Paragraph G below. For sake of clarity, AHS health care providers will seek to have the Consent Form signed by all patients, including those served on an involuntary basis.
- G. In all situations where a patient/personal representative refuses to sign the Consent Form, AHS will explain to the patient:
1. That AHS needs the Consent Form to comply with certain Vermont laws.
  2. The types of uses and disclosures that AHS makes of PHI, to assure the patient that the uses and disclosures are reasonable.
  3. That AHS may not provide care if he/she refuses to sign the Consent Form.
  4. That AHS, even if it provides care (e.g., where it is obligated to do so, or where it does not wish to refuse care), will still use and disclose PHI for treatment and payment needs, as HIPAA would otherwise allow, but that it will not otherwise use or disclose PHI (e.g., it will not use or disclose PHI for health care operations).
- H. Patients may revoke their consent at any time. All revocations must be in writing. AHS will discontinue treatment in all situations where it receives a revocation from

a patient/personal representative receiving direct services on a voluntary basis: however, any actions AHS has taken in reliance on the consent will not be affected by the revocation.

- I. AHS will maintain the following information for at least six (6) years from the date of its creation or the date when it was last in effect, whichever is later:
  1. All signed Consent Forms.
  2. Documentation of any situation where AHS has attempted to obtain a signature on the Consent Form, but has not been able to do so, along with the reason the attempt did not succeed.
  3. All written revocations.

**Consent to Use and Disclose Protected Health Information**

I understand that as part of my healthcare, \_\_\_\_\_ (“\_\_\_\_\_”) creates, receives and maintains health information and records describing my health history, symptoms, examination and test results, diagnoses, treatment and plans for future care or treatment. This information and these records are part of my “Protected Health Information.”

A federal law known as HIPAA, the Health Insurance Portability and Accountability Act, permits \_\_\_\_\_ to use and disclose my Protected Health Information without my consent or authorization, for certain specific purposes, like Treatment, Payment, and Health Care Operations, as HIPAA defines those terms.

I acknowledge that I have been provided with a copy of the \_\_\_\_\_ Notice of Privacy Practices ("Notice"), which provides more detailed information on how \_\_\_\_\_ may use and disclose my Protected Health Information, what Treatment, Payment, and Health Care Operations entail, and my rights regarding my Protected Health Information.

I understand that some Vermont laws are more stringent in terms of privacy protection than HIPAA, and could require my permission before \_\_\_\_\_ uses or discloses my Protected Health Information, for at least some activities that constitute Treatment, Payment, or Health Care Operations. The Vermont Patient Privilege statute and Vermont Mental Health statute are two examples of such Vermont laws.

I hereby consent to allow \_\_\_\_\_ to use and disclose my Protected Health Information for Treatment, Payment, and Health Care Operations, as such terms are defined in HIPAA and further explained in the Notice. I agree that this consent constitutes any permission that \_\_\_\_\_ would otherwise be required to obtain under Vermont laws before so using or disclosing my Protected Health Information.

I have the right to revoke this consent, in writing, at any time, except to the extent that \_\_\_\_\_ has already relied on it. I may send such a written revocation of my consent to \_\_\_\_\_.

I have had an opportunity to ask questions about anything I did not understand in this document or the Notice, and I know that I have the right to review the Notice and discuss any concerns I have regarding the privacy of my Protected Health Information before signing below.

\_\_\_\_\_  
Patient's Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature of Patient's Representative

\_\_\_\_\_  
Date

\_\_\_\_\_  
Representative's Relationship to Patient