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Opinion No. 09-83

Preemption of House Bill 1762 and Senate Bill 2089

QUESTION

Does the Health Insurance Portability and Accountabilty Act ("HIPAA") regulation set out in 45 C.F.R. § 164.502(g)(5) preempt legislation proposed in House Bill 1762 and Senate Bill 2089 (collectively "HB 1762") as currently written or as amended?

OPINION

Yes. Insofar as the proposed legislation as currently written and as amended mandates the disclosure of information otherwise prohibited under HIPAA, the federal regulation would preempt it with respect to such disclosures.

ANALYSIS

This Office has previously opined that, in general, "HIPAA prohibits the use or disclosure of individually identifiable health information by a covered entity." Op. Tenn. Att'y Gen. No. 07-165, (December 14, 2007) (citing 45 C.F.R. § 164.502(a)). HIPAA defines "individually identifiable health information," as health information[1] that includes:

[1] "Health information" is defined as:

> any information, whether oral or recorded in any form or medium, that:
>
> (1) Is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, 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.

45 C.F.R. § 160.103.

> 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.

45 C.F.R. § 160.103. A "covered entity" is "[a] health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter." 45 C.F.R. § 160.103 (emphasis added).

As an exception to this general disclosure prohibition, HIPAA permits the release of individually identifiable health information to the individual or the individual's personal representatives. 45 C.F.R. § 160.502 (a)(2)(i) and (g). A "personal representative" can include the parent or guardian of an unemancipated minor. 45 C.F.R § 160.502 (g)(3)(i). However, the regulation permits a "covered entity" to refuse to treat a person as a personal representative in the following circumstances:

> 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.

45 C.F.R. § 164.502(g)(5). In those circumstances, the "covered entity" would be entitled to withhold protected health information from the parent or guardian of an unemancipated minor.

You have asked whether 45 C.F.R. § 164.502(g)(5), preempts HB 1762 as currently written or as amended. As currently written, HB 1762 seeks to amend Tenn. Code Ann., Title

63, Chapter 6, Part 2 and Title 68, Chapter 11, Part 3, by adding new language that would require physicians licensed in the State of Tennessee and hospitals providing health care to minors to furnish the results of a minor's medical tests or procedures to the minor's parent or legal guardian immediately upon the parent's or legal guardian's request. HB 1762 further mandates that within twenty-four hours of receipt of a written request by the minor's parent or legal guardian for the above-stated information, the hospital or physician must provide copies of the medical tests or procedures. It does not contain language relieving physicians and hospitals from these duties under the circumstances outlined in 45 C.F.R. § 164.502(g)(5).

The proposed amendment would retain the mandate that a health care provider or hospital release a patient's medical records to that patient, the patient's authorized representative or the parent or legal guardian of a patient who is an unemancipated minor. However, the proposed amendment would relieve a health care provider or hospital from disclosure to the parent or legal guardian when the provider or hospital has a good-faith belief that disclosure would subject the minor to imminent danger of physical harm.

The Supremacy Clause provides that the laws of the United States "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. 6, cl. 2. Congressional intent determines whether a federal statute preempts state law. *Wadlington v. Miles, Inc., et al.*, 922 S.W.2d 520, 522 (Tenn. Ct. App. 1996). The Supremacy Clause results in federal preemption of state law when: (1) Congress expressly preempts state law; (2) Congress has completely supplanted state law in that field; (3) adherence to federal and state law is impossible; or (4) the state law impedes the achievements of the objectives of Congress. *Wadlington*, 922 S.W.2d at 522.

Congress has specifically expressed that "A regulation promulgated under paragraph (1) shall not supercede a contrary provision of State law, if the provision of State law imposes requirements, standards, or implementation specifications that are more stringent than the requirements, standards, or implementation specifications imposed under the regulation." HIPAA, Pub. L. No. 104-191, 110 Stat. 2033-2034 (1996) (42 U.S.C. § 1320d-2 (note)(1996)). This has been interpreted to mean that subject to exceptions, HIPAA generally preempts conflicting state privacy laws:

> Under HIPAA, a provision of state law that is contrary to HIPAA's standards or requirements is preempted, unless "[t]he provision of State law relates to the privacy of individually identifiable health information and is more stringent than a [HIPAA] standard, requirement, or implementation specification . . ." 45 C.F.R. § 160.203(b); see also 42 U.S.C. § 1320d-7. "A standard is 'more stringent' if it 'provides greater privacy protection for the individual who is the subject of the individually identifiable health information' than the standard in the regulation." *Nw. Mem'l Hosp.*, 362 F.3d at 924 (quoting 45 C.F.R. § 160.202(6)).

In re Zyprexa Products Liability Litigation; 254 F.R.D. 50, 54 (E.D.N.Y. 2008).

As this Office has previously opined, "HIPAA does not preempt a provision of state law that relates to the privacy of individually identifiable health information and is more stringent than a standard, requirement, or implementation specification in part 164 of the HIPAA privacy rule." Op. Tenn. Att'y Gen. No. 07-165, (December 14, 2007) (internal quotation omitted), *relying on* 45 C.F.R. § 160.203(b). "[M]ore stringent" means that "the law prohibits or restricts a use or disclosure in circumstances under which such use or disclosure otherwise would be permitted under [HIPAA]" or "provides greater privacy protection for the individual who is the subject of the individually identifiable health information." 45 C.F.R. § 160.202.

As currently written, HB 1762 provides less privacy to minors' health care information than does 45 C.F.R. § 164.502(g)(5). Accordingly, the federal regulation would preempt HB 1762 in situations where HB 1762 would require physicians and hospitals to disclose health care information of unemancipated minors to their parents or guardians without regard for the circumstances described in 45 C.F.R § 164.502(g)(5).

Moreover, 45 C.F.R. § 164.502(g)(5) would preempt HB 1762 as amended. The proposed amendment permits health care providers or hospitals to refuse a parent or legal guardian's request for the disclosure of an unemancipated minor's medical records only when the hospital or provider has a good-faith belief that disclosure would subject the minor to *imminent* danger of *physical* harm. In comparison, 45 C.F.R. 164.502(g)(5) provides greater protection of these records. To refuse to release the individually identifiable health information of an unemancipated minor, a "covered entity" need only have: (1) a *reasonable* belief that the parent or guardian requesting the information may have subjected the minor to domestic violence, abuse, or neglect, or releasing the information could endanger the minor; and (2) in the "covered entity's" professional judgment, it is not in the best interest of the minor to release the individually indentifiable health information.

Accordingly, to the extent that HB 1762, both as written and as amended, requires disclosure of health care records in circumstances where 45 C.F.R. 164.502(g)(5) does not require their disclosure, such a requirement would be preempted by federal law.

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