DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
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Center for Medicaid and State Operations

MAR 21 2002

Phyllis J. Dube, Secretary
State of Wisconsin
Department of Health and Family Services
1 West Wilson Street
P.O. Box 7850
Madison, Wisconsin 53707-7850

Dear Secretary Dube:

I am responding to your letter to Secretary Thompson in which you asked for assistance in determining if the Administrative Simplification provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) apply to Wisconsin's Medicaid home and community-based services (HCBS) waiver programs. Your letter mentioned that the HCBS waiver programs are administered by 72 county agencies and one tribal government agency for the Department of Health and Family Services. You asked for clarification as to whether the HIPAA regulations apply to Wisconsin's HCBS waivers, and if they are applicable, whether the county agencies and tribal organization are considered providers, health plans, business associates, or some other type of entity.

Discussion of State Questions

Question 1. Are HIPAA regulations applicable to Wisconsin's HCBS waiver programs?

Yes, Medicaid is considered to be a "health plan" for HIPAA purposes. Therefore, the HIPAA requirements apply to health care services paid under Medicaid, including health care services paid through HCBS waiver programs. There are no statutory provisions for a blanket exemption of HCBS waivers from the HIPAA requirements.

Question 2. Where HCBS waiver programs are administered by county agencies and/or a tribal government agency for the state Medicaid agency do HIPAA regulations apply to the HCBS waivers, and if they are applicable, are the county agencies and tribal organizations administering HCBS waiver programs considered providers, health plans, business associates, or some other entity?

The Medicaid program is itself designated as a "health plan" for HIPAA purposes. Therefore, the state Medicaid agency must meet all applicable HIPAA requirements. If the Medicaid agency hires business associates to conduct transactions on its behalf including those related to the administration of HCBS waivers, those business associates must follow the HIPAA requirements as well. For this reason, the counties and tribal agencies that many state agencies use to conduct Medicaid program administration will be required to use the standards for any electronic transactions they conduct with covered entities on behalf of the State Medicaid plan.

In these cases, the counties and tribal agency would be considered "business associates" of the Medicaid agency under both the HIPAA Transactions and Privacy Rules. The Privacy Rule requires the business associates to provide "satisfactory assurance" by contract, memorandum of understanding, or regulation, as appropriate, that they will protect the personal health information obtained and used in the course of administering the waiver.

Question 3. Where HCBS waiver services are provided by local government agencies and/or a tribal government agency, or any other entity, are HIPAA regulations applicable?

The HIPAA requirements are applicable to health care providers who conduct transactions electronically, but not to providers of non-health care services, or to providers of health care services that do not bill electronically. Therefore, in order to determine whether particular HCBS program providers are required to follow the HIPPA requirements, three criteria must be met:

(1) Is the provider a health care provider, as defined by HIPAA,
(2) Is the service a health care service, as defined HIPAA, and
(3) Is the transaction between the health care provider and health plan (or the health plan's business associate) a HIPAA covered transaction?

While the HIPAA criteria are quite broad, they do not encompass a number of the services that may be provided under HCBS waivers. For example, non-medical transportation, home and vehicle modifications, homemaker services, personal care services, habilitation and respite services are clearly not health care services, and programs that provide these services would not consider such providers as health care providers for purposes of HIPAA. Other HCBS services or supplies, such as clinic services to mentally ill individuals, dental services, pharmacy items, physical therapy, audiology services, among others, clearly qualify as "health care services."

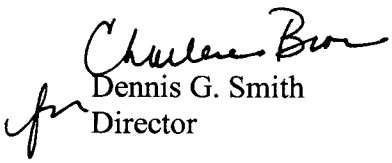
Each State Medicaid agency or HCBS waiver program administered by such agency will need to examine the range of services offered to determine which services meet the definition of "health services" and which do not. Providers of non-health care services are, by definition, not subject to the HIPAA requirements.

Providers of health care services are only subject to the HIPAA requirements if they conduct electronically one or more of the transactions for which the Secretary has adopted a standard. Providers that conduct all such transactions by paper are not subject to HIPAA.

We recognize that the HIPAA structure requires a waiver by waiver examination of both the nature of the services provided by HCBS waivers, whether waiver providers meet the HIPAA definition of health care provider, and an inquiry into their use of electronic transactions.

If you require any additional information, please contact Mary Jean Duckett ((410) 786-3294) concerning HCBS programmatic issues, and Karen Trudel ((410) 786-9937) regarding general HIPAA issues.

Sincerely,



Dennis G. Smith
Director

cc: Jared A. Adair